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1950

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ASSAM HIGH COURT

1950

CHIEF JUSTICE :

The Hon'ble Shri Thakurdas Vasanman Thadani, B.Sc. (Bom.), B.A. (Cantab), Bar-at-law.

PUISNE JUDGE :

The Hon'ble Shri Ram Labhaya.

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THE
ALL INDIA REPORTER
1950

Assam High Court

A. I, R. (37) 1950 Assam 1 *[C. N. 1.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Boloram Kumar and others — Appellants **v.** *Dandiram Kumar and others — Respondents.*

Second Appeal No. 1903 of 1947, Decided on 3rd June 1949.

(a) Tenancy law—Landlord and tenant—Alienation — Tenancy of temple property on condition of service to deity — Transfer to non-paik is not absolutely void but voidable—Temple authorities may acquiesce in transfer—Evidence Act (1872), S. 115.

A transfer of temple lands held by paiks on condition of rendering services to the deity is not absolutely void. The temple authorities may consent to or acquiesce in the transfer. They may accept services from a non-paik transferee or if he is not capable of rendering services they may accept rent in cash from him. There is nothing to prevent the temple authorities from adopting these courses. A transfer without their consent and acquiescence which seeks to separate the obligations of land from its enjoyment is only voidable at the instance of the temple authorities : Appeal No. 1056 of 1938 (Cal.), *Disling*. [Para 8]

Where a sale of *paikan* land was made under the orders of the Court in execution proceedings preceded by attachment without any objection from the temple authorities and the auction-purchaser was shown in the revenue records as a tenant and the period of limitation for challenging the sale had expired :

***Held*, that assuming that the auction sale contravened the custom relating to transfers of *paikan* lands and was therefore originally void, the title of the transferee could not be disputed by the temple authorities.** [Para 8]

(b) Co-sharers — Suit for declaration of title and exclusive possession in absence of partition not maintainable—Transfer of Property Act (1882), S. 44.

A person purchasing a share in the tenancy rights is only a cosharer tenant. As such he is not entitled to a declaration of title to and khas possession of a specified plot of land forming part of the tenancy, where there is no allegation or proof that there was any binding partition between the co-sharers : A.I.R. 1950 Assam/1 & 2

(12) 1925 Cal. 272 and A. I. R. (23) 1936 Mad. 666, *Rel. on.* [Paras 10, 11]

Annotation : ('45-Com.) T. P. Act, S. 44 N 4, 5.

S. K. Ghose, B. C. Barua and D. N. Medhi — for Appellants.

J. N. Bora — for Respondents.

Ram Labhaya J. — The facts leading to this appeal by contesting defendants 1-3 are as follows : Dag No. 695 corresponding to the present dag No 508 was part of the lakheraj lands owned by Hajo Madhab Temple. Defendant 19 is the present Daloi of the temple. The present area of the dag in question is 5 B 3 K 16 Lessas.

[2] This land was held by Paiks of the temple on condition of rendering services to the deity. In 1889 a dispute arose between two groups of tenants. The predecessor-in-interest of the plaintiff of the present suit, belonged to the group which was found entitled to tenancy rights in 9/20th share of the dag in question. The ancestors of the defendants (1-18, both contesting and *pro forma*) were found entitled to tenancy rights in the rest, viz., 11/20th share.

[3] One Lakshminarayan got a money decree against some tenants of the group of the plaintiff and got to entire dag attached in execution of his decree. Objections were raised to the attachment and, it appears, an Amin was appointed to make local enquiries as to the claims of the objectors. An attested copy of the report has been placed on the record. It appears from the report that there were three groups of objectors. The present plaintiff with others claimed 3 K 4 L. The Amin found them in possession of the area they claimed. This portion was marked Ka. Another group of objectors was found to be in possession of 2 B 3 K 7 L. This portion was marked Kha. The rest of the area of the dag 2 B 2 K 5 L marked Ga was not in the actual possession of anyone. It was des-

cribed as dense forest. Exhibit 4 is an attested copy of the order on the claim put forward by the present plaintiff with others. This claim was disallowed on a compromise. No reference was made to the Amin's report in the order. No other order in the objection proceedings has been placed on the record. The attested copy of the sale certificate on the record shows that 9/20th share from the dag was put to auction and sold. The sale was not of any specified portion or plot. The cosharers may have held specified portions of land in groups and different cosharers in the two groups may also have occupied separate plots. But what was put to sale was not the specified plot or plots in the possession of the judgment-debtors but the undivided share to which they were entitled as tenants. The decree-holder according to the certificate became the purchaser of the tenancy rights in the dag in question to the extent of the share mentioned in the sale certificate, i. e., 9/20th share. It is claimed by the plaintiff that the decree-holder auction-purchaser purchased and got possession of specified portions Ka and Ga measuring 3 B 0 K 9 L, though he remained in actual possession of the Ka portion measuring 3 K 4 L on behalf of the decree-holder.

[4] On 24th September 1935 Surjyanarayan, brother of Lakshminarayan who had died, sold to him 2 B 2 K 19 L out of the land said to have been purchased by his brother Lakshminarayan marked Ka and Ga in Amin's report. In the sale deed Surjyanarayan, the vendor, claimed that they (meaning he and his brother) had purchased the area (2B 2K 19L) on 21st June 1921 in a court sale out of dag No 695 measuring 5B 3K 16L and they obtained possession through Court of the two specified plots Ka and Ga This he purported to sell to the present plaintiff who alleges that he was in actual possession even before sale though on behalf of the auction-purchaser. On the basis of the sale deed, the plaintiff got a chitha mutation in his favour on 23rd March 1936. His case now is that he purchased two specified plots of the dag n question from the auction purchasers who were the owner of tenancy rights. He was also in possession till 1937 when a portion of the area in his possession was encroached upon by defendants 1-3. A complaint was lodged against them but they were acquitted on 12th March 1937. On 14th May 1939 plaintiff applied for demarcation of boundaries which were settled by order dated 7th June 1939. Plaintiff further alleged that he removed his dwelling houses from the portion marked Ka to another plot at a distance of about a quarter of a mile. Defendants taking advantage of this fact took forcible possession of the entire area of 3K 4L (Ka portion). On the basis of their possession they also got a mutation in their names during the last Temple Survey Operations. Plaintiff, therefore instituted the suit which gives rise to this appeal for a declaration of his right and title to the plot measuring 3K 4L (Ka portion) and also for recovery of its khas possession.

[5] The claim was resisted by defendants 1-3. *Pro forma* defendants 4-9, 11 and 12, 13-16 and 18 supported the plaintiff's claim by a joint written statement. Defendants 10, 17 and 19 were proceeded against *ex parte*. The trial Court dismissed the suit holding that the suit was not maintainable in the form in which it was laid. The Court also found that the suit was barred by time and plaintiff's title to the land if any, had been extinguished by adverse possession on the part of the defendants. It was further found that plaintiff had no right, title and interest in the suit land nor was he in possession thereof and dispossessed as alleged by him.

[6] On appeal by the plaintiff, the learned Second Additional Judge, A. V. D reversed the decree of the learned Munsif and decreed the claim. He granted plaintiff a declaration of title to the suit land and further ordered that he be put in khas possession thereof.

[7] On behalf of defendant-appellants Mr. Ghose has assailed the correctness of the appellate order on three grounds. He has contended, first, that the tenancy was inalienable The sale in execution of decree by which the auction purchaser became the owner of tenancy rights to the extent of 9/20th share was void and similarly the subsequent transfer of 1935 on which the plaintiff based his title. The second ground of attack was that Surjyanarayan who purported to convey the rights which Lakshminarayan had acquired under the court sale was not competent to transfer those rights and the transfer, therefore did not pass any valid title to the plaintiff. His last contention was that in no case could the plaintiff be granted a decree declaring his exclusive title to a specified plot; nor could a decree for its khas possession be granted to him. We shall deal with these contentions seriatim.

[7a] So far as the first contention is concerned, it is argued that the land belongs to the temple. Plaintiff and defendants were tenants under the temple as paiks They held the land on condition of rendering services to the deity. Their tenure was subject to services which they had to render As the obligation to render services could not be transferred to non-paiks, the land also became inalienable. The land cannot be disassociated from the obligations that it carried. The contention in short is that the tenancy in question is of a peculiar kind and

one of its incidents is that it is inalienable except amongst paiks under certain circumstances. Transfer to a non-paik, it is urged, would be void. In support of this contention the learned counsel has relied on an unreported judgment of the Calcutta High Court in Appeal No. 1056 of 1938 (*Jiban Chandra Sarma Daloi on behalf of the Madhab Temple* v. *Parasuram Kalita*). The case related to the land of the temple to which the land in this belongs. The suit was instituted by the then Daloi of the temple as the land belonging to the temple had been transferred by paiks to a person who could not render services which the paiks holding the land were under an obligation to perform. According to the sale deed, the transferor was to remain responsible for rendering services. The land was transferred to the son-in-law of one of the transferors without the obligations of service that the occupation of the land carried with it. It was held by their Lordships of the Calcutta High Court that a transfer of paikan lands would not be valid and binding on the temple unless the burden of service attached to such lands is also transferred to the alienee, and as in that case the property had been transferred to the transferee free of the obligation to render any service, the alienation was not valid and binding on the temple authorities. The claim of the temple for khas possession of the land on the ground that the tenancy had been forfeited, was disallowed.

[8] This authority is of no avail to the learned counsel. It does not hold that a transfer of the paikan land is void. Such a transfer violates no statutory direction. It may not be valid and binding on the temple for reasons given by their Lordships in that judgment. But it cannot be said that a transfer of the tenancy would be absolutely void. The temple authorities may consent to or acquiesce in the transfer. They may accept services from a non-paik transferee or if he is not capable of rendering services they may accept rent in cash from him. There is nothing to prevent the temple authorities from adopting these courses. A transfer without their consent and acquiescence which seeks to separate the obligations of the land from its enjoyment would certainly be voidable at the instance of the temple authorities. The authority relied on by the learned counsel does not support his argument that the alienation in such circumstances would be wholly void. In fact the question whether an alienation of the rights of paik was void or not was not before their Lordships of the Calcutta High Court. So far as this case is concerned, even if it is assumed for purposes of argument that the auction sale contravened the custom relating to transfers of Paikan land and was therefore void, it will not affect the claim of the plaintiff. The sale was made under the orders of the Court in execution proceedings. It was preceded by attachment. There were objections to the attachment from the tenants. The temple authorities could not have been unaware of the sale. They did not raise any objection. The sale was made and confirmed. The auction purchaser was shown in the revenue records as a cosharer tenant. The auction sale came in 1920. The purchaser was obviously recognised as a tenant by the temple authorities. The Daloi of the temple, who is a defendant in the case, does not challenge either the auction sale or the subsequent transfer in plaintiff's favour. The auction sale of the tenancy rights has not been challenged within the period allowed by law. Therefore, even if the transfer was originally void, the title of Lakshminarayan, the auction-purchaser, could not now be disputed by the temple authorities by reason of the efflux of time. In these circumstances contesting defendants can have no right to challenge the transaction. They did not raise this question in the Court below and it has not been raised even in their grounds of appeal. The second sale in favour of the plaintiff was in favour of a Paik and it has not been contended by anyone of the defendants including the Daloi, the manager of the temple, that the sale was objectionable on the ground that the obligations as to service had been divorced from the rights and privileges which the occupation of the land carried. This contention, therefore, has got no force. It finds no support from authority.

[9] The second contention need not detain us long. The objection is that Surjyanarayan who transferred the rights in the disputed land to the plaintiff was not competent to do so as Lakshminarayan alone was the auction-purchaser. Surjyanarayan has appeared as a witness in the case. He has explained that he and Lakshminarayan the deceased were brothers. They were both members of a joint Hindu family and after the death of Lakshminarayan he became the karta of the family. His nephew, a son of Lakshminarayan, was also a member of the family. He, therefore, was competent to make the transfer and it was made with the consent and acquiescence of Lakshminarayan's son who signed the deed of sale as an attesting witness. In fact, while attesting the deed at the time of execution, he gave his consent to the transfer in express terms. Before registration the words conveying his express consent were scored through. The explanation given for this is that they were advised that consent to the transfer in express terms would render the

document liable to fresh stamp duty and will give rise to other complications. The attestation as a witness, therefore, was allowed to remain and the rest of the endorsement was crossed and was for all practical purposes deleted. This statement of Surjyanarayan has not been rebutted by any evidence. Lakshminarayan's son, who was evidently aware of the transfer, has not objected to it. He has not been examined by the defendants. He is the only person who could object to the transfer. Even though setting up his title, the defendants have not examined him. The inference is irresistible that Lakshminarayan's son does not question the competency of his uncle to transfer the tenancy right to the plaintiff. In these circumstances the sale in plaintiff's favour could be enforced against the present defendants. Lakshminarayan's son is not a party. He would not be bound by this decision but so far as the defendants are concerned, they cannot by their denial alone prevent the plaintiff from claiming relief on the basis of the sale-deed in his favour, which apparently has been consented to by one who is the true owner according to defendants. The contention is repelled.

[10] The last contention raised by the learned counsel is that there was no justification for the appellate Court to grant a declaration of title to and khas possession of the specified plot of land which is one of the two plots which the sale-deed purports to transfer to the plaintiff. The learned counsel is on surer ground here. Under the sale certificate and according to the entries in the revenue records Lakshminarayan, the auction purchaser, was a cosharer tenant. He had purchased tenancy rights to the extent of 9/20th share. There is no allegation or proof that there was any binding partition between the cosharers after the auction sale. It is possible that cosharers may have been holding specified plots in their separate possession under an amicable arrangement for purposes of convenience. But by that arrangement they would not become exclusive owners of the plots in their possession. Lakshminarayan therefore could not be the exclusive owner of any specified plot even if he was in possession of it as under the sale certificate he purchased an undivided share in the tenancy and not specified plots. Lakshminarayan's successors in interest could not sell anything more than he had purchased. They could only transfer to the plaintiff the undivided share in the tenancy of which they were owners. They could also transfer to him the possession of any plot that they have as co-sharers. But they could not convey exclusive title to any specified plot. The sale-deed in plaintiff's favour conveys to him two plots described as Ka and Ga within definite boundaries. The plaintiff's claim is that even though the auction certificate does not mention these specified plots, Lakshminarayan was the purchaser of these plots and was in possession through him and by virtue of the sale-deed of 1935, he acquired exclusive title to these plots. Defendants dispossessed him from one specified plot marked Ka. On the basis of exclusive title and exclusive possession he claims a declaration of title and khas possession. As indicated above there is no basis for a finding that he is exclusively entitled to the plot in suit. The learned Judge in appeal appears to have been influenced by the Amin's report in coming to the finding that what was sold at the auction was not an undivided share but two specified plots. We do not find any justification for this view. The oral evidence in the case is not conclusive. If specified plots were sold, there is no reason why the sale certificate should not have evidenced the sale of the specified plots. The records of the execution proceedings in which the property was sold are not available. They are said to have been destroyed. The Amin's report which appears to have influenced the learned Judge is not helpful. It does not indicate what exactly was put up for auction. Besides it has been objected to as inadmissible though it is not necessary to decide this point as even if admitted it does not support the claim that specified plots were put up for sale. There is no documentary evidence on this point except the certificate which shows that what was purchased was an undivided share. In the absence of any proof of a binding partition before the auction sale, it seems more probable that tenancy rights in specified plots were not sold. We are, therefore, of the opinion that the learned Subordinate Judge had no legal basis or justification for holding in defiance of the contents of the sale certificate that two specified plots were sold. In these circumstances, a decree declaring the title of the plaintiff to the specified plot in suit was not at all possible in law and yet this is what the plaintiff has claimed. He might have claimed in the alternative that he was at least entitled to 9/20th share in the tenancy. No such claim has been put forwarded. The suit is only for a specified plot measuring 3 K. 4 L. out of the entire dag. A decree that he is entitled to a larger area than that claimed by him as a co-sharer cannot be passed, as the entire dag is not in suit and 9/20th share of the whole is not being claimed. The declaratory relief granted to the plaintiff by the lower appellate Court is, therefore, contrary to law and the decree to this extent cannot stand.

[11] As regards khas possession of a specified plot, the position is no less difficult. A co-sharer

may ask to be restored to possession of a specified plot, if his case is that he was occupying a specified plot as a co-sharer under an amicable arrangement between the co-sharers and was dispossessed by another co-sharer. But that is not the case here. Even if it is assumed for purposes of argument that the particular plot in suit was in plaintiff's possession before the sale in his favour on behalf of the auction-purchaser and was subsequently in his possession as a co-sharer in the tenancy, it is not possible to grant him relief in this case as he is not suing as a co-sharer whose possession has been disturbed in that capacity. His suit is for exclusive title and for exclusive possession. He has not been able to prove exclusive title and therefore he is not entitled to exclusive possession also. There is thus no basis for granting him exclusive or khas possession of the property. If he had taken up the position that he was entitled to a specified plot as a co-sharer, as his possession as a co-sharer had been disturbed, the claim could certainly have been considered. But in these circumstances of the present case, even the relief for khas possession is not permissible. The view of the law that we have taken finds support from *Ekabbar Ali* v. *Sh. Kon Ali*, A. I. R. (12) 1925 Cal. 272: (82 I. C. 31) and *Kovummal Ammad* v. *U. Arangadan Ammad*, A.I.R. (23) 1936 Mad. 666 : (163 I. C. 825).

[12] The result is that the suit cannot succeed as laid. We, therefore, allow this appeal, reverse the order of the learned Additional Subordinate Judge and dismiss the suit for reasons given above. We shall leave the parties to bear their own costs throughout.

Thadani Ag. C. J.—I agree.

V.B.B. *Appeal allowed.*

A. I. R. (37) 1950 Assam 5 *[C. N. 2]*

LODGE C. J. AND THADANI J.

Badri Prosad Agrawalla — Petitioner v. *The King.*

Criminal Revn No. 38 of 1948, Decided on 28th February 1949.

(a) Opium Act (1878), S. 9 (a) and (c) — Accused importing opium by carrying it himself — Conviction for two separate offences, one under S. 9 (a) for possession and other under S. 9 (c) for importing and imposing two separate sentences are not justified—(Evidence in fact not establishing offence under S. 9 (c) but only under S. 9 (a)—Conviction under S. 9 (a) upheld and that under S. 9 (c) set aside)—Penal Code (1860), S. 71 — Criminal P. C. (1898), S. 235. [Paras 4 and 5]

Annotation : ('46-Com.) Criminal P. C, S. 235, N. 7 ('46-Man.) Penal Code, S. 71 N. 2.

(b) Criminal P. C. (1898), S. 421—Sessions Judge after hearing appellant calling for record of case and after perusing same dismissing appeal summarily—Appeal held properly dismissed—Evidence held not of such nature as to justify hearing of appeal in full. [Para 5]

Annotation : ('46-Com.) Criminal P. C., S. 421, N. 3.

J. C. Sen—for Petitioner.

Order.—This rule was issued upon the Deputy Commissioner, Nowgong, to show cause why the convictions and sentences imposed on the petitioner should not be set aside. The case for the Crown was that the petitioner was travelling on the train from Pandu through Gauhati on 14th October 1947. His conduct aroused suspicion and he and his luggage were searched. In the trunks belonging to him was found 37 seers of opium. Evidence was adduced by the prosecution in support of these allegations and the learned Magistrate, believing the evidence, found the petitioner guilty under S. 9 (a) of Act I [1] of 1878 and sentenced him under that section to undergo rigorous imprisonment for two years, and to pay a fine of Rs. 1,000 in default, to suffer rigorous imprisonment for a further period of one year. The learned Magistrate also found the petitioner guilty under S. 9 (c) of the said Act on the same facts, and sentenced him under that section to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1,000 and in default of payment of fine, to suffer rigorous imprisonment for a further period of one year. The learned Magistrate further directed that the sentences should run consecutively.

[2] The petitioner appealed. The learned Sessions Judge, after hearing the learned advocate for the appellant, called for the record of the case, but did not say that the appeal would be heard, and did not pass any orders admitting the appeal. After perusing the record, the learned Sessions Judge directed that the appeal be dismissed summarily. It is against that order that the present rule has been obtained.

[3] Mr. Sen for the petitioner has pointed out that separate convictions under S. 9 (a) and S. 9 (c) of the said Act for the same offence were not justified.

[4] If the petitioner imported the opium, he did so by carrying it himself, and his possession was the method of importing it. In our opinion, the learned Magistrate was not justified in convicting him for two separate offences for the same act, and in imposing two separate sentences therefor. In fact, on the evidence, it is impossible to say that there was any evidence of an offence of importing. The evidence against the accused was merely that he was in possession of the opium and that he had a ticket from Pandu a station in Assam. The evidence proved possession of opium, but did not prove importation of opium. Mr. Sen contended further

that the learned Sessions Judge, in view of the nature of the evidence, ought to have heard the appeal properly and to have delivered a judgment after hearing the appeal. Mr. Sen has indicated to us the nature of the evidence in this particular case and we are of opinion that the learned Judge exercised a proper discretion in dealing with appeal summarily.

[5] We are unable to hold that the evidence was of such a nature that the learned Judge ought to have heard the appeal in full. We, therefore, order that the rule be made absolute to this extent only, viz: conviction and sentence under S. 9 (a), is upheld but the conviction and sentence under S. 9 (c) of the Act is set aside and the appellant is acquitted of the charge of importation.

R.G.D. *Order accordingly.*

A. I. R. (37) 1950 Assam 6 *[C. N. 3.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Sampatlal Keshan and others — Petitioners v. *Baliprasad Shah and others — Respondents.*

Civil Revn. No. 322 of 1948, Decided on 3rd June 1949, against order of Sub-Judge, A. V. D., D/- 13th March 1948.

(a) Assam High Court Order (1948), S. 3 — High Court — Constitution of — Chief Justice alone appointed before prescribed day — Constitution of High Court not affected by delay in appointment of other Judges — Government of India Act (1935), S. 220.

Both S 3 of the Assam High Court Order 1948 and S. 220, Government of India Act, 1935, allow the Governor-General to make appointment of Judges other than the Chief Justice from time to time. No time limit is placed on the exercise of jurisdiction vested in him in this respect. It cannot be said, therefore, that the Governor-General was under an obligation to appoint Judges at once or at a time that they could function on the prescribed day or on any particular day. He is really the judge of the time when appointments of other Judges may be made. It follows that where the Chief Justice alone has been appointed before the prescribed day, the constitution of the High Court cannot be affected by the delay in appointment of other Judges. The Chief Justice is not debarred from performing the duties of the Chief or from discharging his function as a Single Judge till the appointment of other Judges : A. I. R (25) 1938 Pat. 550; 9 All. 625 and A.I.R. (22) 1935 All. 322, *Rel. on.* [Paras 3, 4 & 5]

(b) Civil P. C. (1908), S. 115—Limitation—There is no period of limitation provided for petitions of revision—Limitation Act (1908), S. 3. [Para 6]

Annotation : ('44-Com.) C. P. C., S. 115 N. 17; ('42-Com.) Lim. Act, S. 3 N. 26.

(c) Civil P. C. (1908), O. 41, R. 23 — Remand for disposing of application according to law after hearing parties—Disposal by successor-in-office of deciding Judge is not without jurisdiction.

Where a case is remanded to the 'lower Court' for disposal of an application for restoration of suit dismissed for default, on merits and according to law after hearing the parties, there is no direction that the case is to be disposed of by the deciding Judge and not by his successor. If, therefore, the successor in office of the deciding Judge, who has been transferred, disposes of the petition on remand, he does not act without jurisdiction : 2 W. R. 275 and 5 W. R. 124, *Disting.* [Paras 14, 15]

Annotation : ('44-Com.) C. P. C., O. 41 R. 23 N. 32.

(d) Civil P. C (1908), O. 5, R. 19 — Declaration of due service need not be express — Omission to declare due service is only irregularity—It does not affect jurisdiction of Court regarding parties present before it.

The declaration of due service under O. 5, R. 19 in express terms is not imperative. The declaration may be implied in the proceedings. [Para 18]

Assuming that an express declaration of due service is necessary under O. 5, R. 19, the omission to declare due service under the rule would be an irregularity on the basis of which the party adversely affected by the omission may ask for an opportunity to be heard. It would not affect the jurisdiction of the Court as regards parties that are present before the Court. [Para 17]

Annotation : ('44-Com.) C. P. C., O. 5, R. 19 N. 2.

(e) Civil P. C. (1908), O. 9, R. 13 — Sufficient cause—Peremptory early hearing fixed in case proceeding at very slow pace—Some plaintiffs leaving jurisdiction of Court before learning about date of hearing for their native places for making arrangements for their sons' marriages — Their attending Court on date of hearing and then going back to native districts extremely difficult—Other plaintiffs ill and invalid — Finding that sufficient cause for non-appearance had been made out held could not be interfered with. [Para 19]

Annotation : ('44-Com) C. P. C., O. 9 R. 13 N. 19.

Ambikapada Chaudhury, B. C. Barua and U. K. Goswami — for Petitioners.

S. K. Ghose, M. N. Roy and J. C. Sen — for Respondents.

Ram Labhaya J.—This petition of revision is directed against the order of Mr. D. N. Hazarika Spl. Subordinate Judge, A. V. D., dated 13th March 1948, by which plaintiffs' application for restoration of their suit, which had been dismissed in default, was allowed and the suit restored. The petition was presented to Sir R. F. Lodge, the then Chief Justice of this Court on 1st June 1948. He was the only Judge of the Court at that time. No other Judge had been appointed till then. He heard the advocate for the petitioner and directed that a rule should issue calling upon the Court concerned to show cause why the order complained of in the petition be not set aside. Usual notices on the opposite parties were also ordered to issue. Further proceedings in the suit were stayed. The opposite parties have been served, the records have been received and the petition is now before us for hearing and disposal.

[2] The learned counsel for the opposite parties (plaintiffs) has raised two preliminary objections, both of a somewhat unusual character. The first objection is that on 1st June when the petition of revision was presented and received, this High Court was not properly

constituted and the Chief Justice, therefore, had no jurisdiction either to receive the petition or to issue a rule on it. The objection is based on the language of S. 3, Assam High Court Order, 1948. This section provides that :

"As from 5th April 1948, (hereinafter referred to as 'the prescribed day'), there shall be a High Court for the Province of Assam which shall be a Court of record, and shall consist of a Chief Justice and such other Judges as the Governor General may from time to time, whether before or after the prescribed day, appoint in accordance with the provisions of S. 220 of the Act."

It is urged that the High Court, according to this section, must consist of a Chief Justice and such other Judges as the Governor General may from time to time appoint. The Chief Justice alone could not constitute the High Court. The appointment of some other Judges was essential. The direction, it is argued, is mandatory and the High Court could not come into existence till in conformity with the direction the Governor General had appointed other Judges necessary to constitute the High Court. Our attention has already been drawn to the provisions contained in S. 220, Government of India Act, which also provides that every High Court shall be a Court of record and shall consist of a Chief Justice and such other Judges as the Governor General may from time to time deem it necessary to appoint. The learned counsel has relied on the language of the provisions of the two sections referred to above and has not produced any authority in support of the proposition he has put forward.

[3] We have carefully considered the argument addressed to us on this point and we think the objection is not sound. There was to be a High Court for this Province from 5th April 1948, the prescribed day. The Calcutta High Court, which formerly was exercising jurisdiction so far as this province was concerned was to cease to have that jurisdiction. The appointment of the Chief Justice was made before the prescribed day, but under the proviso to S. 3 it took effect from the prescribed day. The appointment of such other Judges as the Governor-General deemed necessary within the maximum limit was no doubt necessary. But both S. 3, Assam High Court Order, 1948 and S. 220, Government of India Act, 1935 allow the Governor-General to make other appointments, from time to time. No time limit is placed on the exercise of jurisdiction vested in him in this respect. It cannot be said, therefore, that the Governor-General was under an obligation to appoint Judges at once or at a time that they could function on the prescribed day or on any particular day. He is really the judge of the time when appointments of other Judges may be made. Besides, the possibility that the Governor-General may take some time to make other appointments could not have been overlooked by the Legislature. If the intention had been that the Chief Justice should not exercise the powers which he as Chief Justice or as a single Judge of the High Court could exercise till these appointments were made an express provision to that effect should have appeared in the section. If the objection raised is accepted, the conclusions would be that the Chief Justice could not act at all till at least the appointment of a second Judge was made. This second appointment was made in August 1948. The result would be that the High Court could come into existence only in August though, according to the Assam High Court Order this province was to have a High Court from the prescribed day (5th April). The Calcutta High Court had ceased to exercise jurisdiction from that day. This result could not have been meant. The interpretation placed on the relevant section by the learned counsel leads to anomalous results. The Legislature could not have intended that the Chief Justice was not to exercise any jurisdiction even as Chief Justice or as a Single Judge till the appointment of other Judges. If this intention is attributed to the Legislature, it would be reading something into the section that it does not contain.

[4] The question, however, is not one of the first impression. It arose before a Division Bench of the Patna High Court in *Emperor* v. *Sohrai Koeri* reported in A. I. R. (25) 1938 Pat. 550 : (40 Cr. L. J. 41). A criminal case was argued before the learned Judges constituting the Bench. The hearing was concluded on 9th May and judgment was reserved. On 10th May news was received that Sir Courtney-Terrell C. J., of the Court had died in England. On 11th May, the objection was raised on behalf of the accused that there being no chief justice, the High Court was not properly constituted and therefore the Bench too had ceased to have jurisdiction to pronounce judgment in the case. The objection was based on Cl. 2, Letters Patent of the Patna High Court by which it was declared that the High Court shall consist of a chief justice and six other Judges. The Patna High Court was established under the Government of India Act, 1915. At the time the objection was raised in the Patna High Court, the Government of India Act, 1935, was in force. Clause 1 of S. 220 of the Act which enacts that every High Court shall consist of a Chief Justice and such other Judges as the Governor-General may from time to time deem it necessary to appoint was also considered. The Letters Patent of the Patna High

Court did not provide for succession to the Chief Justice or other Judges if a vacancy occurred. But as the Letters Patent were subject to the legislative power of the Governor-General in Legislative Council, the situation arising from the happening of a vacancy was to be dealt with under S. 222, Government of India Act, 1935. This section lays down that if the office of the Chief Justice of the High Court becomes vacant, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the Chief Justice has resumed his duties, as the case may be, be performed by such one of the other Judges of the Court as the Governor-General may in his discretion think fit to appoint for the purpose. Even a temporary appointment by the Governor General would naturally take some time. The section, therefore, while taking note of the difficulty which may arise from the happening of a vacancy provides the remedy by laying down that the duties of the Chief Justice shall be performed by one of the other Judges whom the Governor-General may in his discretion think fit to appoint for the purpose. The implication is that the jurisdiction of the High Court would not be affected. The vacancy in the office of the Chief Justice arising from death or retirement would not affect the constitution of the Court. The jurisdiction of the other Judges also will not be affected. The duties of the Chief Justice could be performed by one of the other Judges appointed for the purpose by the Governor General. In the interval till the appointment is made no Judge of the High Court would be in a position to exercise the powers of the Chief Justice. But the Court will not loose its jurisdiction merely because there is a vacancy in the office of the Chief Justice. The office remains and therefore the constitution is not affected. By this process of the reasoning, the learned Judges of the Patna High Court came to the conclusion that where the office of a Chief Justice of a High Court remains vacant due to death of the Chief Justice or other cause, it cannot be said that till the vacancy is filled up there is no validly constituted High Court. Vacancy, in their opinion, did not mean total abolition of that office; it amounts merely to a suspension of the duties to be discharged by a Chief Justice. Other work and duties of the High Court could be carried on. If the High Court can remain properly constituted without a Chief Justice, it is obvious its constitution would not be affected if the Governor-General was not able to appoint other Judges of this Court when the Chief Justice was appointed. If the Chief Justice is the only judge of the High Court, he could perform the duties of the Chief Justice. He could also dispose of such judicial business of the Court as he was empowered to dispose of sitting singly, but the constitution of the Court could not be affected by delay in the appointment of other Judges required to be appointed under S. 220, Government of India Act or under S. 3, Assam High Court Order, 1948.

[4a] In *Lalsingh* v. *Ghansham Singh*, 9 ALL. 625 : (1887 A. W. N. 154 (F.B.)), the contention raised was that the Allahabad High Court was not properly constituted in as much as the number of Puisne Judges was less than five. The Letters Patent of the High Court provided that the High Court was to consist of the Chief Justice and five Puisne Judges. The omission to appoint the fifth Judge was the basis of the argument that the High Court was improperly constituted and therefore could not exercise any jurisdiction till the appointment of a fifth Judge was made. The objection was overruled. Mahmood J. in the course of the argument observed as follows :

"The fact that His Majesty has omitted for several years to fill up a vacancy does not alter the constitution of the Court or make it illegal nor does it amount to altering Cl. 2 of the Letters Patent. If your argument is correct, supposing a Judge was to die, the whole working of the Court would be brought to a standstill until his successor could be appointed."

He even went further and remarked that even if the Crown was bound to fill up a vacancy within a specified time and acted illegally in not filling it up it did not follow that the constitution of the Court is vitiated so as to deprive the remaining Judges of all other jurisdiction.

[5] In *Collector of Etah* v. *Golab Kunwar*, A. I. R. (22) 1935 ALL. 322 : (4 A. W. R. H. C. 79), the same question arose in another form. The objection to the constitution of the Court was on the ground that the provisions contained in cl. 4 of S. 101 of the then Government of India Act had been contravened. The clause referred to above provided that at least one third of the Judges of the High Court shall be barristers. It was argued that on the appointment of one of the Pusine Judges of that Court as the Chief Justice of the Lahore High Court, the constitution of the Allahabad High Court had broken down as no barrister Judge had been appointed in his place. Therefore the Chief Justice and other Judges lost all their jurisdiction to dispose of their judicial work. The contention was overruled. It was pointed out that if barrister Judge or a civilian Judge happens to die suddenly there is bound to be a vacancy and the Government would naturally take some time to make a suitable appointment. If in the interval the High Court were to be with-

out any jurisdiction, some provision in the Government of India Act to that effect must have existed. If it does not exist it cannot be read into the Act. The *ratio decidendi* in all these cases is the same and we are in respectful agreement with the view taken in these cases. The result is that the vacancy in the office of the Chief Justice or in the office of a Judge necessary for the Court does not affect the constitution or the jurisdiction of the Court. The High Court retains its jurisdiction and its function can be carried even in the absence of a Chief Justice or other Judge or Judges necessary for the Court. In the absence of a Chief Justice it will not be possible for any one to perform his functions but the other Judges of the Court could continue their work and the High Court could function as such. Similarly a Chief Justice could perform his duties and also discharge his function as a single Judge in the absence of other Judges. The objection has got no force and is repelled.

[6] The second objection raised is that under R. 15 of Chap V relating to general rules of procedure (the Rules of the High Court of Judicature at Fort William in Bengal), an application of revision must be presented direct to a Division Bench. In this case, the petition was presented to the Chief Justice alone and he issued the rule. The contention is that the presentation was invalid and the learned Chief Justice was not competent to issue the rule sitting singly. It is correct that the petition should have been presented to a Division Bench. But at the time the petition was put in there was only one Judge of this Court functioning. No Division Bench could have been constituted. The petition in those circumstances could have been received only by the office for formal presentation before a Division Bench later. That procedure would have avoided technical objection. The presentation of the petition to a single Judge and the issue of a rule by him, however, cannot be fatal to the petition. It is now before a Division Bench. It can be taken as formally presented now and the issue of a further rule can be dispensed with as the parties are before the Court and the record of the case is also available. There is thus no difficulty in the disposal of the petition. The learned counsel has pointed out that the petition, if taken as presented now will be barred by time. There is no period of limitation provided for petitions of revision and if there had been any, this could be a very fit case for the condonation of delay as the petitioner is not guilty of any laches or negligence. The petition was actually put in at a time when no objection on the score of limitation could have been taken. The objection is overruled.

[7] The facts bearing on the contentions raised in the petition may now be briefly stated.

[8] Plaintiffs (opposite parties 1-4) instituted a suit for recovery of Rs. 70,000 by the sale of the mortgaged property against the representatives of the mortgagors and other persons interested in the equity of redemption on 2nd January 1941. It took about six months to get written statement from the defendants. On 14th November 1941, an interim order staying further proceedings, in the suit was issued by the Calcutta High Court. This was vacated on 19th June 1942. In pursuance of another order by the High Court, a commission for the examination of a woman was issued. It was received back unexecuted on 14th December 1942. On 18th December 1942, the suit was fixed for peremptory hearing on 9th January 1943. The order was communicated to the counsel for the plaintiffs on 21st December 1942. The plaintiffs got the information about the order on 29th December 1942. They had already left for their native place in the district of Arah in Bihar in November 1942. For reasons given in their application for adjournment of the case presented on 9th January, they applied for adjourment through their counsel. The adjournment was refused. The counsel then withdrew from the case as he had no further instructions and the suit was dismissed for default on that date. On 8th February 1943, plaintiffs applied for restoration of the suit under O. 9, R. 9. They explained their inability to arrange for the prosecution of the suit on 9th January 1943, by stating that when the date for hearing was fixed, they were in Arah District in Bihar. Further, before getting information about the date of hearing, plaintiffs 1 and 4 had fixed the dates for the marriages of their sons. These marriages were to be celebrated on 16th and 19th January 1943, respectively. They could not, therefore, arrange to produce evidence on 9th January and then go back to their native district in Bihar in time to arrange for the celebration of marriages. Plaintiff 2 who was ill, had sent a medical certificate which was presented to the Court when the request for the adjournment of the case was made on plaintiffs' behalf. Plaintiff 3 was said to be a chronic invalid.

[9] On 29th March 1943, Mr. I. Rasul, who had dismissed the suit for default, ordered its restoration. He was inclined to the view that no sufficient cause prevented the plaintiffs from appearing in Court on 9th January, but in view of the statement of defendant 1, in para. 8 of the written statement and for the ends of justice, he agreed to set aside the order of dis-

missal of the suit and directed it to be restored to the file.

[10] Defendant 1 challenged the correctness of the order by a revision petition in the High Court at Fort William. The case came before a Division Bench of the High Court. The learned Judges held that the order of restoration was passed

"under a vague mixture of reasons, partly for reasons which are for consideration under O 9, R. 9 of the Code, and partly for reasons which would justify action under S. 151, and the parties have been put into some difficulties."

In these circumstances they held that instead of their diposing of the case on the merits, it was more suitable that the case should go back for a proper order to be passed by the Court below. The learned Judges laid down that the Court could not restore the case under its inherent powers under S. 151 of the Code, if it found that there was no sufficient cause for restoration within the meaning of O. 9, R. 9. The case was, therefore, remanded to the lower Court for disposal of the application under O. 9 R. 9 on the evidence already on the record. The Court was further directed to come to a clear finding one way or the other whether it considered or did not consider that there was sufficient cause for non-appearance on 9th January and to restore the case or reject the application accordingly.

[11] On remand, the case again came before Mr. I. Rasul. He rejected the petition under O. 9, R. 9 holding that sufficient cause was not shown for non-appearance of the plaintiffs on 9th January. Plaintiffs preferred an appeal againt this order to the High Court. It was held in appeal that the learned Judge had not heard the parties or their pleader before disposing of the case after remand. The order rejecting the application was set aside. The learned Judge was directed to dispose of the application under O. 9, R. 9 according to law and in the light of observations made in previous order of remand. He was also directed to hear the pleader of the parties or parties themselves before disposing of finally the application for restoration of the suit.

[12] When this case was received back, Mr. Rasul had been transferred and the petition was disposed of by Mr. D. N. Hazarika, Spl. Sub-Judge, his successor in office. He felt satisfied that there was sufficient cause for the non-appearance of the plaintiffs on the date of hearing and setting aside the dismissal of the suit ordered its restoration on 13th March 1948. The plaintiff petitioners were directed to pay Rs. 50 to the opposite party as costs within a month from the date of the order.

[13] Defendant 1 had again come up on revision to this Court against this order.

[14] The first contention raised by the learned counsel for the petitioner is that Mr. D. N. Hazarika had no jurisdiction to hear and dispose of the petition. He contended that the case had been remanded for disposal by Mr. Rasul. who had dismissed the suit for default and had later restored it. His order being vague it had to be set aside. It is urged that considering the reasons on which the order of Mr. Rasul dated 29th March 1943 was set aside the intention of the High Court was that Mr. Rasul alone should dispose of the petition by a proper order. We have been taken through the whole of the order and its substance has been reproduced above. The main reason why this order was set aside was that it was not clear whether in the view of the Judge sufficient cause had been shown for non-appearance on 9th January 1943 or not. There were observations in the order of the learned Sub-Judge which indicated that he was making use of his inherent jurisdiction under S. 151. Since the order was not clear, the case was remanded. But in the last paragraph of the order, which embodies the directions of the Court, it was said that the case is remanded to the 'lower Court' for disposal of the application on the merits and on the evidence already on record. We are not prepared to read in this order any direction that the case was to be disposed of by Mr. Rasul and not by his successor.

[15] The second order of remand merely directs that parties must be heard before the disposal of the case. In all other respects, the previous order of remand was allowed to remain in tact and was to be followed. In these circumstances, the contention has got no force.

[16] The learned counsel has relied on two authorities viz., *Bhoyro Lal* v. *Mokoond Lal*, 2 Suther 275 and *Bhyrub* v. *Khettur Mohun*, 5 Suther 124, in support of his contention. These cases have no application to the facts of the case before us. In both these cases, the remand orders directed the Judges of the Court below to give their reasons for their decisions which they had omitted to state. There was to be no rehearing of the matter. In the present case, the direction in the order of remand was that the application be disposed of according to law after hearing the parties. These authorities, therefore, do not assist the petitioner in any way.

[17] The second contention raised is that the order of the special Sub-Judge is without jurisdiction in asmuch as all defendants were not properly served. It is admitted that the petitioner was served, appeared, and was heard. But, it is contended that service in the case of

defendants 9-12 had not been duly effected and therefore the Court could not dispose of the petition in their absence It appears that after the last order of remand, substituted service was effected on these defendants The process-server's report was verified by an affidavit. This is not denied. The learned counsel points out that after the verification of the report by the process server, the Court should have declared that the summons had been duly served under O 5, R. 19. The failure on the part of the Court to record an order declaring that service had been duly effected deprived it of all jurisdiction to dispose of the petition. He has not cited any authority in support of this proposition. It is a question whether declaration of due service under R. 19 must be in express terms. There is a conflict of authority on the point. But even if it is assumed for purpose of argument that an express declaration of due service is necessary, the omission to declare due service under the rule would be an irregularity on the basis of which the party adversely affected by the omission may ask for an opportunity to be heard. It would not affect the jurisdiction of the Court as regards parties that are present before the Court. The learned counsel for the petitioner could not cite any authority in support of the proposition that the order of the Court below would be wholly without jurisdiction merely because there was no declaration of due service in respect of some defendants who are not challenging the order and against whom the order has already become final It is worthy of note that defendants, on whom substituted service was effected, included a representative of a mortgagor and some mortgagees. They did not contest the petition for restoration of the suit at any stage. They have been served on this petition and have not appeared. It is clear that they are not feeling aggrieved by the order. The petitioner cannot take advantage of the irregularity, if any, as it is not possible to hold that the order of the Court below was without jurisdiction as contended by his learned counsel even as regards parties who were present and were heard.

[18] We are not convinced that the declaration of due service in express terms is imperative. We are inclined to the view taken by Oudh Chief Court, *Harcharan* v. *Md. Azizullah*, A. I. R. (19) 1932.Oudh 326: (141 I. C. 759) and the Lahore High Court, *Tehal Singh* v. *Chainchal Singh*, A. I. R. (21) 1934 Lah. 985. The declaration may be implied in the proceedings Where such a declaration exists though by necessary implication, there would be no irregularity in the service and proceedings in the Court below will not be open to any objection. Now if Court had not been satisfied that the service on defendants 9 to 12 had been effected duly it would have ordered fresh service. This was not done. The implication, therefore, is obvious and deprives the objection of all its force.

[19] The last contention is that sufficient cause for non-appearance was not made out and the order of the Special Sub-Judge was not sustainable as it took judicial notice of certain facts against the provisions contained in the Evidence Act and also relied on a medical certificate which had not been proved according to law. It is correct that the Court should not have taken judicial notice of the fact that railway travel at the time (January, 43) was uncertain. This was a matter for proof. Similarly, the unproved medical certificate could not be considered as evidence. But even if the medical certificate is not taken into consideration and the uncertainities of railway travel in January 1943 are not presumed, the order is not liable to interference. The learned Judge came to a definite conclusion that one of the plaintiffs was a chronic invalid. Another was ill. There was oral evidence about his illness, which the learned Judge did not reject. The other two plaintiffs according to evidence, had left Assam before the middle of November 1942. They learned about the hearing on 29th December. They had already made arrangements for celebrating the marriages of their sons on 16th and 19th January 1943. In these circumstances, in his view, it was extremely difficult for them to attend the Court on 19th January and then go back to their native district and make arrangements for two marriages. We think he was right in taking this view of the matter. The case had been proceeding at a very slow pace. When leaving the jurisdiction of the Court plaintiffs had no idea that the case will be fixed for a peremptory hearing so early. In view of the circumstances in which they found themselves, their request for adjournment was reasonable. Plaintiffs took some risk in applying for adjournment, without making arrangements for the prosecution of the case in the hope that they will get it. But for this, a suit in which such a huge sum is being claimed need not have been dismissed. They could have been ordered to pay costs. As held by the Subordinate Judge, there is no basis for the view that plaintiffs were absent wilfully or without any reasonable cause. It is possible to arrive at this finding without taking judicial notice of the conditions of railway travel at the time and without taking into consideration the medical certificate objected to by the learned counsel.

[20] We have, thus, no basis for interference with the finding of the Court below that sufficient cause for non-appearance has been made

out. The order advances substantial justice and gives the parties a chance to have their disputes settled on the merits. We, therefore, decline to interfere. The petition is dismissed with costs.

Thadani Ag. C. J. — I agree.

V.B.B. *Petition dismissed.*

A. I. R. (37) 1950 Assam 12 *[C. N. 4.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Joygovinda Prosad Shah — *Appellant* v. *Dwarika Prosad Shah and others* — *Respondents.*

First Appeal No. 259 of 1946, Decided on 16th May 1949, from decree of Addl. Sub-Judge, A. V. D., D/- 22nd April 1946.

Civil P. C. (1908), O. 34, R. 1—Mortgage suit by manager of joint Hindu family — Other members are not necessary parties.

A mortgage suit brought by a manager of a joint Hindu family without impleading the other members of the family does not fail on account of non-joinder : *Case law referred.* [Para 13]

Annotation : ('44-Com) Civil P. C., O. 34 R. 1 N. 12.

J. C. Sen — for Appellant.

B. C. Barua, and P. K. Gupta — for Respondents 2, and 12, respectively.

Judgment.—This is a first appeal from the judgment and decree of the learned Additional Subordinate Judge, A. V. D., dated 22nd April 1946, by which he dismissed the plaintiff's suit with no order as to costs.

[2] The suit instituted by the plaintiff, Joygobinda Prasad Shah, against Dwarikaprosad Shah and 11 others, upon a registered mortgage-bond executed by the father of defendant 1 on 30th September 1929, whereby he mortgaged certain lands and houses in favour of the plaintiff as security for a loan of Rs. 8244-3-0 with interest at the rate of 10 per cent. per annum. During the subsistence of the mortgage, he transferred some of the mortgaged properties to defendants 2 to 12. Defendants 3 and 4 were in possession of some of the mortgaged houses built upon land belonging to the Railway, and defendants 6 to 12 were in possession of some of the remaining mortgaged property. In the mortgage bond, the property mortgaged was described by their dag and patta numbers in use before the last Re-settlement. At the last Re-settlement, the old numbers and pattas were given new numbers as shown in the schedule attached to the plaint. The area comprised in the new numbers and pattas is also mentioned in the schedule. The plaintiff sought a decree for the sale of the mortgaged property for a sum of Rs. 6000 including interest then due and costs of the suit, with future interest from the date of the suit till payment.

[3] Defendants 1, 5, 8 and 9 did not appear and contest the suit. Defendants 2, 3, 4, 6, 7, 10, 11 and 12 denied the plaintiff's claim and alleged that the bond in suit was insufficiently stamped and was ineffective as a mortgage bond for want of proper registration. They further alleged that the mortgagor, the deceased Ramkhelaun Shah, was not the *karta* of the joint family and that the debt in question was not incurred for the family necessity, nor was it for its benefit. They claimed to be *bona fide* purchasers of the land for value and without notice of the encumbrance, and also pleaded that the suit was time-barred and not maintainable in the absence of the joinder of the coparceners of the joint family of the plaintiff.

[4] Upon the pleadings, the trial Court framed the following issues :

"1. Is the suit by the plaintiff alone maintainable ?

2. Is the suit time barred ?

3. Is the mortgage bond invalid for improper registration and insufficiency of stamp ?

4. Was the mortgage debt incurred for the use and benefit of the joint family or for any legal necessity of the family ?

5. Who was the Karta of the family of Ramkhelaun Dwarikaprosad at the time of the mortgage in question ?

6. Whether Ramkhelaun borrowed the sum of Rs. 8244-3-0 from the plaintiff and executed the mortgage bond on 30th September 1929 ?

7. Whether the lands and the houses mentioned in the Schedule were mortgaged ?

8. Whether the defendants were *bona fide* purchasers for value and without notice of the mortgage ? And whether the plaintiff is entitled to a decree for sale of the lands and the houses purchased by the defendants ?

9. Whether the mortgaged lands have been properly or rather adequately described ?

10. What relief, if any, is the plaintiff entitled to ?

[5] On all the issues, except Issue 1, the findings of the trial Court were in favour of the plaintiff. On Issue 1, the trial Court dismissed the plaintiff's suit holding that the plaintiff alone was not entitled to sue.

[6] Mr. Sen for the appellant has contended that the plaintiff-appellant's suit was not liable to be dismissed for the reasons stated by the trial Court; assuming that the plaintiff's sons are members of the joint family of which the plaintiff is the karta, the trial Court should have given an opportunity to the plaintiff to join his sons as parties to the suit. We think the contention is well founded. This was a suit by a mortgagee under the provisions of O. 34, Civil P. C., for the sale of the mortgaged property. The mortgage bond was executed in favour of the plaintiff alone and he alone, therefore, was entitled to bring a suit for the sale of the mortgaged property. It appears from the evidence of the plaintiff that the father of defendant 1 was a member of a Mitakshara Hindu joint family and was the karta of his family; the family business consisted of liquor shops at Guijan and Ledo and a sundry shop at Guijan; the father of defendant 1 had dealings with the

plaintiff and, as a result of the dealings between them, the father of defendant 1 became indebted to the plaintiff in the sum of Rs. 8244-3-0. It was in respect of this indebtedness that the father of defendant 1 executed the mortgage bond. It is true that this debt of Rs. 8000 odd was due to the firm of Rajkumar Shah Joygovinda Shah, of which the plaintiff was a partner. After the dissolution of the partnership, however, the father of defendant 1 acknowledged his liability in respect of the debt to the plaintiff and executed the mortgage bond in his favour.

[7] We think the view taken by the trial Court that the sons of the plaintiff were necessary parties to the suit, cannot be sustained in view of the observations of their Lordships of the Privy Council in *Kishan Prasad* v. *Har Narain Singh*, 33 ALL. 272 : (9 I. C. 739). The head-note to the decision, which is in conformity with their Lordships' judgment, reads as follows :

"Where a joint family business has to be carried on in the interests of the joint family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts, and compromising or discharging claims ordinarily incidental to the business; and where they are so entrusted and empowered, they are entitled as the sole managers of the family business, to make in their own names contracts in the course of that business, and to maintain suits brought to enforce those contracts without joining in the suit with them either as plaintiffs or defendants the other members of the family."

[8] There is no doubt from the facts of this case that after the dissolution of the plaintiff's partnership with the firm of Rajkumar Shah, the plaintiff was carrying on a joint family business in the interests of the joint family as a whole and was competent to obtain a mortgage bond from the father of defendant 1 as security for the debt acknowledged by him as being due to the plaintiff alone.

[9] In a later decision of their Lordships of the Privy Council in *Sheo Shankar Ram* v. *Mt. Jaddo Kunwar*, 36 ALL. 383: (A. I. R. (1) 1914 P. C. 136), their Lordships of the Privy Council affirmed the decision of the Allahabad High Court observing

"that the plaintiffs who sued to redeem a mortgage after foreclosure on the plea that they had not been parties to the mortgage suit, were properly and effectively represented in the suit by the managing members of the Hindu joint family, of which the plaintiffs were also members, and that in such a case, the Court was not bound to set aside the execution proceedings where substantial justice had been done merely because every existing member of the family was not formally a party to the suit."

Their Lordships also observed they saw no reason to dissent from the Indian decisions which showed that there were occasions, including foreclosure actions, when the managers of a Hindu joint family so effectively represented all the other members that the family as a whole was bound, and were of opinion that it was clear on the facts of this case; and on the findings of the Court upon them, that it was a case where that principle ought to be applied. There was not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself and no question arose under S. 85, T. P. Act, (IV [4] of 1882), because the mortgagee had no notice of the plaintiff's interests.

[10] We cannot see how in the case before us the interest of the plaintiff's sons are in any way affected by the plaintiff alone having brought the suit for sale of the mortgaged property. It is a question of fact in each case whether the karta effectively represents the other members of the joint family, and we can find nothing in the facts of this case from which it can be inferred that the father did not represent the sons. The sons have not sought to be made parties to the suit.

[11] In *Lingangowda Dod-Basangowda* v. *Basangowda Bistangowda*, A.I.R. (14) 1927 Bom. 56: (51 Bom. 450), their Lordships observed:

"In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he comes of age and then bring an action, or bring an action by his guardian before; and in each of these cases, therefore, the Court looks to Expln. 6 of S. 11, Civil P. C., to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors."

As we have observed, the plaintiff's sons, if they have any interest in the mortgage security, are properly represented by their father, the plaintiff.

[12] The decision of the Patna High Court in *Hit Lal Mahton* v. *Jaboo Mahton*, 3 Pat. 81: (A.I.R. (11) 1924 Pat. 458) is directly in point. In that case, it was held:

"Where a mortgage bond is executed in favour of two members of a joint Hindu family to secure money advanced from joint family funds, the mortgagees named in the bond are entitled to sue to enforce the bond without joining the other members of the family as parties."

Dawson Miller C. J. in delivering the judgment of the Division Bench, observed :

"The mortgagors entered into the transaction with the mortgagees in the name of the latter alone, treating them as the other contracting party. If, at the due date, the mortgagors had tendered the principal sum advanced together with any interest remaining due to the plaintiffs as mortgagees, it is conceded that the latter could have given a valid acquittance binding upon the other members of the family who were interested in the mortgage. It must be presumed that in entering into the transaction, they were authorized to do so on behalf of all the members of the family, and if they could grant a valid discharge to the mortgagors on

payment of the principal sum, I can see no reason why they should not be presumed to have implied authority to enforce payment by a suit. The question appears to me to be one of authority and, if they were authorised to enter into the transaction on behalf of the family, I think it must be taken that they were equally authorised to institute a suit to enforce it."

[13] The Patna, Allahabad and Madras High Courts have taken the view that a mortgage suit brought by or against the manager of a joint Hindu family without impleading the other members of the family, does not fail on account of non-joinder. The Calcutta High Court, however, dissents from this view, but we think that, in view of the pronouncements of their Lordships of the Privy Council in the cases to which we have referred, the view of the Patna, Allahabad and Madras High Courts appears to be the better view.

[14] Mr. Barua for respondent 2 did not support the judgment and decree of the trial Court for the reasons stated by it, but urged another ground for the first time before us, namely, that as the partners of the dissolved firm of Rajkumar Shah Joygovind Shah have not been made parties to the suit, the suit was liable to be dismissed. We think there is no substance in this ground. It was the plaintiff's case that the debt due to the firm of Rajkumar Shah, of which he was a partner, was acknowledged by the father of defendant 1 as being due to him alone upon the dissolution of that firm. This was a question of fact which should have been agitated in the trial Court. Indeed we find that the plaintiff was not even questioned on this point. It was next contended that respondent 2 being in possession of the mortgaged houses which stood on the land belonging to the Railway and which the mortgagor had no right to mortgage, the houses should be regarded in law as chattels, and a suit for the sale of chattels was time-barred at the date of institution of the suit. Again, this point was not raised before the trial Court, and no authority has been cited to us in support of it.

[15] It was lastly contended by Mr. Barua that the provisions of the Assam Money-lenders Act apply to the transaction in suit and that the decree-holder was in no case entitled to a decree for an amount exceeding twice the principal amount due. As we propose to set aside the judgment and decree of the trial Court on the issue of the maintainability of the suit and remand the appeal to the trial Court to enable it to pass the usual preliminary mortgage decree after notice to the advocate of the parties it will be open to Mr. Barua to raise this point before the trial Court and obtain a decision thereon, before the preliminary decree is passed.

[16] Mr. Gupta for the respondent 12 raised only two points before us. Firstly, that respondent 12 was a *bona fide* purchaser for value without notice of the encumbrance, and secondly, that no mortgage decree could be passed in this suit because the properties mentioned in the schedule are not proved to be identical with the properties mentioned in the mortgage deed.

[17] As to the first contention, there is a finding of fact of the trial Court that respondent 12 had knowledge of the encumbrance. The learned Judge's finding is based upon the evidence of one Lakshmichand Agarwalla, a witness examined on behalf of defendants 6 and 7, from whom respondent 12 purchased some of the mortgaged properties. It is clear from the evidence of Lakshmichand that he and the mortgagor went to Babu Prafulla Chandra Bagchi, an advocate, and one Rajani Chakravarty, a petition writer and sought the advice of the advocate in the matter of the sale of the property in suit. The advocate asked the witness to enquire from the Registration Office if there was any encumbrance, but the witness did not go to the Registration Office, nor did he make any enquiry to satisfy himself in this behalf. We think the trial Court was right in saying that the case of respondent 12 is no better than the case of defendants 6 and 7 who like other respondents except 2 and 12 have not contested the appeal.

[18] As to the identity of the mortgaged property with the property as mentioned in the schedule, we do not think there is any difficulty in passing a preliminary mortgage decree involving property mentioned in the mortgage bond; nor do we think there is any difficulty in passing a preliminary mortgage decree merely because the mortgaged property consists of a half undivided share of the property mentioned in the mortgage deed and that out of the half undivided share some portion of it has been sold to respondent 12, as is contended by his advocate. If and when the property is sold after the usual preliminary mortgage decree is passed, the sale will doubtless be limited to the half undivided share of the mortgaged property, and the auction-purchaser will get joint possession with the transferees of the mortgagor or those claiming under him. The question of the transferees of the mortgagor or those claiming under him retaining what has been given to them under the pattas issued to them by the Revenue authorities, will properly arise in a suit for partition, which may hereafter be instituted by the auction-purchaser. The question of equities in favour of the transferees arising out of the grant of pattas to them by the Revenue authorities will be a matter for decision in a partition suit.

[19] In the view we have taken, the judgment and decree of the trial Court is set aside and the appeal is remanded to the trial Court to pass a usual preliminary mortgage decree after notice to respondents 2 and 12. As we have observed, the learned advocate for respondent 12 who has raised the question of the applicability of the Assam Money-lenders Act before us, will be at liberty to agitate this point before the trial Court, before it passes a preliminary mortgage decree. The dispute as to the identity of the property will be decided by the trial Court if and when the mortgaged property is put to sale.

[20] The result is that the appeal is allowed with costs.

V.B.B. *Appeal allowed.*

A. I. R. (37) 1950 Assam 15 *[C. N. 5.]*

RAM LABHAYA J.

Jajneswar Nath — Appellant v. *Jarma Singh and another — Respondents.*

Second Appeal No. 51A of 1948, Decided on 23rd August 1949.

Assam (Temporarily Settled Districts) Tenancy Act (III [3] of 1935). S. 33, Proviso — 'Requires' — Meaning of — Emphasis is really on bona fide demand for building homestead or for cultivation — Defendant's inconvenience is no ground for refusing relief to plaintiff.

According to the proviso to S. 33, all that the plaintiff is required to do is that he should satisfy the Court that he requires the land for his homestead or for cultivation in the manners stated in the proviso. The word "requires" in the proviso is not used as synonymous with "needs". The emphasis is really on a bona fide demand for building a homestead or for cultivation. What a plaintiff has to satisfy the Court about is that he is honestly wanting the land for his own use as required by the proviso. The idea is not to permit the eviction of a tenant in order to bring in another tenant or to enhance the rent. There is no limit placed on his requirements. A plaintiff may have land in possession and he may be wanting more land. He is to satisfy the Court that he wants it for his own cultivation. If he can satisfy the Court on that point, he could have as much land for his own cultivation as he can manager Similar consideration will govern where ejectment is prayed for in order to build a homestead though so far as residential accommodation is concerned, the question may be somewhat on a different footing so far as proof goes. In order to satisfy the Court that he requires the land for building a homestead, a plaintiff may have to bring out the circumstances which go to indicate that he has reasons for acting in the manner that he proposes to do. Plaintiff may have his own reasons for preferring a particular land for his homestead. The choice lies with him. If a homestead is needed, his selection of land is a matter which should rest with him. If plaintiff is asking for ejectment bona fide, the fact that it will cause inconvenience to the defendent can be no reason for refusing the relief to the plaintiff. [Para 4]

***K. P. Bhattacharjee*—for Appellant.**

***S. K. Ghose and P. Chaudhury*—for Respondents.**

Judgment. — This appeal arises out of an ejectment suit which was dismissed by the trial Court. The order was affirmed in appeal. Plaintiff has appealed to this Court.

[2] The only live issue which requires determination at this stage of the case is whether the defendant is liable to ejectment. The trial Court found that the defendant had been in possession of the property for about 27 years before suit. Plaintiff could eject him only if he could satisfy the Court that he required the land for building his homestead or for cultivation by himself or by members of his family or by hired servants or labourers according to the proviso to S. 33 of the (Temporarily-Settled Districts) Tenancy Act. The learned Judge inspected the present homestead of the plaintiff and found that plaintiff had lands on the East and West of it. He had two other vacant homesteads also. On his own showing he had about 8 to 10 kears of land though, according to P. W. 3, the area owned by him would measure about 20 kears of land. On these facts, the learned Judge held that he was not satisfied that plaintiff requires the land for his homestead. He further found that plaintiff was living in his present homestead with three other co-sharers and might be finding it inconvenient, but more inconvenience and hardship would be caused to defendant 1 if he was evicted from the disputed land. In consequence, the finding arrived at was that defendant 1 was not liable to ejectment. The learned Subordinate Judge in appeal could not find any reason to differ from the view taken by the trial Court on the basis of evidence and local inspection.

[3] It appears to me that the proviso to S. 33 has been completely misunderstood by the Courts below. The learned Munsif went to see the existing homestead of the plaintiff and observed that besides the homestead occupied by him, he had other homesteads. He had also other land and though there were co-sharers occupying the homesteads on the land where his homestead is now situate, inconvenience that may result from it would be much less than that caused to defendant by his eviction. The point obviously has been decided more on a balance of convenience. The possible inconvenience or hardship to the defendant seems to have influenced the decision to a considerable extent. The local inquiry appears to have been confined to the plaintiff's needs for residential accommodation. The allegation of the plaintiff that he required the land for cultivation entirely escaped the attention of the Courts below.

[4] According to the proviso to S. 33, all that the plaintiff is required to do is that he should satisfy the Court that he requires the land for his homestead or for cultivation in the manners

stated in the proviso. The plaintiff did state in his plaint and also in his deposition in Court that he wanted it for both the purposes. The words "requires the land" which occur in the proviso have been the subject-matter of interpretation in several decisions of this Court, and it has been held that the word "requires" is not used as synonymous with "needs." The emphasis is really on a bona fide demand for building a homestead or for cultivation. What a plaintiff has to satisfy the Court about is that he is honestly wanting the land for his own use as required by the proviso. The idea is not to permit the eviction of a tenant in order to bring in another tenant or to enhance the rent. This ulterior purpose is to be excluded. His own right to eject a tenant, who has not acquired occupancy rights, is curtailed only to this extent that he may not eject a tenant who has been in possession for more than 10 years unless the purpose of ejectment is the building of a homestead for himself or for cultivation by himself as described in the section. The emphasis is, therefore, on his bona fides. There is no limit placed on his requirements. A plaintiff may have land in possession and he may be wanting more land. He is to satisfy the Court that he wants it for his own cultivation. If he can satisfy the Court on that point, he could have as much land for his own cultivation as he can manage. Similar consideration will govern where ejectment is prayed for in order to build a homestead though so far as residential accommodation is concerned, the question may be somewhat on a different footing so far as proof goes. In order to satisfy the Court that he requires the land for building a homestead, a plaintiff may have to bring out the circumstances which go to indicate that he has reasons for acting in the manner that he proposes to do. A man already owning half a dozen residential houses may not require another one. On the other hand, if an existing house is not suitable for some reason, the building of another house would certainly be reasonable as in this case. These are some points which bear on the question of bona fides though no hard and fast rule can be laid on the subject. The learned Munsiff has been influenced in this case by the fact that there are two other vacant homesteads and there will be inconvenience to the defendant if he is evicted. Plaintiff may have his own reasons for preferring a particular land for his homestead and it cannot be said such reasons do not exist in this case. The choice lies with him. If a homestead is needed, his selection of land is a matter which should rest with him. If another house is not required and circumstances indicate that the object of the ejectment suit is not what appears to be on the face of it, the position would be very different. But if the demand is bona fide and there are no adequate reasons for holding otherwise in the case plaintiff's freedom to select the site of his own house may not be restricted. The consideration of defendant's inconvenience is not relevant at all. If plaintiff is asking for ejectment bona fide, the fact that it will cause inconvenience to the defendant can be no reason for refusing the relief to the plaintiff. In fact, in all cases where ejectment is ordered, inconvenience is caused. If that were a relevant consideration, no ejectment decree would be possible. The learned Subordinate Judge in appeal has merely agreed with the finding of the Court below. He has given no other reasons beyond those stated in the trial Court's order.

[5] Again the perusal of the judgments shows that the case has been examined only from the view point of plaintiff's requirements for residential accommodation. His case was that he wanted to cultivate the land also. There is no finding on that point. Plaintiff's bona fides might have been doubted if the case had been that the plaintiff wanted the entire 7 bighas of land for residential purposes. That, however, was not the case. He wanted the land for a homestead as well as for cultivation. He made a statement to that effect. He is suppported by one witness. Against that we have got the statement of the defendant alone; plaintiff purchased the land in 1939. Sometime after that he instituted a suit for ejectment and rent. He got a decree for rent, but his prayer for ejectment was not granted as a valid notice of ejectment had not been served on the defendant. This is the second suit for ejectment. His plea that he purchased the land for his own cultivation cannot easily be doubted considering his conduct subsequent to his purchase.

[6] On the evidence on the record I see no reason to doubt plaintiff's bona fides that he wants the land for his own purposes. The Courts below have approached the case from a very wrong point of view as shown above. They were influenced by a consideration of hardship that ejectment may cause to defendant. The finding, therefore, is not sustainable in law particularly in view of the fact that the real basis of the plaintiff's claim was not at all examined.

[7] Mr. Ghose has also claimed occupancy rights under clause (b) of S. 13 of the Act. The Courts below concurrently found that plaintiff had been in possession for about 27 years, but was not entitled to occupancy rights as possession had not covered the full period of 30 years. Mr. Ghose has tried to place the case under clause (b) of this section. He claims that defendant has got his homestead on the land and

therefore his case is covered by clause (b). Twelve years' continuous possession, therefore, was enough for confirming the occupancy rights on him. It is obvious that this view of the case was not presented to the Court below. The fact that defendant had been in possession for more than 12 years was there in his favour and if it had been pointed out to the Court below, that the defendant was not liable to ejectment, the point would have been considered. It is clear that clause (b) has not been relied on at all at any previous stage of the litigation. In these circumstances, this is an entirely new contention which I do not allow at this stage of the litigation.

[8] As regards the plaintiff's allegation that he wants the land for his own cultivation, I have already found that it is not possible on the evidence on the record to give a finding against him. The appeal, in these circumstances, must succeed. It is allowed and the plaintiff is granted a decree for ejectment of the defendants in terms of the prayer contained in the plaint. Parties shall bear their own costs throughout.

D.H. *Appeal allowed.*

A. I. R. (37) 1950 Assam 17 *[C. N. 6.]*

THADANI Ag. C. J. AND RAM LABHAYA J.

Hanuman Box Agarwalla — Appellant v. *Bibhuti Prosad Singh —Respondent.*

Second Appeal No. 2240 of 1947, Decided on 8th August 1949, from judgment and decree of Addl. Sub-Judge, A. V. D. Dibrugarh, D/- 31st July 1947.

(a) Evidence Act (1872), S. 63 (2) — Copy of copy— When admissible stated.

A copy of a copy is admissible in evidence if it has been compared with the original or a copy of the original taken out by means of a mechanical process.

[Para 12]

Annotation: ('46-Man.) Evidence Act, S. 63 N. 5.

(b) T. P. Act (1882), S. 105 — Contract for sale between appellant's agent and respondent— Latter agreeing to pay rent pending receipt of required authority from appellant—Relationship of landlord and tenant held established.

Where pending the completion of sale of a house by the appellant's agent to the respondent on the former's obtaining the required authority from the appellant, the respondent agreed to pay rent to the appellant, *held* that there was a contract of tenancy between the appellant and the respondent and the latter was liable for rent.

[Para 12]

Annotation: ('45-Com.) T. P. Act, S. 105 N. 8.

J. C Sen— for Appellant.

K. R. Barooah— for Respondent.

Judgment.— This is a second appeal from the judgment and decree of the learned Additional Sub-Judge, A. V. D. Dibrugarh, dated 31st July 1947, by which he set aside the judgment and decree of the trial Court which had decreed the plaintiff's suit for Rs. 466-8-0 with proportionate costs.

[2] The facts material to the appeal are these: The defendant-respondent rented the houses in suit from the plaintiff-appellant from 1st October 1942 at a monthly rent of Rs. 15; at the date of the suit in 1946, there was a sum of Rs. 510 due to the appellant as rent from 1st October 1942 to 31st July 1945. The respondent denied that there was a relationship of landlord and tenant between the appellant and himself. His case was that in 1942, when the threat of Japanese invasion was extending to Assam, the appellant entered into negotiations with him in his capacity as manager of the Charali Tea Estate, for the sale of the houses for a sum of Rs. 775, and Gouri Dutta Agarwalla, acting as agent of the appellant, received a sum of Rs. 75 from him; Agarwalla passed a receipt for the money on the appellant's behalf on 19th August 1942. In pursuance of these negotiations, the Charali Tea Estate took possession of the land and the houses; the proper person, therefore, liable to be sued was the Charali Tea Estate, and not the respondent.

[3] Upon the pleadings, the trial Court framed the following issues:

(1) Whether the suit is maintainable in the present form? And whether the suit is bad for non-joinder of Charali Tea Estate as defendant? (2) Is the claim barred by limitation? (3) Is the rate of rent unreasonable and excessive? (4) Whether the defendant is liable for the plaintiff's claim? If so, to what extent? (5) To what relief, if any, is the plaintiff entitled ?

[4] On issue 1, the trial Court held that having regard to Ex. 1, a letter written by the respondent to the appellant, the suit brought against the respondent in his personal capacity was maintainable and that it was not necessary for the appellant to implead the Charali Tea Estate.

[5] On the second issue, the trial Court came to the conclusion that a part of the claim was time-barred, namely, the claim from 1st October 1942 to 27th January 1943; the rest of the claim was within time. On issue 3, it decided that Rs. 15 p. m. was reasonable rent. On issue 4, it held that the defendant was personally liable to pay the rent at the rate of Rs. 15 p. m. In the result, it passed a decree for Rs. 466-8-0, with proportionate costs.

[6] The lower appellate Court took the view that the main question to be determined in the appeal was—whether there was a contract of sale between Gouri Dutta Agarwalla as the agent of the appellant on the one hand, and the respondent, as the agent of the Charali Tea Estate, on the other, or whether the house in question was rented by the respondent. It took the view that the determination of this question depended on the evidence of Gouri Dutta Agarwalla (P. W. 1) and the circumstances of the

case, which failed to establish a relationship of landlord and tenant between the appellant and the respondent. In this view, it set aside the judgment and decree of the trial Court, and dismissed the appellant's suit with costs.

[7] We think the lower appellate Court has erred in law on the facts established in this case that there was a contract of sale of the property in suit between the appellant's agent on the one hand and the respondent acting as agent of the Charali Tea Estate.

[8] Mr. Barooah who appeared for the respondent, has conceded that he does not rely upon S. 53A, Transfer of Property Act, and further conceded that there were negotiations only for the sale of the property between the appellant through his agent, Gouri Dutt Agarwalla, and the Charali T. E., through its agent, the respondent; that until the appellant's agent had obtained authority from the appellant to sell the property in suit, the agreement for sale could not be given effect to.

[9] We think, Ex. 1, written by the defendant on 23rd September 1942, establishes beyond all doubt that pending receipt of authority from the appellant to sell the property, the property in suit was to remain in the possession of the respondent as a tenant. The translation of Ex. 1, which is not in dispute, is as follows :

"Gouri Babu,

With this letter, I am sending a specimen copy of *amukhtarnamah*. It will do well if it is written in this manner; please send this to your brother by registered post. I have asked you to send by registered post, so that it may not be lost. Send it to-day ; delay is harmful to us.

Another thing; the shop house is lying vacant. The building materials of the house are being removed by others at their sweet will. There is want of space in our small shop house. If you will so permit, we want to remove our shop to your brother's house. So long it is not registered, I am agreeable to pay you rent. If you agree, please drop a line to the bearer of this letter, the amount you will demand as rent.

I hope you will please do this act of kindness to me.

Yours,

Sd/- Bibhuti Prosad Singh."

[10] It is the case of the appellant that he sent a reply to the respondent agreeing to the respondent's occupation of the house in suit on payment of Rs. 15, P. M., as rent. At the trial, the appellant called upon the respondent to produce the reply to Ex. 1. The respondent failed to produce it, whereupon the plaintiff tendered a copy of the reply to Ex. 1., in evidence. The copy was admitted by the trial Court in the absence of any objection as to its admissibility.

[11] It is plain from the judgment of the trial Court that it was influenced by Exs. 1 and 2 in coming to the conclusion that pending the receipt of authority to sell the property, the respondent was to remain in occupation as a tenant of the appellant. The lower appellate Court in its judgment expressed the view that Ex. 2, ought not to have been admitted in evidence at the trial. Mr. Barooah for the respondent urged before us that the view of the lower appellate Court was right, and that if Ex. 2 were omitted from consideration, there was nothing to prove relationship of landlord and tenant between the appellant and the respondent.

[12] It is true that Agarwalla has stated in his evidence that Ex. 2 is a copy of a copy of the original letter written by the appellant to the respondent in reply to the respondent's letter, Ex. 1. But a copy of a copy is admissible in evidence if it has been compared with the original or a copy of the original taken out by means of a mechanical process. No question was put to Agarwalla at the trial suggesting that the copy tendered in evidence was not a copy taken out by such process. Had the objection been taken at the trial, the plaintiff might have produced the copy taken out by such process. In the absence of any objection taken in this behalf at the trial, we do not think the lower appellate Court was right in saying that the trial Court was in error in admitting Ex. 2. In our view, the two documents, Exs. 1 and 2, disclose a contract of tenancy whereby the respondent agreed to pay rent to the appellant pending the completion of the sale on obtaining the required authority from the appellant.

[13] It was next contended by Mr. Barooah for the respondent that assuming that there was a contract of tenancy, the rent was not fixed and that the reasonable rent in this case is not Rs. 15 P. M. but Rs. 5 P. M. Apart from the fact that by Ex. 2 the appellant intimated to the respondent that the rent would be Rs. 15 a month, to which the respondent raised no objection, we think, in the circumstances of this case, the trial Court was not unreasonable in fixing Rs. 15 a month as reasonable rent.

[14] In this view, we set aside the judgment and decree of the lower appellate Court and restore that of the trial Court, with costs throughout.

V.B.B. *Appeal allowed.*

A. I. R. (37) 1950 Assam 18 *[C. N. 7.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Rahimuddin Choudhury — Appellant v. *Nayan Chand Das and another — Respondents.*

Second Appeal No. 915 of 1947, Decided on 5th August 1949, from judgment and decree of Addl. Dist. Judge, Cachar, D/- 25th November 1946.

(a) Debt laws — Assam Money-lenders (Amendment) Act (VI [6] of 1943), S. 9 (2) — Mortgagee

decree-holder purchasing property in execution of his mortgage decree — Suit by him for declaration of title and possession against prior usufructuary mortgagee—He can invoke S. 9 (2) and say that it stood extinguished.

A mortgagee decree-holder purchasing the mortgaged property in execution of his mortgage decree is entitled to invoke S. 9 (2), in a suit by him against a prior usufructuary mortgagee of the same property, for declaration of title and possession, and claim that by virtue of S. 9 (2) the prior mortgage stands extinguished. [Para 8]

(b) T. P. Act (1882), S. 58 (d) and (g)—Mortgage with possession containing stipulation for repayment within specified time — It is not out and out usufructuary mortgage but anomalous mortgage.

Where there is an express undertaking to pay money contained in a deed of mortgage, even though the mortgage is with possession, it is not an out and out usufructuary mortgage. It partakes of the character of a simple mortgage also and is thus converted into an anomalous mortgage being a simple cum-usufructuary mortgage. Where an undertaking or a promise to pay money or rather the personal covenant is found in the document side by side with the right of the mortgagee to enjoy and possess the lands on payment of land revenue, it implies that the mortgagee has the right to bring the property to sale. The mortgage, in these circumstances, cannot be treated as purely usufructuary : A.I.R. (22) 1935 Lah. 103 ; A. I. R. (34) 1947 Lah. 40 (F.B.); 12 All. 203; A.I.R. (16) 1929 Pat. 605; 34 Bom. 462 and 27 Mad. 526 (F. B.), *Rel. on* ; A.I.R. (27) 1940 Cal. 436 and 24 Cal. 677, *Dissent.* ; 53 C. W. N. 96, *Disting.* [Para 9]

Annotation : ('45-Com.) T. P. Act, S. 58, N. 35 and 41.

S. K. Ghose — for Appellant.

M. N. Roy — for Respondents.

Ram Labhaya J.—This is an appeal from the judgment and decree of the Additional District Judge, Cachar, dated 25th November 1946 by which he affirmed the order of the Subordinate Judge dated 5th June 1945 granting plaintiff a decree declaring his title to and granting khas possession of the suit land by eviction of the defendants therefrom.

[2] The land in suit belonged to Atan Chouba. On 11th July 1926, he mortgaged it to Abantan, defendant 3. The mortgage consideration was Rs. 300 and the mortgage was for a period of three years. Possession was, according to the recitals contained in the document, handed over to the mortgagee, who was to continue to enjoy and possess the land on payment of revenue every year. The relevant portion of the deed of mortgage is reproduced below :

"I take Rs. 300 in cash from you by mortgaging the lands for a period of 3 years. From today you continue to enjoy and possess the lands as per schedule below on payment of revenue every year. I shall redeem the lands by paying your money within the period mentioned ; until the amount is paid, the said lands will remain in your possession. I shall not be able to transfer, or gift or mortgage the said land until the amount is paid, I have not sold or gifted or mortgaged the property to anyone. I shall be punished according to law if that is found out. I have no objection to the Ejara being registered according to law. Finis 11th July 1926."

[3] The parties described the document as an Ejara. It is agreed before us that the document embodies a mortgage notwithstanding the fact that it is described as an Ejara.

[4] On 6th May 1927, Atan Chouba executed a simple mortgage in favour of plaintiff's father. The consideration for the mortgage was for Rs. 100. Plaintiffs sued on the mortgage for sale of the property. They got a decree and purchased the property in execution sale on 1st February 1937. Their case is that they also obtained delivery of possession through Court on 17th March 1938 and after obtaining possession they settled the land on tenants. Defendant 1, who claimed to have purchased the rights of Abantan, the prior mortgagee, instituted proceedings under S. 145, Cr. P. C., against them and succeeded in getting possession through the Criminal Court. Plaintiffs have sued for a declaration of title and khas possession of the land.

[5] The plaintiffs have averred in their plaint that the mortgage in favour of defendant 3 whose right defendant 1 claimed to have acquired, had been redeemed before their mortgage. It was mortgaged to them on this representation. Defendant 1, it is claimed, had then no subsisting right. Another ground of claim put forward was that the mortgage if not redeemed has been extinguished by operation of the law as contained in S. 9 (2), Assam Money-lenders' (Amendment) Act, 1943.

[6] Defendant 1 resisted the suit. The Courts below have come to the conclusion that defendant 1 has stepped into the shoes of the prior mortgagee. His mortgage was never redeemed as alleged in the plaint but that it stood extinguished by operation of the provisions of law contained in S. 9 (2), Assam Money-lenders' (Amendment) Act.

[7] Defendant 1 has appealed to this Court. His learned counsel urges that plaintiffs could not invoke the aid of S. 9 (2) of the said Act in this suit as framed. He also contends that the mortgage in favour of the defendants not being usufructuary, S. 9 (2) had no application.

[8] I see no force in the first contention. Plaintiffs had purchased the property in the course of the execution of their decree for sale. The rights of the mortgagor were thus acquired by the plaintiff. The sale of the property no doubt would be subject to the rights of the prior mortgagee if his rights were subsisting. Plaintiffs' case was that either that prior mortgage had been redeemed before his mortgage or it has been extinguished by operation of law and defendant 1 has, therefore, no subsisting rights. Now, it is not disputed that plaintiffs purchased

the property in execution sale and they stepped into the shoes of the mortgagor. If the prior mortgage has been extinguished, he can claim possession on that basis. If on the other hand, the mortgage is still subsisting, he must redeem the prior mortgage in order to obtain possession of the property. Section 9 (2) lays down that a usufructuary mortgage the consideration for which does not exceed Rs. 500 if made before the Act as in this case shall be extinguished on the expiry of a period of 12 years from the date of its execution. If the mortgage is usufructuary, it would stand extinguished on 11th July 1938, and defendant 1 will have no right to remain in possession of the property. If a mortgagor claims possession of the property on the ground that the mortgage has become extinct by reason of the expiry of the period of time laid down for it in S. 9 (2), he could sue for title and possession. This suit is based on the right which S. 9 (2) gives to the mortgagor whom the plaintiffs admittedly represents. This provision of the law deals with substantive rights and not with procedure. It lays down that a mortgage of the kind referred to therein would automatically stand discharged on the expiry of a period of 12 years. If, therefore, S. 9 (2) applies, the mortgagor will be entitled to sue for possession without payment of any money and if he also asks for a declaration of title, he would not be offending against the letter or the spirit of the Act. I have no hesitation in repelling this contention.

[9] The second contention raised is that the mortgage on which defendant 1 relies was not usufructuary in nature and therefore the provisions contained in S. 9 (2), Assam Money Lenders (Amendment) Act, 1943, are not attracted. This contention must prevail though on grounds wholly different from those on which the learned counsel has based it. The relevant part of the mortgage deed has been reproduced above. It provided that the mortgage was for a period of three years and that from the date of the execution of the deed, the mortgagee was to enjoy and possess the lands on payment of revenue every year. The further provision is in the following terms—

"I shall redeem the lands by paying your money within the period mentioned; until the amount is paid, the said lands will remain in your possession."

This is a clear undertaking to pay the money within three years. Where there is an express undertaking to pay money contained in a deed of mortgage, even though the mortgage is with possession, it is not an out and out a usufructuary mortgage. It partakes of the character of a simple mortgage also and is thus converted into an anomalous mortgage being a simple cum-usufructuary mortgage. An undertaking or a promise to pay money or rather the personal covenant is found in this document side by side with the right of the mortgagee to enjoy and possess the lands on payment of land revenue. Wherever there is a personal covenant in a mortgage, it implies that the mortgagee has the right to bring the property to sale. The mortgage, in these circumstances, cannot be treated as purely usufructuary. This view of the law finds support from *Qadir Parast Khan* v. *Mehr Nur Mahomed*, A. I. R. (22) 1935 Lah. 103: (16 Lah. 612). In this case, the mortgage deed provided that the mortgage money would be paid on the 1st of Poh, Sambat 1984, corresponding to 15th December 1927 when the land would be redeemed. It was held that the mortgage though partly usufructuary contained an express promise on the part of the mortgagor to pay the sum on a particular date and to redeem the land on that date. Taken as a whole the mortgage, therefore, was an anomalous one.

[10] In the present case there is similarly an express promise to pay the money not on a specified date but within a specified period. This distinction is without a difference. The principle of the *Lahore case* : (A. I. R. (22) 1935 Lah. 103 : 16 Lah. 612) therefore, fully applies to this case. It was further held in that case that "usually a personal covenant to pay is held to have the effect of implying a right of sale."

[11] In *Mahomed Saeed* v. *Habdul Alim*, A. I. R. (34) 1947 Lah. 40: (I. L. R. (1946) Lah. 805), a Full Bench of the Lahore High Court held that the mortgage deed before them contained a personal covenant. Having found this, they held that

"it was a settled proposition of law that if a deed of mortgage contains a personal covenant to pay the principal mortgage debt or interest by the mortgagor such a covenant implies the right of sale unless there is some specific terms to the contrary."

[12] Other cases which support the Lahore case may now be examined. In (1) *Hikmat-ullah Khan* v. *Imamali*, 12 ALL. 203 : (1890 A. W. N. 87), land was mortgaged for a terms of four years. The mortgage money was to carry interest. The mortgagee was put in possession of the property. It was further stipulated that the mortgagee will pay Government revenue and after defraying the village expense, whatever profit will remain will be credited towards the yearly interest and if there was any further balance it was to be credited towards principal. In case of any deficiency, the mortgagor was to make it good from his pocket and on his paying the whole of the money, principal and interest, at the time of the expiry of the term, the mortgaged property was to be redeemed. It was held that the instrument could

not be regarded as strictly falling within the definition of cl. (d) of S. 58, T. P. Act 'as it was lacking in a stipulation in terms that the mortgagee is to remain in possession until payment of the mortgage money.' The learned Judges, in these circumstances decided to apply the principal enunciated in S. 98, T. P. Act.

[13] (2) In *Chhatilal* v. *Bindeshwari Prasad*, 8 Pat. 16: (A. I. R. (16) 1929 Pat. 605), a zarpeshgi deed executed for a term of years but which did not authorise the mortgagee to retain possession until repayment of the mortgage money was held to contain an implied covenant on the part of the mortgagor to pay the money even though the bond did not contain an express promise to repay. The transaction was held not to be usufructuary mortgage within the meaning of S. 58 (d), T. P. Act. It was held that in such a case the mortgagee was entitled on the expiry of the term to sue for the mortgage money irrespective of whether the security has been rendered insufficient or the mortgagee has lost possession of the mortgaged property.

[14] (3) A Division Bench of the Bombay High Court considered the question in *Dattambhat* v. *Krishnabhat*, 34 Bom. 462: (7 I. C. 446). The mortgage provided that the mortgage money shall be repaid within two years. The recital in the mortgage deed was as follows "I shall repay your money in two years from today." The mortgage was with possession. The mortgagee was to cultivate the land and enjoy it in lieu of interest. It was held that it was not a case of a purely usufructuary mortgage but a case in which the mortgage money was to become payable by the mortgagor and therefore in the absence of a contract to the contrary, the mortgagee had the right under S. 67, T. P. Act, to an order that the property be sold.

[15] (4) The facts in *K. Gurukal* v. *Kalimuthu Anavi*, 27 Mad. 526 (F. B.) are identical with the facts of this case. The relevant portion of the mortgage deed was as follows:

"Thereafter, on (naming a date) on paying (the amount advanced) we shall redeem our land. If on the date so fixed the amount be not paid and the land recovered back, in whatever year we may pay (the amount advanced) on (naming the date) of any year then you shall deliver back our lands to us."

It was held that the mortgage deed contained a promise by the mortgagor to pay on the date named and this entitled the mortgagee to a decree for the mortgage money under cl. (a) of S. 68, T. P. Act and to a decree for sale under S. 67, the right to cause the mortgaged property to be sold in default of payment being implied within the meaning of S. 68 (b). The learned Judges found that the mortgage was a combination of simple and usufructuary mortgage within the meaning of S. 98, T. P. Act, and therefore the mortgagee was entiled to bring the property to sale for recovery of his money.

[16] A discordant note, however, has been struck in a Division Bench decision of the Calcutta High Court reported in *Bhut Nath* v. *Gopal Prosad*, A. I. R. (27) 1940 Cal. 436: (193 I. C. 26). The mortgage in this case was with possession and the stipulation was that the mortgagee should remain in possession till the sum advanced was paid and enjoy the usufruct in lieu of interest. The mortgage bond further mentioned a period after which the mortgagor undertook to redeem the property on payment of the principal money. Relying on a previous case decided by the Court *Luchmeshar Singh* v. *Dukhmochan Jha*, 24 Cal. 677 the learned Judges held that the provision of a term in a usufructuary mortgage was contemplated by S. 62 (b), T. P. Act. The undertaking on the part of the mortgagor to redeem the property after the fixed term was held not to entitle the mortgagee to demand the money after the expiry of the due date. The covenant in the mortgage that the mortgagee would go on holding and enjoying the property even after the default by the mortgagor was taken as indicating that the mortgagee could not sue for recovery of the money by sale of the property.

[17] Clause (b) of S. 62, T. P. Act, as it stands covers all the classes of a usufructuary mortgage as defined in S. 58 (d) which are not included in cl. (a). It recognises that the mortgagee may be given possession and the right to pay himself from rents and profits or any part thereof for a term fixed in the deed of mortgage. Cases covered by cl. (b) are generally cases in which the mortgagee pays himself out of the property mortgaged or any part thereof. The arrangement contemplated by this section is conceivable without a personal covenant. Where, however, a document embodies in express terms or by necessary implication a personal covenant or an undertaking to pay the mortgage money, the case would be taken out of the ambit of S. 58, cl. (d). The determining factor in each case would be the terms of the document itself.

[18] In the Calcutta case there was an undertaking by the mortgagor to redeem the property on payment of the principal money after the expiry of a term. This undertaking or obligation created a corresponding right on the mortgagee. If the mortgagor was bound by the terms of the mortgage to pay the principal sum and redeem the mortgage on a given date, the breach on his part would give the right to the mortgagee to recover the money. There can be no obligation without a corresponding right. The learned Judges held that though the undertaking to redeem on payment of the principal money was

there in the mortgage, the deed did not say that the mortgagee will be entitled to demand the money on that date. This need not be stated expressly. A personal covenant does imply that the mortgagee has the right to bring the property to sale on default. The condition in the document allowing the mortgagee to continue in possession even after the default till the amount is paid does not deprive the mortgagee of the right to demand money when the breach of the obligation to pay occurs. There would be no point in an undertaking if it is not capable of enforcement. It can be enforced only if there is a corresponding right to sue in the mortgagee. The view taken in this case conflicts with the view taken in the cases discussed above.

[19] The Patna case referred to above represent the extreme view. It was held that where mortgage is redeemable after a term, there is an implied personal covenant. It is not necessary for the purposes of this case to go so far. In the case before us, there is a personal covenant contained in the document and the necessary implication of the covenant is that it gives rise to a corresponding right in the mortgagee to recover the amount by sale of the property if it is not paid within the period specified.

[20] The mortgage deed in the Full Bench case of the Madras High Court provided that the mortgage will be redeemed on a certain date and if it was not redeemed on that date, it could be redeemed on a fixed date in any subsequent year. In spite of this, it was held that there was a personal covenant contained in the deed. It is clear that the view taken in the Calcutta case is opposed to all other cases discussed above. We find ourselves in respectful agreement with the majority view and hold that the mortgage in this case is not purely a usufructuary mortgage containing as it does a personal covenant. It can be appropriately described only as an anomalous mortgage.

[21] Mr. Ghose has relied on *Towahir Ali* v. *Md. Moniruddin*, 53 C. W. N. 96, in support of his contention. This case is obviously distinguishable. Besides, my learned brother did not intend to lay down any rule of general application in that case. It may also be remarked that his observations as to the requirements of a usufructuary mortgage are obiter.

[22] In view of our finding that the mortgage deed does not fall within the purview of S. 9 (2), Assam Money-lenders' (Amendment) Act, it must be found that the mortgage is still alive and has not been extinguished by the expiry of a period of 12 years from the date of its execution. The plaintiff, in these circumstances, would not be entitled to a decree for possession against defendant 1, whose mortgage is yet alive without paying the mortgage money.

[23] The mortgagor has the immediate right to redeem the property. Plaintiff, in these circumstances, may remove the encumbrance on the property by paying off the mortgage money due to defendant 1. Without this payment, he cannot demand possession of the property as against defendant 1. The decree in plaintiffs' favour therefore must be modified accordingly.

[24] We, therefore, order that on deposit of Rs. 300 due to defendant 1 on his mortgage in Court, plaintiff will become the owner of the property and will be entitled to possession. The appeal has succeeded partially. In view of the somewhat complicated nature of questions involved in the case, it is ordered that parties shall bear their own costs throughout.

Thadani Ag. C. J.— I agree.

R.G.D. *Order accordingly.*

A. I. R. (37) 1950 Assam 22 *[C. N. 8.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Surendra Das—Appellant v. *Bhola Prasad Kairi and others—Respondents.*

Second Appeal No. 1581 of 1947, Decided on 5th August 1949.

(a) Civil P. C. (1908), S. 96—Who can appeal—Person adversely affected by decree can appeal—Existence of right of appeal doubtful—Appellant to get benefit of doubt—Joint family of two brothers *A* and *B*—*A* transferring family land to *C*—Subsequent transfer by *B* of his share in land to *D*—Suit by *D* for declaration of title and possession against *A*, *B* and *C*—Defence raised common to all defendants—Suit decreed—Appeal by *B* alone is competent as his interest is adversely affected by decree.

The test for determining whether a person has got a right of appeal is whether any part of the decree affects his interest adversely. If the answer to the question is in the affirmative, he will have a right to appeal. It is a question of fact to be determined in each case according to its peculiar circumstances. Where existence of this right is in doubt, the benefit ought to go to the appellant: 62 Cal. 701 and A. I. R. (13) 1926 Cal. 1113, *Rel. on.* [Para 6]

Two brothers *A* and *B* constituted a joint Hindu family. *A* transferred the family lands to *C* by a registered sale-deed. Subsequently *B* transferred his share to *D*. *D* brought a suit for declaration of title and joint possession of suit land purchased by him against *A*, *B* and *C*. The defence raised was common to all the three defendants and was that *B* had no right to transfer his share to plaintiff as it had already been transferred to *C*. The suit was decreed on appeal. *B* alone appealed:

***Held* that as the two transfers to *C* and *D* could not stand together, the transferors *A* and *B* could not be regarded as persons having no interest in the controversy. The finding one way or the other will have effect on their interests. *B* had, therefore, as much right of appeal as *C* had against the decision and therefore appeal by *B* alone was competent: A. I. R. (3) 1916 P. C. 14 and A. I. R. (4) 1917 Pat. 585, *Disting.* [Paras 9 and 11]**

Annotation : ('44-Com.) C. P. C., S. 96 N. 6 Pts. 17 and 37.

(b) Hindu law—Joint family — Manager—Joint family of brothers—Elder brother acting as guardian on behalf of minor brothers in his dealings with family property—No evidence of partition—He must be deemed to act as manager.

An elder brother who is the karta in a joint Hindu family consisting of brothers has the right to manage the property of the minor members of the family. The mere fact that he describes himself as a guardian and not as a karta in his dealings with the joint family property is not sufficient to show that he ceased to act as karta in the absence of any evidence of partition in the family. [Para 14]

S. K. Ghose—for Appellant.

B. C. Barua—for Respondents.

Ram Labhaya J.—This appeal arises out of a suit for a declaration of title to and for joint possession of the suit land. The suit was instituted under the following circumstances:

[2] Plaintiff purchased half share in the land in dispute from Surendra, defendant 3, by a registered sale deed on 3rd March 1944. He states that he was informed about a week later that Surendra's elder brother Jugalkishore had sold the entire land including Surendra's share to Bajua, defendant 1, on 25th February 1944. Plaintiff claims that defendant 2 had no right to sell the share of defendant 3 and he is, therefore, entitled to the relief he has claimed.

[3] Defendant 1 the transferee from defendant 2 and both the brothers defendants 2 and 3 have resisted the suit. They have pleaded that the sale in plaintiff's favour was voidable at the instance of defendant 3 as it was brought about by the exercise of undue influence. They further contend that defendant 3 was bound by the sale of the property in favour of defendant 1 as that sale had been made by defendant 2 as a karta of the joint family of defendants 2 and 3 for family necessity. On the date that defendant 3 had sold the property to the plaintiff he had no rights in it. Both these pleas prevailed with the trial Judge. He therefore declined to grant plaintiff a declaration of title and a decree for joint possession, and instead passed a decree in his favour for a sum of Rs. 700 (against defendants 2 and 3) which represented the consideration he had paid to defendant 3. This sum carried interest at the rate of 12 % per annum. Plaintiff was not satisfied with this decree. He appealed.

[4] The learned Additional Judge, A. V. D., reversed the order of the trial Court and granted plaintiff a decree in terms of the prayer contained in his plaint holding that though defendants 2 and 3 were members of a joint Hindu family defendant 2 had never purported to act as karta and the transfer made by him in favour of defendant 1 was not justified by valid necessity. Defendant 3 alone has appealed to this Court.

[5] A preliminary objection has been raised by the learned counsel for the respondent. He points out that defendant 3 has got no right of appeal. The reason that he has given in support of this contention is that defendant 3, according to his own showing has got no subsisting interest in the property. His defence is that he is bound by the sale in favour of defendant 1. The property, therefore, vests in defendant 1, who is not appealing. The decree, it is argued, can have no adverse effect on the interest of defendant 3 in these circumstances. He has relied on *Chandrika Baksh Singh* v. *Indar Bikram Singh*, 43 I. A. 179: (A. I. R. (3) 1916 P. C. 14) and *Nandlal* v. *Naresh Chandra*, A. I. R. (4) 1917 Pat. 585: (41 I. C. 468).

[6] The contention raised is not sound in our opinion. The test for determining whether a person has got a right of appeal is whether any part of the decree affects his interest adversely. If the answer to the question is in the affirmative, he will have a right of appeal As held in *Harachandra Das* v. *Bhola Nath Das*, 62 Cal. 701: (61 C. L. J. 353), it is a question of fact to be determined in each case according to its peculiar circumstances. Where the existence of this right is in doubt, the benefit ought to go to the appellant: vide *Salimuddin Ahmmad* v. *Rahim Sheik*, A. I. R. (13) 1926 Cal. 1113: (97 I. C. 1038).

[7] Defendant 3 was undoubtedly a contesting defendant. The defences raised were in fact common to all the three defendants. The main plea was that defendant 3 had no right to transfer his share of the property to the plaintiff as it had already been validly transferred to defendant 1. The learned Judge in appeal has found against the defendants on this point. He has passed a decree in plaintiff's favour and granted him joint possession with defendant 1. All the three defendants are adversely affected. All or any one of them could appeal. The right of defendant 3 to contest the suit cannot be denied. If he had the right to contest the suit on a certain plea, he cannot be deprived of that right if the plea does not prevail in the trial Court or in the Court of first appeal.

[8] The learned counsel has not been able to cite any authority which will cover the circumstances of this case. The Privy Council decision, *Chandrika Baksh Singh* v. *Indar Bikram Singh*, 43 I. A. 179: (A. I. R. (3) 1916 P. C. 14) which he has relied on is distinguishable and affords no guidance for the purposes of this case. It was held by their Lordships of the Privy Council that a decree obtained by a plaintiff against three defendants declaring plaintiff's title to immovable property cannot be reversed upon an appeal by one of the defendants who

admits that he has no title to the property. The learned Subordinate Judge had found in that case that Raja Indar Bikram Singh had no title to the property. The correctness of this finding was not disputed in the Court of the Judicial Commissioner of Oudh. Their Lordships, in these circumstances, observed that

"it should have been apparent to the Judges of that Court who were hearing the appeal that, as Raja Indar Bikram Singh had failed to prove that he was, even remotely, concerned in the title to Mahagawan and in the right to the proprietary possession of that taluka, he had no title to protect and no interest which could give him a right to contest the declaration of title which Babu Chandrika Baksh Singh had obtained, and that the appeal to that Court should be dismissed."

[9] The case of defendant 3 in the appeal before us is very different. He had a ½ share in the property. There have been two transfers so far as the share of defendant 3 is concerned. Plaintiff is the transferee of the share from defendant 3. Defendant 1 is the transferee of the share of both the brothers. The two transfers cannot stand together. The transferors in these circumstances cannot be regarded as persons who have got no interest in the controversy. The finding one way or the other will have effect on their interests.

[10] *Nandlal* v. *Naresh Chandra*, A. I. R. (4) 1917 Pat. 585 : (41 I. C. 468), is also distinguishable on facts. In this case plaintiff's claim for a declaration of title to property was disallowed. A pro forma defendant, to whom plaintiffs had agreed to sell the property, wanted to appeal from the decree. It was held that he had no right of appeal and was not a necessary party to the suit. The agreement of sale, it was held, did not create any right in the property and he could not be held to have been adversely affected. This case has nothing in common with the facts of the present case and as held above, the question has got to be decided with reference to the peculiar circumstances of the case before us.

[11] No other authority has been cited before us. We are of opinion that defendant 3 has got as much right of appeal as defendant 1 had against the decision given by the learned Additional Judge and even if there were some doubt, it would be safer to give the benefit to him. We hold, therefore, that the appeal is competent.

[12] On the merits, the only question to be determined is whether the sale in favour of defendant 1 was made by defendant 2 as karta of the family and the sale is supported by family necessity.

[13] It is admitted that when the father of defendants 2 and 3 died, defendant 3 was a minor. The father had left ancestral property. The two brothers lived together and defendant 2 was looking after the family property and managing its affairs.

[14] Both the Courts were agreed that in these circumstances the two brothers formed a joint Hindu family. But the learned Additional Judge was of the view that the mere existence of a joint Hindu family did not necessarily raise the presumption that the elder member of the two was the karta of the family. He observed that in previous mortgage deeds of the family property executed in 1932, defendant 2 did not purport to act as karta of the joint Hindu family. The mortgage deeds were executed by him on his own behalf and as guardian of his minor brother who though a minor was made to attest these documents. He further pointed out that even in the sale-deed in favour of defendant 1, defendant 2 did not describe himself as the karta of the family. He also referred to another sale-deed relating to the joint family property which was executed by defendant 2 in favour of defendant 1 on 27th January 1944. Even in this document defendant 2 did not describe himself as karta. The conclusion drawn from this evidence was that he was not a karta. This inference is not legitimate. The family is admittedly joint. The members are joint in mess. The property is held jointly. It was being managed by defendant 2. Defendant 3 was in the Air Force. His wives were living with defendant 2. It is obvious that defendant 2 was managing the family affairs as a karta. The de facto exercise of the powers of a karta is apparent. In law he had the authority to function as a karta. This authority had never been challenged or disputed by defendant 3, even after the attainment of majority by him. The mortgage deeds and the sale-deeds executed by defendant 2 relate to the family property. In the first two documents the minor is shown as a party to the documents and is represented by defendant 2, who described himself as guardian. But this does not take away from him his capacity as karta. An elder brother who is the karta in a joint Hindu family has also the right to manage the property of the minor members of the family. His description of himself as a guardian therefore is not inconsistent with his status as a karta of the family. In fact, after the death of the father and during the minority of defendant 3, defendant 2 could not help acting as karta. The failure, therefore, to describe himself as karta in his dealings with the joint family property is not sufficient to show that he ceased to act as karta when there is absolutely no suggestion that there has been any partition or disruption of the joint family. The learned counsel for the plaintiff-respondent has made no serious attempt to support this part of the judgment of the learned Judge. He has, how-

ever, urged that the sale in favour of defendant 1 was not for valid necessity and therefore it is not binding on defendant 3, whose representative the plaintiff is. Assuming that plaintiff has got the right to challenge the transfer, we have now to see whether the transferee has succeeded in showing that there was necessity for the sale in his favour. The sale consideration was Rs. 1500. It is conceded that on the date of the sale in favour of defendant 1, a mortgage debt of Rs. 500 binding on the family was due to Karamat, defendant 4. Similarly, a sum of Rs. 300 was due to the plaintiff. These sums were paid off from the sale consideration. The learned counsel urges that defendant 2 had sold some family property for Rs. 800 on 27th January only about a month before the transfer in question. These debts should have been paid off from the consideration of that sale and if these liabilities were not then discharged, it cannot be said that there was necessity for a further transfer. The argument loses sight of the fact that the transferee so far as the transaction in dispute is concerned, had not to enquire as to what had happened to the money that defendant 2 got by a previous sale. That sale may be questionable or the money realised from that sale may not have been spent on a family purpose. On the date of the sale in question, the liabilities to the extent of Rs. 800 existed and even if these liabilities are attributable to mismanagement on the part of the Manager, they constitute a valid necessity as there is no suggestion or proof that the transferee (defendant 1) contributed to this mismanagement. The main purpose of the transfer, therefore, was a valid necessity of the family. The balance of the consideration has been invested in property acquired for the family and it has not been pressed that this investment was not for family benefit. Defendant 3, therefore, was bound by the sale and plaintiff, as his representative, cannot challenge it successfully.

[15] The result is that the appeal is allowed. The order of the learned Additional Judge is reversed in favour of all the defendants as the point on which appellant succeeds was raised by all the three defendants and it is further ordered that the order of the trial Judge be restored. Parties shall bear their own costs throughout.

Thadani Ag. C. J.—I agree.

K.S.

Appeal allowed.

A. I. R. (37) 1950 Assam 25 *[C. N. 9.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Deputy Commissioner, Goalpara — Petitioner v. *Upendra Saran Sanyal and others— Opposite Party.*

Original Criminal Misc. Case No. 1 of 1949, Decided on 4th August 1949.

(a) Contempt of Courts Act (1926), S. 2 —Person criticised must be Court — Sub-Deputy Collector acting under Assam Land and Revenue Regulation, S. 142, imposing fine—Appeal pending against his order—Public meeting held condemning his action —No contempt of Court.

Sub-Deputy Collector wrote to the Secretary of a Ladies' Club that he had to inspect the records of the Club in his official capacity and that he would inspect the same the next day. Next day he visited the Club premises and finding the Secretary of the Club absent, he ordered in her absence to pay a fine of Rs. 10 under S. 142, Assam Land and Revenue Regulation. An appeal was filed against this order in the Court of the Deputy Commissioner. While this appeal was pending a public meeting was held in which the action taken by the Sub-Deputy Collector was criticised. This meeting was convened by a public notice issued over the signatures of the eleven persons. On an allegation that the contents of the notice and the speeches delivered at the meeting constituted contempt of Court :

Held (1) that having regard to the relevant provisions of the Rules framed under the Assam Land and Revenue Regulation, neither the enquiry and report called by the Deputy Commissioner on the application of the Samiti from the Sub-Deputy Collector nor his action taken or purporting to have been taken under Ss. 141 and 142 of the Regulation were proceedings of a judicial nature ; [Para 14]

(2) that having regard to the relevant provisions of the Assam Land and Revenue Regulation, the Deputy Commissioner was not a Court in which the appeal preferred against the order of the Sub-Deputy Collector was pending ; [Para 8]

(3) that whatever was done with respect to the public notice and said in the meeting by the eleven persons could not be regarded as contempt of Court. [Para 17]

(b) Assam Land and Revenue Regulation (1886), Ss. 141, 142 and 147 — Non-judicial proceeding cannot be regarded as judicial proceeding because there is statutory provision for right of appeal.

There is no justification for the proposition that a non-judicial proceeding taken by the Sub-Deputy Collector under Ss. 141-142 must be regarded as a judicial proceeding merely because there is a statutory provision under S. 147 for a right of appeal from an order made in a non-judicial proceeding. The character of the original proceeding is not changed, notwithstanding the statutory right of appeal against an order made in a non-judicial proceeding. [Para 16]

(c) Contempt of Courts Act (1926), S. 2 —In absence of definition of 'Court' in Act, that word is to be interpreted in its general sense.

The word "Court" has not been defined in the Contempt of Courts Act. In the absence of any definition of the word in that Act, the word has got to be interpreted in its general sense : A. I. R. (22) 1935 Mad. 673 and A.I.R. (27) 1940 Cal. 286, *Rel. on.* [Para 25]

F. Ahmed, Advocate-General Assam, K. R. Barman (Sr.) Govt. Advocate and B. C. Barua (Jr.), Govt. Advocate—for Petitioner.

S. S. Mukherjee and J. C. Sen (for Nos. 1, 3, 4 and 6 to 11), S. K. Ghose and P. K. Gupta (for Nos. 2 and 5)—for Opposite Party.

Thadani Ag. C. J. — On 23rd April 1949, the Deputy Commissioner of Goalpara, Shri K. C. Barua, addressed a letter to the Registrar (Judicial) of this Court, in these terms :

"I have the honour to bring the following facts to your kind notice for taking necessary actions as the

Hon'ble Court deems fit. The facts appear to me to constitute an offence under Contempt of Courts Act, 1926, as well as misconduct of certain pleaders and Advocates practising in Dhubri Court under the Legal Practitioners Act, 1879. The facts are briefly as follows :

In the course of an enquiry under the Assam Land and Revenue Regulation by the Sadar S. D. C. Mr. D. Sarma, one Miss Sumati Das Gupta, Secretary, Ladies, Club, was asked to produce certain records of the Club and attend his enquiry personally. On her failure to do so, a daily fine of Rs. 10 was imposed on her under S.142, Assam Land and Revenue Regulation on 23rd March 1949 until the papers would be produced. The next day a Distress Warrant was issued and a teapoy was attached and sold for Rs. 10. On 25th March 1949, an appeal was filed by Mr. U. N. Sanyal, B.L. and Mr. J.N. Chatterjee, M. A. B. L., two practising pleaders of Dhubri Bar, before me as Deputy Commissioner. On 26th March 1949, while the appeal was pending in my Court, the said two pleaders, along with others, convened a public meeting condemning the actions of the S. D. C. for imposing a fine on a lady. A printed leaflet, dated 25th March 1949, for convening the meeting on 26th was circulated with the names of the said two pleaders and Mr. Ramani Kanta Bose, B. L. who is also a pleader of the local Bar (now said to have been enrolled as an Advocote in the Hon'ble High Court) and a few other pleaders and gentlemen of the town as conveners. A copy of the notice is enclosed herewith. The notice does not contain the name of the press. The notice itself condemns the actions of the authorities as unjust, illegal and unseemly. Mr. Ramani Kanta Bose delivered a speech attacking the actions of the S. D. C. in violent language and declaring the orders of the S. D. C. to be *ultra vires* and illegal. Mr. Sanyal and Mr. Chatterjee were present at the meeting. As the appeal against the order which was thus condemned by Mr. R. K. Bose and others was pending in my Court at the time when the notice was circulated and the speeches made, I consider the three gentlemen mentioned above to have committed an offence under the Contempt of Courts Act, 1926. Further the three gentlemen, who are members of the legal profession, appear to be guilty of misconduct under the Legal Practitioners Act, 1879. I would, therefore, request you to please place the matter before the Hon'ble High Court for favour of taking necessary actions against the offending persons as the Hon'ble High Court deems fit.

The appeal has since been disposed of holding the orders of the S. D. C. to be legal but modifying the order by reducing the amount of fine and allowing a week's time to produce the papers asked for."

[2] On receipt of this letter, the Deputy Commissioner was required by this Court to furnish verified contents of the speech which Mr. R. K. Bose was alleged to have made, together with a verified copy of the translation of the notice. This requisition was complied with by the Deputy Commissioner on 23rd May 1949. On 3rd June 1949, this Court issued a Rule calling upon (1) Sri Upendra Saran Sanyal, (2) Sri Ramani Kanta Basu, (3) Sri Satyapriya Basu, (4) Sri Banshidhar Agarwalla, (5) Hemendra Chandra Dasgupta, (6) Syed Ahmed Ali, (7) Sri Jatindra Nath Chattopadhya, (8) Sri Chintaharan Pal, (9) Sri Surendra Mohan Sen, (10) Sri Amal Kanta Ganguli, and (11) Sri Rathindra Kumar Goswami, to show cause why they should not be dealt with for contempt of Court. The Rule came up for hearing on 4th July 1949. (After reproducing the notice convening the public meeting referred to in the Deputy Commissioner's letter of reference and the report, dated 23rd May 1949, of the speeches alleged to have been delivered at the public meeting and made by the Inspector of C. I. D., his Lordship proceeded.)

[3] The facts culminating in the public meeting of 26th March 1949, may now be stated. In 1936, a club called The Ladies' Club was formed at Dhubri and housed on a plot of land granted to the Club free of land-revenue by the Government of Assam. The club-house was built from public subscriptions. On 10th February 1949, an Association called The Dhubri Mahila Samiti applied to the Deputy Commissioner, Goalpara, Mr. K. C. Barua, for a plot of land at Dhubri for housing the Samiti. The Deputy Commissioner endorsed the application on 15th February 1949, in these terms :

"S. D. C., Mr. D. Sarma, will please report. He will also please examine if there be any records as to how and under what conditions the present Ladies' Club building was handed over, and report."

[4] On 28th February 1949, Sri Sarma, the S. D. C., wrote the following letter to the Secretary of the Ladies' Club:

"I have the honour to request you to be so good as to furnish me the following informations about the Club: (1) How and when it has been given and for what purpose? (2) The conditions, if there be any, to be fulfilled and observed. (3) How it has been utilised at present? (4) Rules for enrolment of members of the Club. (5) The number of enrolled members at present. If it is not utilised for the purpose for which it has been given, what objection there may be if it is resumed by the Government? I would request you to treat this as urgent, and to send the reply at a very early date. We have had to take prompt action on the subject mainly due to some letter received from the Government."

[5] On 5th March 1949, Sri Sarma wrote a reminder to the Secretary, Ladies' Club, Dhubri, and the Secretary, Miss Dasgupta, replied to the S. D. C's. letter on 8th March 1949. [After reproducing the reply the judgment proceeded.] The S. D. C. sent the following reply to the Secretary on 21st March 1949 :

"I have received your letter under reference on 14th March 1949, and to say that full informations required have not been found in the letter. However, I would like to inspect the records of the club on 23rd March 1949 at about 9 A. M. It will be good of you if you please arrange for the inspection and attend it."

On the same day, the S. D. C. wrote the following letter to the Chief Secretary of the Dhubri Mahila Samiti :

"With reference to your letter of 8th February 1949, to the address of the Hon'ble Minister, Finance and Revenue, I have to say that there is a plot of reserve land with a decent building for the Ladies' Club at this town. I would request you to kindly let me know why your Samiti requires another plot of land; so far I see that there is sufficient land in the Reserve Dag wherein

you may erect houses etc., for the implementation of the weaving and other activities of your Samiti.

I propose to inspect the records of the Ladies' Club at 9 A. M. on 23rd March 1949. It will be pleasant privilege for me if I find to hear more about your activities and difficulties about it there."

Contrasted with the official tone of the letter addressed to the Secretary, Ladies' Club, Dhubri, the tone of the letter addressed to the Chief Secretary of the Samiti may be regarded as almost subservient, having regard to the concluding 2 lines:

"It will be pleasant prlvilege for me if I find to here more about your activities and difficulties about it there."

[6] On the following day, 22nd March 1949, the Secretary of the the Ladies' Club, Dhubri, replied to the S. D. C's. letter, dated 21st March 1949. The reply reads:

"With reference to your letter of today's date, I would like to say that I have made an engagement with Mrs. L. Roy tomorrow morning. Thus I am affraid, it will not be possible for me to see you at 8 A. M. at the time of inspection. Moreover, this Club is not a Government institution. So, I find it irregular to have the records inspected by a Sub-Deputy Collector, Sadar. I would like to let you know later when and whether the records may be opened to be inspected by the Goverment officer."

The S. D. C. then addressed the Secretary, Ladies' Club, Dhubri, on 22nd March 1949, as follows:

"With reference to your letter of today's date, I have the pleasure to say that on official capacity as Sub-Deputy Collector, Sadar, I have to inspect the records of the Ladies' Club here. It will not take a long time. If the time at 9 A. M. does not suit you, I shall go to inspect it at 8 A. M. I hope you will please arrange for it. I do not understand why a Secretary of a public institution cannot have the authority to show the records of it for the inspection of a Government officer."

[7] On 23rd March 1949, the S. D. C. went to the Ladies' Club at 8 A. M. and after calling out the lady Secretary's name thrice, to which there was no response, he made an order fining her Rs. 10 under S. 142, Assam Land and Revenue Regulation, and made a further order that the Secretary was liable to pay a recurring fine of Rs. 10 a day so long as she did not appear before him in his Court with all the relevant papers of the Club. This order was communicated by the S. D. C. to the Secretary, Ladies' Club, Dhubri, on the same day. On 25th March 1949, an appeal was preferred to the Deputy Commissioner, against the order of the S. D. C., dated the 23rd March 1949. While the appeal was pending before the Deputy Commissioner, the eleven respondents called a public meeting for 26th March 1949, by a public notice issued on 25th March 1949. On 26th March 1949, a meeting in pursuance of the public notice, was held, at which certain speeches were delivered. The public notice, dated 25th March 1949, convening the meeting for 26th March 1949, and the alleged speeches delivered at the meeting are the subject-matter of the present proceedings.

[8] Messrs. Mookerji and Ghose for the respondents have urged a number of grounds against the reference made by the Deputy Commissioner, but we propose to dispose of the reference upon the short ground that having regard to the relevant provisions of the Assam Land and Revenue Regulation, the Deputy Commissioner of Goalpara was not a Court in which the appeal preferred against the order of the S. D. C., Dhubri, dated 23rd March 1949, was pending.

[9] It will be recalled that the Deputy Commissioner, Goalpara, had endorsed the application of the Samiti, dated 10th February 1949, to the following effect :

"S. D. C. Mr. Sarma will please report. He will also please examine if there be any records as to how and under what conditions the present Ladies' Club building was handed over and report."

[10] We will now proceed to examine the provisions of the Regulation in relation to the report and examination called for by the Deputy Commissioner. Section 129, Assam Land and Revenue Regulation reads as follows :

"*129.* (1) Subject to any rules which the Provincial Government may make in this behalf, a Deputy Commissioner or Subdivisional Officer may refer any case to any Revenue Officer subordinate to him for investigation and report, or, if that officer has power to dispose of the case, for disposal.

(2) Subject as aforesaid, a Deputy Commissioner may direct that any Revenue Officer subordinate to him shall, without such reference, deal with any case or class of cases arising within any specified area, and either investigate and report on the case or class of cases, or, if he has power, dispose of it himself.

(3) A subordinate Revenue Officer shall submit his report on any case referred to him under this section for report to the officer referring it, or otherwise as may be directed in the order of reference ; and the officer receiving the report may, if he has power to dispose of the case, dispose of the same, or may return it for further investigation to the officer submitting the report or may hold the investigation himself."

[11] We think what the S. D. C. was required to do when the D. C referred to him the application made by the Samiti, was, firstly, to report as to the availability of the plot of land measuring about half a bigha, bounded on the north : by Municipal Latrine ; south : holding of Sjt. N. N. Guha occupied by the District Congress Office; east : D. K. Road; and west: dead Gadadhar river; and secondly, to examine the records with a view to ascertaining the conditions upon which the Ladies' Club building was handed over to the Club. Under sub-s. (3) of S. 129 of the Regulation, the S. D. C. had to submit his report to the Deputy Commissioner. It is common ground that no such report was submitted to the Deputy Commissioner.

[12] Chapter VIII of the Regulation containing Ss. 141 and 142 deals with "Procedure". Sections 141 and 142 of the Regulation read as follows:

"*141.* (1) The Provincial Government and any officer mentioned in S. 140 may summon any person whose

attendance they consider necessary for the purposes of any investigation or other business before them conducted under this Regulation.

(2) All persons so summoned shall be bound to attend either in person or by authorised agent as such officer may direct ; and to state the truth upon any subject respecting which they are examined; and to produce such documents and other things as may be required."

"*142.* If any person fails to comply within the time fixed by a notice served on him with any requisition made upon him under S. 141, the officer making the requisition may impose upon him such daily fine as he thinks fit, not exceeding fifty rupees, until the requisition is complied with :

Provided that, whenever the amount levied under an order under this section passed by an officer other than the Commissioner or the Provincial Government exceeds five hundred rupees, the Deputy Commissioner shall report the case to the Commissioner, or, if there is no Commissioner, to the Provincial Government, and no further levy in respect of the fine shall be made otherwise than by authority of the Commissioner or Provincial Government. as the case may be."

[13] Chapter VII, Assam Land and Revenue Manual contains Rules framed under Ss. 129, 152 and 155 (b) and (c) relating to procedure, the mode of serving processes, and process-fees. Rule 181 is in these terms :

"*181.* The provisions of the Code of Civil Procedure, and of enactments amending the same, relating to the trial of suits, the evidence and examination of witnesses, procuring the attendance of witnesses, and the production of documents, shall apply to all proceedings of a judicial nature, other than appeals, held before a Deputy Commissioner or other Revenue Officer or a Settlement Officer duly empowered to hold such proceedings.

For the purposes of this rule, the following proceedings under the Land and Revenue Regulation shall be regarded as proceedings of a judicial nature :

(a) Proceedings in connection with boundary disputes (S. 23) ; (b) Proceedings in connection with disputes relating to the record of rights (Ss. 41 and 42) ; (c) Resumption proceedings (S. 43) ; (d) Proceedings in connection with applications for mutation and registration of names (Ss. 53 and 54) ; (e) Proceedings in connection with applications for registration of talukdari and other similar tenures (S. 56) ; (f) Proceedings in connection with applications for separate accounts (S. 65); (g) Proceedings arising out of the attachment or sale of moveable or immoveable property, or of applications to set aside sale, under Chap. V; (h) Proceedings in connection with the partition or union of estates under Chap. VI ; (i) Any other proceedings expressly declared by rules issued under the provisions of the Land and Revenue Regulation to be judicial proceedings."

The marginal note to R. 183 of the Rules framed under the Regulation is "executive procedure," and the R. 183 itself reads :

"In proceedings other than those mentioned in R. 181, witnesses shall not be examined on oath, and a memorandum only of their evidence shall be recorded. Such memorandum shall be written and signed by the Revenue Officer who examines the witnesses, and may be written in the language of the Court, or in English, if the revenue officer is sufficiently acquainted with English."

[14] Having regard to the provisions of R. 181, it is manifest that neither the enquiry and report called for by the Deputy Commissioner on the application of the Samiti from the S.D.C. nor his action taken or purporting to have been taken under Ss. 141 and 142 of the Regulation were proceedings of a judicial nature. Clauses (a) to (h) of R. 181 enumerate what are judicial proceedings. The language of cl. (1) justifies the conclusion that in so far as R. 181 deals with the category of judicial proceedings under the Regulation, it is exhaustive, that is to say, if no other proceedings are expressly declared by the rules framed under the Assam Land and Revenue Regulation to be judicial proceedings, they are not to be regarded as judicial proceedings. Rule 183 tends to support this view. It refers to proceedings other than those mentioned in R. 181 as "executive procedure," in other words, proceedings of an executive nature.

[15] The learned Advocate-General for the Deputy Commissioner conceded that the enquiry and report called for by the Deputy Commissioner cannot be regarded as judicial proceedings within the meaning of the Land and Revenue Regulation. But he contended that when in the course of the enquiry and report, the S. D. C. decided to have recourse to S. 141 of the Regulation and proceeded to pass an order under S. 142 of the Regulation, the order so passed was passed in a judicial proceeding. We do not think we can give weight to this contention, having regard to the provisions of R. 181 framed under the Regulation, which does not include proceedings under S. 141 or S. 142 of the Regulation in the category of judicial proceedings. Indeed the note to R. 183 says :

"In virtue of S. 141, cl. (2), witnesses may be punished for giving false evidence even though they have not been examined on oath."

The note tends to suggest that although proceedings under S. 141 are not judicial proceedings, nevertheless persons giving false evidence can be punished under that section. We think the concession made by the learned Advocate-General, namely, that the enquiry and report called from the S.D.C.was not judicial proceedings must be extended to proceedings taken or purported to have been taken by the S. D. C. under Ss. 141 and 142 of the Regulation. We do not wish to say in this order anything about the legality or otherwise of the proceedings alleged to have been taken by the S. D. C. under Ss. 141 and 142 of the Regulation in view of the pendency of an application in revision against the order of the Deputy Commissioner passed in appeal against the order of the S. D. C., dated 23rd March 1949.

[16] The learned Advocate-General next contended that, assuming the proceedings taken by the S. D. C. under Ss. 141 and 142 of the Regulation were not judicial proceedings, as soon as an appeal was preferred to the Deputy Commis-

sioner under the Regulation in pursuance of S. 147 of the Regulation, the Deputy Commissioner became a Court, and anything said or done during the pendency of the appeal before the Deputy Commissioner which had the tendency to interfere with the course of justice, constituted contempt of the Court, which this Court was competent to punish. We can find no justification for the proposition that a non-judicial proceeding must be regarded as a judicial proceeding merely because there is a statutory provision for a right of appeal from an order made in a non-judicial proceeding. On the contrary, we think there is ample justification for maintaining the character of the original proceeding, notwithstanding the statutory right of appeal against an order made in non-judicial proceedings. For instance, an order passed by a customs officer under the Sea Customs Act, unquestionably an order passed in non-judicial proceedings, does not become an order passed in judicial proceedings when, in pursuance of a right of appeal under the Sea Customs Act, an appeal is preferred to the Chief Customs Authority. The learned Advocate-General was unable to cite any authority in support of his contention that an original non-judicial proceeding can be regarded as a judicial proceedings upon appeal made to a prescribed revenue authority under the Assam Land and Revenue Regulation. The learned Advocate-General very properly conceded that if the proceedings in appeal before the Deputy Commissioner in this case are to be regarded as non-judicial proceedings the question of our interference under the Contempt of Courts Act does not arise.

[17] In the view we take of the nature of the proceedings before the Deputy Commissioner, namely, that they were not judicial proceedings, whatever was said and done by the respondents on 25th or 26th March 1949, cannot be regarded as contempt of Court. We heard this reference for more than 3 days from every conceivable point of view, including the motive underlying the reference. Happily it is not necessary to refer to the motives of the parties concerned in this case. The facts are nauseating enough without probing into questions of motives.

[18] In the result, we reject the reference and discharge the rule issued against the respondents. The reference will be returned to the Deputy Commissioner.

[19] **Ram Labhaya J.**— I entirely agree with learned the Chief Justice. I wish however to add a few words.

[20] The crucial question in the case is whether the publication of the notice dated 25th March 1949 and the speeches delivered at the meeting amount to contempt of a 'Court' within the meaning of the expression as used in the contempt of Courts Act. Under S. 2 (1) of the Act this Court has the same power to punish contempts of Courts subordinate to it as it has of punishing contempts of its own authority. The learned counsel for the opposite parties urges that the Sub-Deputy Collector and the Deputy Commissioner, the appellate authority, both were not Courts within the meaning of the Act when they purported to act under the Assam Land and Revenue Regulation. [After recapitulating the facts culminating in the allegation that the contents of the notice and the speeches delivered constitute contempt of Court, his Lordship proceeded.] The character of the proceedings detailed above is in question. It is to be determined whether the proceedings held by the Sub-Deputy Collector on the original side and by the Deputy Commissioner on the appellate side are proceedings before a 'Court' within the meaning of the expression which may be assigned to it under the Contempt of Courts Act.

[21] The learned Advocate-General could not refer us to any provision of the Regulation which would cover the application of the Samiti made to the Deputy Commissioner. The order for enquiry and report does not refer to any provision of the law. We do not find it possible to place this order under any provision of the Regulation. The enquiry by the Sub-Deputy Collector would, therefore, be not covered by the Regulation. He did not appear to have started any formal proceedings on receiving the application with the Deputy Commissioner's endorsement. It was for the first time on 22nd March after the Secretary of the Ladies' Club had objected to the inspection of the records as something irregular that the Sub-Deputy Collector informed her that he would inspect the records in his official capacity. Even in this letter no reference was made to S. 142 of the Regulation or to the consequence of disobedience. The proceedings so far give no indication as to their nature and the learned Advocate-General could not help conceding that the enquiry by the Sub-Deputy Collector was not under any Chapter of the Regulation. He stated that it was certainly not under S. 43 of the Regulation, which deals with resumption of certain lands which are wholly or partially revenue free.

[22] The proceedings are again admittedly non-judicial even if the Sub-Deputy Collector's *bona fide* believed that he was acting under the Regulation. Chapter VII, Land Revenue Manual contains rules framed under Ss. 129, 152 and 155 (b) and (c). Rule 181 provides that the provisions of the Civil Procedure Code and all enactments amending the same relating to the trial of suits, evidence and examination of witnesses, procuring the attendance of witnesses and

of production of documents shall apply to all proceedings of a judicial nature other than appeal before a Deputy Commissioner or other officer or a Settlement Officer duly empowered to hold such proceedings. The proceedings enumerated in different clauses of the section do not include the present proceedings. This is conceded by the learned Advocate-General. According to the scheme of the Regulation, proceedings under it are either judicial, viz., those mentioned in R. 181 or non-judicial, viz., those not covered by R. 181. The non-judicial proceedings are dealt under R. 183. But it is necessary that even those proceedings to which R. 183 applies should be under the Regulation. The description of the nature of the proceedings not covered by R. 181 as given on the margin of the rules is "Executive Proceedings". The Regulation does not create any revenue Courts as distinct from Revenue Officers. It makes, however a distinction between proceedings which are described as judicial and all others which do not fall under that category. In proceedings which are non-judicial, the witnesses are not to be examined on oath and a memo of their evidence alone is to be recorded. The proceedings in the present case do not fall under any of the two categories.

[23] The Deputy Commissioner has the power to refer any case to a Revenue Officer subordinate to him for investigation and report. This power is conferred on him by S. 129 of the Regulation. Now, it cannot be contended that S. 129 could be utilised by a Deputy Commissioner even when he is not acting under the Regulation. He can order his subordinate Revenue Officer to investigate and report on matters which come before him in his capacity as a Revenue Officer acting under the Regulation. The Deputy Commissioner when directing the Sub-Deputy Collector to enquire and report did not purport to act under this section.

[24] Section 142 of the Regulation punishes failure to comply with a notice served on a person with any requisition made upon him under S. 141. The officer making the requisition may impose upon him such daily fine as thinks fit, not exceeding Rs. 50 until the requisition is complied with. When the amount levied under an order under this section passed by an Officer other than the Commissioner or the Provincial Government exceeds Rs. 500, the case has to be reported to the Commissioner, or if there is no Commissioner to the Provincial Government. Non-compliance is punishable only if the requisition is covered by S. 141. Under this section the Provincial Government and any other officer mentioned in S. 140 may summon any person whose attendance they consider necessary for the purposes of any investigation or other business before them to be conducted under the Regulation. Persons so summoned are bound to attend either in person or by authorised agent, they are bound to state the truth and to produce such documents as may be required of them. This section gives the necessary power to Officers acting under the Regulation when their proceedings are not covered by R. 181. It is obvious, however, that the requisition under S. 141 can be made only for purposes of investigation or other business under the Regulation. The proceedings in this case were initiated by an application to the Deputy Commissioner. The Sub-Deputy Collector was merely to report after enquiry. He had not to pass any final orders. The application was not under the Regulation. Similarly, the enquiry that followed was not covered by any provision of the Regulation. No requisition under S. 141 could be issued, and in these circumstances the powers given to Revenue Officers by S. 142 could not be invoked on the failure of the Secretary, Ladies' Club, to comply with the requisition.

[25] It is at last clear that the Sub-Deputy Collector was not performing any judicial function when he directed the Secretary, Ladies' club, to appear at the club and place club's records before him for inspection. The enquiry was not under any law. There was thus no procedure prescribed for it. The procedure which governs Courts, Civil, Criminal or Revenue, did not apply to his enquiry. His resort to S. 142 of the Regulation when he encountered resistance in the course of his enquiry was unauthorised. He had no jurisdiction to avail himself of its provisions. It would not be possible to describe him as a Court in these circumstances. The word 'Court' has not been defined in the Contempt of Courts Act. There is no definition of it even in the Code of Criminal Procedure. The definition of the word 'Court' as given in the Evidence Act would include all Judges, Magistrates and all persons except arbitrators legally authorised to take evidence. This definition is for purpose of the Evidence Act which did not apply to the enquiry which the Sub-Deputy Collector was making in this case. In the absence of any definition of the word in the Contempt of Courts Act, the word has got to be interpreted in its general sense. In *Haricharan* v. *Kaushi Charan*, 44 C. W. N. 530 : (A. I. R. (27) 1940 Cal. 286 : 41 Cr. L. J. 662), the question arose whether a Debt Settlement Board was a Court within the meaning of S. 195, Criminal P. C. Decisions bearing on the question of the general attributes of a Court were examined in this case and a summary of these attributes given by Curgenven J. in *Mahabaleswarappa* v. *Gopalaswami Mudaliar*, 58 Mad. 954 at pp. 966, 967 : (A. I. R.

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(22) 1935 Mad. 673: 36 Cr. L. J. 895), was adopted as laying down correctly the attributes by which it may be possible to distinguish a Court from other officers exercising non-judicial functions. The observations of Curgenven J. are as follows:

"To summarise the effect of these decisions it would seem that we have to look, not the source of a tribunal's authority, or to any peculiarity in the method adopted of creating it, (though it is undoubtedly a consideration that it derives its powers mediataly or immediately from the Crown) but to the general charactor of its powers and activities. If it has power to regulate legal rights by the delivery of definitive judgments, and to enforce its orders by legal sanctions, and if its procedure is judicial in character, in such matters as the taking of evidence and the administration of the oath, then it is a Court."

[26] The learned Judges of the Calcutta High Court observed further that particular emphasis should also be laid upon what they considered to be "an essential feature of all Courts, viz., that the tribunal in question must be one in which justice is judicially administered, and which is empowered to arrive at an independent judicial decision on legal evidence." The application of these tests to the case before them yielded the result that a Debt Settlement Board was not a Court.

[27] I am in respectful agreement with the statement of law contained in this case as to the general attributes of a Court. If the test laid down above is applied, there can be no question that the proceedings in the original as well as in the appellate stage were not in a Court. The Sub-Deputy Collector had merely to make a report in an executive or in an administrative matter. His enquiry was not covered even by the Regulation. He had no power to regulate legal rights by delivery of definitive judgment. His procedure even if he were treated as a Revenue Officer acting under the Regulation was admittedly non-judicial in character as these proceedings were not covered by R. 181 and were, therefore, expressly taken out of the category of judicial proceedings. He had admittedly no power to administer oath. He had no power to arrive at an independent judicial decision on legal evidence. The proceedings before him, therefore, were not in a Court. When he resorted to S. 142 punishing the defaulter on the failure of the Secretary to comply with his order, he no doubt purported to act under the Regulation, though he had no jurisdiction to do so. Even when taking action as such, he was not clothed with the authority of a Court and his proceedings were not judicial in character.

[28] The proceeding before the appellate authority, viz., the Deputy Commissioner, was also not a proceedings in a Court. If the Sub-Deputy Collector had not taken action under S. 142 of the Regulation, he would merely have reported to the Deputy Commissioner. The report would have been merely an executive or administrative act of an Executive Officer. The appellate jurisdiction of the Deputy Commissioner sprang or arose from the fact that the Sub-Deputy Collector had at one stage of the proceedings purported to act under the Regulation. When he took action under the Regulation, his orders became appealable and the appeal lay to the Deputy Commissioner. The Deputy Commissioner, therefore, was acting under the Regulation in entertaining and disposing of the appeal against the order of conviction of the Secretary of the Ladies' Club. As a Revenue Officer exercising appellate jurisdiction in a matter which according to the Regulation was not a judicial proceeding even he could not be regarded as a Court. He also did not possess those attributes which go to make a Court. The mere fact that he exercised appellate jurisdiction would not convert him into a Court. In *Sashi Bhusan* v. *Ful Khan*, 44 C. W. N. 763: (A. I. R. (27) 1940 Cal. 454: 41 Cr. L. J. 951), it was held that like Debt Settlement Boards, an appellate Officer also is not a 'Court' within the meaning of S. 195, Criminal P. C. In that case, the learned Chief Justice of the Calcutta High Court when considering whether the Deb. Settlement Tribunal was a 'Court' or not, observed as follows:

"There is an old definition and yet a comprehensive one by great authority; it is that of Sir Edward Coke in his treatise Coke on Littleton, 58-a, where he says 'a Court is a place where justice is judicially ministered."

With this dictum in view he held that the functions of the Debt Settlement Tribunals on the original as well as appellate side, however admirable their purposes, did not come within this wider definition. They were held not to be Courts.

[29] Against this view the learned Advocate-General has cited only *Advocate-General* v. *Maung Chit Maung*, A. I. R. (27) 1940 Rang. 68: (41 Cr. L. J. 470). But this authority does not help him. The question in this case was whether a Sub-Divisional Magistrate when holding an inquiry under S. 176, Criminal P. C., was acting as a Court for the purposes of S. 2, Contempt of Courts Act. It was held that the word 'Court' was used in the Contempt of Courts Act in the same wider sense in which it was used in S. 195, Criminal P. C. The meaning given to the word 'Court' for purposes of that section was held to include a tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to arrive at a determination. Giving this wider sense to the word, the learned Judges of the Rangoon High Court held that a

Magistrate holding an enquiry into the cause of death who must come to a finding as to what caused that death and who caused it comes within that definition. For the purposes of his enquiry he has authority to receive evidence. The enquiry, therefore, was held to be covered by the expression 'judicial proceedings' as defined in the Criminal Procedure Code. It is the judicial character of the proceedings that was the basis of the decision. In this case, the proceedings of the Sub-Deputy Collector were admittedly not judicial. His action under S. 142 was in excess of his authority. The Rangoon case, therefore, is distinguishable.

[30] In these circumstances it is clear that the proceedings, both original and appellate, with which we are concerned in this case, were not before a Court and the Contempt of Courts Act, therefore, has no application.

V.S.B. *Rule discharged.*

A. I. R. (37) 1950 Assam 32 *[C. N. 10.]*

THADANI Ag. C. J. AND RAM LABHAYA J.

Miss S. Das Gupta—Petitioner v. *Deputy Commissioner, Goalpara—Opposite Party.*

Revenue Revn. No. 36 (R) of 1949, Decided on 4th August 1949.

(a) Assam Revenue Tribunal (Transfer of Powers) Act (IV [4] of 1948), S. 3 — Enquiry before Sub-Deputy Collector not coming under S. 141 or S. 142 of Assam Land and Revenue Regulation — Sub-Deputy Collector acting or purporting to act under those sections—Case is revenue case within S. 3.

If the Sub-Deputy Collector acted or purported to act under the Assam Land and Revenue Regulation with reference to an enquiry, even though the enquiry itself does not come within the purview of the Regulation, the Sub-Deputy Collector, in so far as he acted or purported to act under the provisions of S. 141 or S. 142, acts as a Revenue Officer in a revenue case within the meaning of S. 3. [Para 3]

(b) Assam Land and Revenue Regulation (1886), S. 151—Jurisdiction under—Revisional jurisdiction under section is now exercisable by High Court —Assam Revenue Tribunal Act (II [2] of 1946), Ss. 5, 6 and Schedule — Assam Revenue Tribunal (Transfer of Powers) Act (IV [4] of 1948), S. 3 and Schedule.

Section 151 does not find place in col. 3 of the Schedule to the Notification No. RL 12/46/8 dated 8th May 1948. The plain meaning of the omission of S. 151, of the Regluation from col. 3 of the Schedule is that the revisional jurisdiction of the Commissioner has not been transferred to the Development Commissioner. Item No. 6 in the 3rd column of the schedule to Assam Act II [2] of 1946, under the head "jurisdiction" includes revision under S. 151, which means that in all revenue cases after 28th May 1946, the day on which Act II [2] of 1946, received the assent of the Governor, revision under S. 151, lay to the Tribunal. The jurisdiction and powers of the Revenue Tribunal appointed under Act II [2] of 1946, have been transferred partly to the High Court and partly to certain authorities appointed by the Provincial Government. In col. 3 of Sch. A of Act IV [4] of 1948 under the head "Jurisdiction" the revisional jurisdiction of the Provincial Government vested in the Provincial Government immediately before the 1st day of April 1937, was transferred to the High Court under sub-s. (2) of S. 3, Assam Act IV [4] of 1948. Between 1946 and 6th April 1948, the day on which Assam Act IV [4] of 1948, received the assent of the Governor, the revisional jurisdiction of the Provincial Government under S. 151 of the Regulation was exercised by the Revenue Tribunal under S. 5 of Assam Act II [2] of 1946, and by Assam Act IV [4] of 1948, the jurisdiction exercised by the Revenue Tribunal up to 6th April, 1948, was transferred to the High Court to the extent mentioned in Sch. A. Thus the revisional powers under S. 151 of the Regulation, are now exercisable by the High Court. [Paras 8, 9, 10]

(c) Assam Land and Revenue Regulation (1886) Ss. 140, 141—Revenue Officer cannot regard private house or club as his Court.

Section 140 cannot be interpreted as meaning that a Revenue Officer described in S. 140 or S. 141, can, in virtue of his presence in a house or club on official business, regard the house or club as his Court. Nor can it be said that having regard to the multifarious duties which a Revenue Officer has to perform under widely different conditions and circumstances, his right to enter a place, whether it be a house or a club, at any time of the day or night, and to regard it as a Court, ought to be recognised. [Para 14]

S. K. Ghose, P. K. Gupta and J. C. Sen — for Petitioner.

K. R. Barman, Government Advocate — for the Crown.

Judgment. —This is a petition under S. 151, Assam Land and Revenue Regulation against the following order passed by the Deputy Commissioner, Goalpara, dated 19th April 1949:

"Orders passed. The S. D. C.'s orders held to be legal. But the appellant is given one week's time from the date of the order to produce the necessary records before the S. D. C., failing which, a daily fine of Re. 1/- under S. 142, A. L. R. Manual shall be imposed upon the appellant and the order of the learned S. D. C. is modified to that extent."

The order passed by the S. D. C. was an order fining the petitioner a sum of Rs. 10, under S. 142, Assam Land and Revenue Regulation, and declaring that the petitioner was liable to pay a recurring fine of Rs. 10, a day for so long as she did not appear before him in his Court with all the relevant papers of the club called the Dhubri Ladies Club.

[2] The facts leading to this petition are stated at some length in our judgment in Original Criminal Misc. Case No. 1 of 1949 *(Deputy Commissioner, Goalpara* v. *Sri Upendra Saran Sanyal,* (A. I. R. (37) 1950 Assam 25).

[3] Mr. Barman for the Deputy Commissioner has contended that this Court has no jurisdiction to entertain the application in view of S. 3, Assam Act IV [4] of 1948, called the Assam Revenue Tribunal (Transfer of Powers) Act, 1948, which says:

"3. (1). Subject to the provisions of sub-s. (3), of this section, the Assam High Court shall exercise such jurisdiction to entertain appeals and revise decisions in

revenue cases as was vested in the Provincial Government immediately before the first day of April 1937, under any law for the time being in force."

Mr. Barman's contention is that the subject-matter of the petition before us is not a revenue case inasmuch as the S. D. C. was merely asked to make a report and examine some records in connection with a petition made to the Deputy Commissioner by the Mahila Samiti for securing housing accommodation; that as the enquiry and examination which the S. D. C. was required to make upon the application of the Mahila Samiti was not within the purview of the Regulation, it cannot be regarded as a revenue case. The short answer to this contention is that the subject-matter of the revision petition before us is not the enquiry and examination called for by the Deputy Commissioner from the Sub-Deputy Collector but an order of the Sub-Deputy Collector by which he fined the petitioner a sum of Rs. 10 acting or purporting to act under the provisions of Ss. 141 and 142 of the Regulation. If the S. D. C. acted or purported to act under the Assam Land and Revenue Regulation with reference to an enquiry, even though the enquiry itself does not come within the purview of the Regulation, the S. D. C., in so far as he acted or purported to act under the provisions of Ss. 141 or S. 142 of the Regulation, acted as a Revenue Officer in a revenue case within the meaning of S. 3, Assam Act IV [4] of 1948.

[4] It was next contended by Mr. Barman that assuming that the subject-matter of the petition is a revenue case, the proper authority before which the revision petition should have been filed is not the High Court but the Development Commissioner, and he has drawn our attention to Notification No. RL. 12/46/8, dated 8th May 1948, which is in these terms:

"In exercise of the powers conferred by S. 3, Assam Commissioner's (Transfer of Powers) Act, 1947 (Assam Act XII [12] of 1947), the Governor of Assam is pleased to transfer the powers hitherto exercised by, and the jurisdiction vested in the Commissioner of Division, Assam, under the provisions of the Acts, Rules and Regulations, specified in columns 2 and 3 of the Schedule attached hereto to the authority or authorities mentioned in column 4 thereof."

[5] Columns 2, 3 and 4 of the Schedule read as follows:

Serial No.	Names of the Acts, Rules and Regulations.	No. of section Rules or Regulation.	Authority or Authorities to whom the power is transferred or jurisdiction vested in	Remarks
1	2	3	4	5
1.	The Assam Land and Revenue Regulation, 1886 (Regulation I of 1886).	Section 69A	Development Commissioner.	
	Ditto	Section 69B	Ditto	
	Ditto	Section 90 — Note (4)	Ditto	
	Ditto	Section 123	Ditto	
	Ditto	Sections 130 and 140.	Ditto	
2.	Rules under the Assam Land and Revenue Regulation, 1886 (Regulation I of 1886) Settlement Rules.	Rule 11	Government in the Revenue Department.	
	Ditto	Rule 22 (ii) and (iv)	Development Commissioner	
	Ditto	Rule 26	Ditto	
	Ditto	Rule 46	Ditto	
	Ditto	Rule 66	Government in the Revenue Department.	
	Rules under the Assam Land and Revenue Regulation, 1886 (Regulation I of 1886) Settlement Rules.	Rules 67 (Note), 68 & 69.	Ditto	
	Ditto	Rules 88	Development Commissioner.	
3.	Rules under Sections 26, 27, 152 and 155 (Survey and Demarcation of land) of the Assam Land and Revenue Regulation, 1886 (Regulation I of 1886).	Rule 92	Government in the Revenue Department.	
4.	Rules under Chapter V of the Rule 139, Assam Land and Revenue Regulation, 1886 (Regulation I of 1886) relating to arrears and the mode of recovering them.	Rules 104 and 117.	Development Commissioner.	
		Rules 139, 149 and 167.	Deputy Commissioner; Development Commissioner.	

Serial No.	Names of the Acts, Rules and Regulations.	No. of section Rules or Regulation.	Authority or Authorities to whom the power is transferred or jurisdiction vested in.	Remarks.
1	2	3	4	5
5.	Rules under Sections 129, 152 and 155 (b) and (c) of the Assam Land and Revenue Regulation, 1886 (Regulation I of 1886) Settlement Rules.	Rule 188 (c)	Ditto	
6.	The Assam Land Revenue Re-assessment Act, 1936 (Assam Act VIII of 1936).	Section 24 (1) and (2).	Director of Land Records.	
7.	Rules under the Assam Land Revenue Re-assessment Act, 1936 (Assam Act VIII of 1936).	Rule 6 Rule 13 Rule 14	Deputy Commissioner. Director of Land Records with approval of Govt. Director of Land Records.	
8	Rules under Sections 34 (2) (e), 35 (2) and 72 (c) of the Assam Forest Regulation, 1891.	Rule (6) (v) Rule 9 (1)	Development Commissioner.	
9.	Rules framed under Sec. 6 of the Indian Fisheries Act, 1897 (Act IV of 1897), and sections 155 and 156 of the Assam Land and Revenue Regulation, 1886 (Regulation I of 1886), in respect of the waters declared to be fisheries by proclamations issued from time to time under section 16 of the Regulation.	Rule 10 Executive Instructions. 179 187 Executive Instructions. 190 Executive Instructions. 194	Ditto Development Commissioner. Government in the Revenue Department. Development Commissioner. High Court. Development Commissioner.	
10.	The Goalpara Tenancy Act, 1929 (Assam Act I of 1929).	Section 4 (21) Section 17 (2) Sections 100 (1) and 119 (1)	Ditto Ditto Ditto	
11.	Rules under the Goalpara Tenancy Act, 1929 (Assam Act V of 1929).	Rule 60 (1) Rule 60 (5) Rules 62 (4), 62 (6) and 72.	Ditto Ditto Ditto	
12.	The Assam (Temporarily Settled Districts) Tenancy Act, 1935, and the Rules thereunder.	Sections 98 (a) and 99 (1).	Development Commissioner.	
13.	The Sylhet Tenancy Act, 1936 (Assam Act XI of 1936).	Sections 74 (6), 120 (1) & 139 (1). Section 170 (1) and (2).	Ditto Ditto	
14.	Rules under the Sylhet Tenancy Act, 1936 (Assam Act XI of 1936).	Rules 7 (2), 51 (1) and (5), 53 (4) and (5), and 63.	Ditto	
15.	The Bengal Public Demands Recovery Act, 1913 (Bengal Act III of 1913).	Sections 3 (3), 51 (1) and (3), and 53.	Ditto	

It is clear from the contents of column 3 that the powers which were before 8th May 1948, exercised by a Commissioner of a Division under Ss. 69A, 69 (b) 90, 123 and 140, Assam Land and Revenue Regulation, were transferred to the Development Commissioner. Sections 141 and 142 are not included in column 3. Under S. 141, the Provincial Government and any officer mentioned in S. 140 may summon any person whose attendance is considered necessary for the purpose of any investigation or other business before them conducted under the Regulation. Sections 141 and 142 of the Regulation read as follows:

"*141.* (1) The Provincial Government and any officer mentioned in S. 140 may summon any person whose attendance they consider necessary for the purposes of any investigation or other business before them conducted under this Regulation.

(2) All persons so summoned shall be bound to attend either in person or by authorised agent as such officer may direct;

and to state the truth upon any subject respecting which they are examined;

and to produce such documents and other things as may be required.

142. If any person fails to comply within the time fixed by a notice served on him with any requisition made upon him under S. 141, the officer making the requisition may impose upon him such daily fine as he thinks fit, not exceeding fifty rupees, until the requisition is complied with:

Provided that, whenever the amount levied under an order under this section passed by an officer other than the Commissioner or the Provincial Government exceeds five hundred rupees, the Deputy Commissioner shall report the case to the Commissioner, or if there is no Commissioner, to the Provincial Government, and no further levy in respect of the fine shall be made otherwise than by authority of the Commissioner or Provincial Government as the case may be."

[6] Under S. 147 of the Regulation, an appeal shall lie as follows:

"(a) to the (Tribunal appointed under S. 296, Government of India Act, 1935) from any original or appellate order passed by a Commissioner; (b) to the (Tribunal appointed under S. 296, Government of India Act, 1935) from any order, original or appellate, passed by a Deputy Commissioner of a district not included in any division of a Commissioner or by a Settlement Officer in any such district; (c) to the Commissioner from orders, original or appellate, passed by a Deputy Commissioner, Settlement Officer or Survey Officer; (d) to the Deputy Commissioner, from orders passed by a Sub Divisional Officer, an Assistant Commissioner, or Extra Assistant Commissioner; and from orders, original or appellate, passed by a Survey Officer, in a district not included in any division of a Commissioner; (e) to a Settlement Officer, from orders passed by an Assistant Settlement Officer; (f) to a Survey Officer, from orders passed by an Assistant Survey Officer:

Provided that no appeal shall lie against the following orders:

(g) orders of an Assistant Settlement Officer or Assistant Survey Officer under Ss. 21 and 22; (h) orders of a Survey Officer or Settlement Officer

(1) under Ss. 21, 22 and 24;

(2) apportioning the expenses of erecting and repairing boundary-marks in accordance with rules made under S 27;

(i) orders of a Survey Officer, Settlement Officer, or Deputy Commissioner, original or appellate, imposing or confirming a fine not exceeding fifty rupees; (j) orders of a Commissioner imposing a fine not exceeding one hundred rupees; (k) any decision given in accordance with an award of arbitrators appointed under S. 143, except in the case of fraud or collusion; (l) orders under S. 148, admitting an appeal after the period of limitation has expired; (m) orders expressly declared by this Regulation to be final subject to the provisions of S. 151."

[7] It was in pursuance of the provisions of S. 147 of the Regulation that an appeal was preferred to the Deputy Commissioner against the order of the S. D. C., dated 23rd March 1949. The revisional jurisdiction under the Regulation is conferred by S. 151 of the Regulation which is in these terms:

"The Tribunal appointed under S. 296, Government of India Act, 1935, a Commissioner, a Deputy Commissioner, a Settlement Officer, and a Survey Officer may call for the proceedings, held by any officer subordinate to it or him, as the case may be, and pass such orders thereon as it or he, as the case may be, thinks fit."

[8] Section 151 does not find place in col. 3 of the Schedule to which we have referred. The plain meaning of the omission of S. 151 of the Regulation from col. 3 of the Schedule is that the revisional jurisdiction of the Commissioner has not been transferred to the Development Commissioner. Indeed S. 5 (1), Assam Revenue Tribunal Act, 1946, (Assam Act II [2] of 1946) provides that:

"(1) The Tribunal shall exercise such jurisdiction to entertain appeals and revise decisions in revenue cases as was vested in the Provincial Government immediately before 1st April 1937 under any law for the time being in force. (2). In particular and without prejudice to the generality of the foregoing provision, the Tribunal shall have jurisdiction to entertain appeals and revise decisions:

(a) in all revenue cases arising under the provisions of the enactments specified in the Schedule, in which such jurisdiction was vested in the Provincial Government immediately before 1st April 1937, and

(b) in all cases specified in S. 9. (3) save as expressly provided in any enactment for the time being in force, the Provincial Government may, by notification in the official Gazette, direct by general or special order that the Tribunal shall also have jurisdiction to entertain and decide appeals and applications for revision in any case in which the Provincial Government has or may have jurisdiction to entertain and decide such appeals and applications. The Provincial Government may at any time, by like notification, cancel any direction by it under this sub-section."

Section 6 of the same Act, namely Act II [2] of 1946, says:

"In the exercise of the jurisdiction conferred by S. 5 in any case, the Tribunal shall have and may exercise all the powers which the Provincial Government had or could have exercised in such case."

[9] Item 6 in col. 3 of the Schedule to Assam Act II [2] of 1946, under the head 'jurisdiction," includes revision under S. 151, which means that in all revenue cases after 28th May 1946, the day on which Act II [2] of 1946 received the assent of the Governor, revision under S. 151 lay to the Tribunal. The jurisdiction and powers of the Revenue Tribunal appointed under Act II [2] of 1946 have been transferred partly to the High Court and partly to certain authorities appointed by the Provincial Government. We have already referred to S. 3 of Assam Act IV [4] of 1948 dealing with the transfer of powers of the Assam Revenue Tribunal. Sub-sec. (2) of S. 3 says:

"In particular and without prejudice to the generality of the foregoing provision, the Assam High Court shall have jurisdiction to entertain appeals and revise decisions in all revenue cases arising under the provisions of the enactments specified in Sch. A in which such jurisdiction was vested in the Provincial Government immediately before first day of April 1937."

[10] In Col. 3 of Sch. A of Act IV [4] of 1948, under the head "Jurisdiction", the revisional jurisdiction of the Provincial Government vested in the Provincial Government immediately before 1st April 1937, was transferred to the High Court under sub-s. (2) of S. 3 of Assam Act IV [4] of 1948. Between 1946 and 6th April 1948, the day on which Assam Act IV [4] of 1948 received the assent of the Governor, the revisional jurisdiction of the Provincial Government under S. 151 of the Regulation was exercised by the Revenue Tribunal under S. 5 of Assam Act II [2] of 1946, and by Assam Act IV [4] of 1948, the jurisdiction exercised by the Revenue Tribunal up to 8th (6th ?) April 1948, was transferred to the High Court to the extent mentioned in Sch. A. As we have already said, item No. 5 in col 3 of the Sch. A to Assam Act IV [4] of 1948, contains the powers in revision under S. 151 of the Regulation. It follows from the various enactments to which we have referred that the revisional powers under S. 151 of the Regulation are now exercisable by the High Court. We have, therefore, by jurisdiction to entertain this petition.

[11] As to the merits of the petition, it is contended on behalf of the petitioner by Mr. Ghose that the action of the S. D. C. in going to the Ladies' Club on the morning of 23rd March 1949 at 8 A. M. with a view to examine the records of the Club, was unwarranted by the provisions of Ss. 141 and 142 of the Regulation under which the S. D. C. acted or purported to act. It is urged that under S. 141, the S. D. C. must issue a summons to a person whose attendance is required for the purpose of any investigation or other business conducted under the Regulation, and that when a person is so summoned, he shall be bound to attend either in person or by authorised agent, and to state the truth upon any subject respecting which he may be examined, and to produce such documents and other things as may be required; in the absence of a summons, the Revenue Officer prescribed under S. 141, is powerless to act under S. 142 of the Regulation.

[12] Mr. Barman, on the other hand, contends that the word "summon" used in S. 141 of the Regulation has not the same meaning as the word "summons" used in the Code of Civil Procedure; that if proceedings under S. 141 are not to be regarded as judicial proceedings, R. 181 of the Regulation, which says that the provisions of the Code of Civil Procedure, and of enactments amending the same, relating to procuring the attendance of witnesses and the production of documents, shall apply to all proceedings of a judicial nature, has no application to action taken under S. 141 or S. 142 of the Regulation, and that a requisition in writing howsoever informal calling upon a person to attend amounts to sufficient compliance with the provisions of S. 141 of the Regulation. Assuming for the sake of argument that the word 'summon" used in S. 141 is not to be given the same meaning as the word "summon" used in the Code of Civil Procedure, because proceedings under S. 141 are not judicial proceedings the question arises whether the S. D. C. acted or purported to act in the matter of an investigation or other business conducted under the Regulation.

[13] Mr. Barman frankly admitted that apart from the official routine which enables a Deputy Commissioner to ask the S. D. C. to report on an application such as was made by the Samiti in this case, there is no provision in the Regulation which authorises a S. D. C. to initiate proceedings under S. 141 of the Regulation.

[14] In our view, the report called for by the Deputy Commissioner was a report upon the availability of accommodation, as indicated by the Samiti in its application, which made no reference whatsoever to the grant of land to the Ladies' Club. As to the terms and conditions upon which the land was granted to the Ladies' Club, they must be matters of record and all that the S. D. C. was required by the order of the Deputy Commissioner to do was to refer to the office records relating to the grant of land to the Ladies' Club and to report to the Deputy Commissioner accordingly. In the course of arguments it was suggested by Mr. Barman that the office records relating to the grant of land to the Ladies' Club were not traceable and that that was the reason why the S. D. C. called upon the Secretary of the Ladies' Club to produce the relevant papers before him. Even so, we do not think the S. D. C. was well advised in visiting the Ladies' Club for that purpose ; he should have been content to stay in his office and require the Secretary of the Ladies' Club to produce the relevant papers before him during the prescribed office hours. We cannot accept the interpretation of S. 140 of the Regulation as put by Mr. Barman, that a Revenue Officer described in S. 140 or S. 141 of the Regulation can, in virtue of his presence in a house or club, on official business, regard the house or club as his Court. Nor can we accept the position that having regard to the multifarious duties which a Revenue Officer has to perform under widely different conditions and circumstances, his right to enter a place, whether it be a house or a club, at any time of the day or night, and to regard it as a Court, ought to be recognised. We think, acceptance of this position would amount to adding a rider to the well-established right of a man to

regard his house as his castle. The rider would have to be in these words :

"The house of an Assamese is his castle subject to the right of a Revenue Officer to enter it at any time of the day or night and to use it as his Court."

The learned Advocate General who appeared in the contempt proceedings, arising out of the same matter frankly stated that he regarded as indiscreet the visit of the S. D. C. to the Ladies' Club at about 8 A. M. on the morning of 23rd March 1949, when Miss Das Gupta had informed him that she would not be able to be present at the inspection owing to a previous engagement.

[15] We think the S. D. C.'s indiscretion can, on the facts of this case, be properly attributed to a sense of injured pride when he found that Miss Das Gupta preferred keeping a prior engagement to meeting him at the Ladies' Club on the morning of 23rd March 1949. It is on this assumption that we can reconcile the S. D C.'s rejoinder to Miss Das Gupta's letter that he would visit the Club at 8 A. M., if she had to keep a prior engagement at 9 A. M. Assuming that the action of the S D. C. on the morning of 23rd March 1949 was inspired by executive zeal only, we do not think, executive zeal can be regarded as a virtue when it seeks to use so unceremoniously a private club as a court-house.

[16] We are satisfied that the facts of this case justify our interference with the order of the Deputy Commissioner passed in appeal from the order of the S. D. C., which we regard as a fit one to be set aside.

[17] We accordingly set aside the order of the Deputy Commissioner, dated 19th April 1949 and order that the fine, if recovered, be refunded to the petitioner.

D.H. *Revision allowed.*

A. I. R. (37) 1950 Assam 37 *[C. N. 11.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Dighola Ahom and others — Appellants v. *The King.*

Criminal Appeal No. 19 of 1949, Decided on 22nd July 1949.

(a) Criminal P. C. (1898), S. 297 — Misdirection —Accused charged under S. 366, Penal Code—Investigation of previous offence of abduction pending — Some accused concerned in previous offence — Jury finding accused guilty of offence under S. 365, Penal Code and acquitting them of offence under S. 366 — Judge in his charge to jury directing them to infer from conduct of accused and circumstances if they had requisite intention contemplated under S. 365 — No opportunity given to accused to explain inference — Judge held misdirected jury — Criminal P. C. (1898), S. 342.

The accused were charged and tried for an offence under S. 366, Penal Code pending the investigation of a previous offence of abduction in which some of the accused were concerned. The jury unanimously brought a verdict of guilty against the accused under S. 365, Penal Code, an offence with which they were not charged, while acquitting them of the charge under S. 366. In his charge to the jury, the Sessions Judge directed them to infer from the conduct of the accused and the circumstances of the case whether the accused had the requisite intention as contemplated under S. 365. The Judge, however, did not give an opportunity to the accused, as he was required to do under S. 342, to explain this inference :

Held that, by his reference to the terms of S. 365 in his charge to the jury merely on the strength of an equivocal inference upon which he invited the jury to consider the application of S. 365 when there was no charge against the accused under that section, the Sessions Judge misdirected the jury in law in the absence of an explanation from the accused in their examination under S. 342, Criminal P. C. [Para 12]

Annotation: (46-Com.) Criminal P. C., S. 297 N. 11.; S. 342 N. 35.

(b) Penal Code (1860), S. 362 — Section does not define offence — Abduction becomes offence when accompanied by certain intentions.

Section 362 merely defines what "abduction" is. It does not define an offence. Abduction becomes an offence only when it is accompanied by one of the three intentions described in Ss. 364, 365 and 366, Penal Code. [Para 14]

Annotation : (46-Man.) Penal Code., S. 362, N. 1 Pt. 1.

(c) Criminal P. C. (1898), S. 238 (1) — Offence under S. 366, Penal Code, sought to be reduced to one under S. 365, Penal Code — Section has no application. [Para 15]

Annotation : (46-Com.) Criminal P. C., S. 238 N. 2 Pt. 6.

(d) Criminal P. C. (1898), S. 236—Accused charged under S. 366, Penal Code — Fact that girl was forced to go from her house with intent specified in S. 366 attempted to be proved — Fact if proved constituting offence under S. 366 — Accused held could not be convicted of offence under S. 365, Penal Code.

Where in a case in which the accused were charged under S. 366, Penal Code, it was attempted to prove that the girl was compelled to go from her house with the intent specified in S. 366 and there was no doubt that if this fact could be proved it would constitute an offence under S. 366 :

Held, that the question of the applicability of S. 365 did not arise and the accused could not be convicted of the offence under that section. [Para 16]

Annotation : (46-Com.) Criminal P.C., S. 236, N. 1.

J. C. Sen for H. K. Lahiri—for Appellants.
B. C. Barua, Govt. Advocate (Jr.)—for the Crown.

Judgment. — This is an appeal by 5 persons-one Dighola Ahom, Bhanu Ahom. Gopal Ahom, Debiram Ahom, and Someswar Ahom-who were tried along with 4 others by the learned Sessions Judge, Lower Assam Division, with the aid of a Jury for offences under Ss. 147, 325 and 366, Penal Code. The jury brought a unanimous verdict of not guilty of any offence against 4 accused persons, but brought a verdict, of guilty against the 5 appellants under S. 365, Penal Code, an offence with which they were not charged, while acquitting them of the charges under S. 366, Penal Code., and 147, Penal Code. The appellant Bhanu was in addition found

guilty under S. 325, Penal Code. The learned Sessions Judge agreed with the unanimous verdict of the Jury against the 5 appellants and sentenced each of them to rigorous imprisonment for 2 years under S. 365, Penal Code, and further sentenced the appellant Bhanu under S 325, Penal Code., to rigorous imprisonment for 6 months, the sentences to run concurrently.

[2] The case for the prosecution was that some time before the present occurrence which took place on 1st February 1948, Mt. Kapahi, a girl of 17 years of age and a daughter of one Kalai Bora, was forcibly dragged to the house of one Cheru by the appellants Bhanu and Dighala and one Gerela in order that she might be compelled to marry Cheru. After living for a while with Cheru who forced her live with him as his wife, she managed to escape and return to her father, and made a statement before a Magistrate.

[3] On 1st February 1948, at about 2 P. M. her younger brother called Kaneswar asked her to take a jug of water to the field. No sooner had Mt. Kapahi left the house with the water-jug than the appellant Dighala Ahom and a brother of the appellant Debiram seized her by the arm; almost immediately the other appellants and some others, about 16 in number, came armed with spears, lathis and daos and took away the girl by force; in the course of the abduction, the appellant Bhanu is alleged to have injured the father of the abducted girl. In the first information report lodged by the father of the girl, he stated that the motive for the abduction was revenge.

[4] It is the prosecution case that the abducted girl was first taken to the house of appellant Mahidhar Ahom and thence to the house of appellant Someswar; in the house of Someswar her *thuria* (ear-rings) were removed by the appellant Debiram, a brother of the appellant Someswar; in the house of Someswar, the appellant Bhanu hit her on the mouth with a fist and dislocated her teeth; after sunset she was taken to a jungle in the *bari* of appellant Someswar and his brother, Debi, later she was taken to the house of one Indiram, outside the house of Indiram; in a *bari* of bamboo clumps, the appellants Debi, Gopal and Bhanu raped her; the following morning she managed to escape to the house of one Paniram, from where Paniram's son, Gandhiram, took her to father's house, where she narrated the story to her parents and implicated the appellants and others; her father then lodged the first information report at the Gahpur Police Station.

[5] On completion of the investigation, the police sent up the appellants and their companions before a Magistrate who, after holding a preliminary enquiry, committed the appellants and their companions to the Court of Sessions to stand their trial under Ss. 147, 366 and 325, Penal Code.

[6] Mr. Sen who appears for the appellants, has contended that the verdict of guilty brought by the Jury under S. 365, Penal Code and accepted by the learned Sessions Judge, was a verdict which the jury was incompetent to bring in view of the summing up of the learned Sessions Judge which, except for a passing reference to the terms of S. 365, Penal Code was a summing up with reference to the charge under S. 366, Penal Code. For instance, the learned Sessions Judge has stated in his charge to the jury :

"You are to infer from the conduct of the culprits and the circumstances of the case whether the culprits had the requisite intention as contemplated under S. 366, Penal Code. In the *ejahar*, it was stated that there had been a previous case pending about the abduction of the girl, Mt. Kapahi, and that the girl, Mt. Kapahi, was abducted this time while she was in *Jimma* (custody) of Kolai with the permission of the Magistrate, and that some of the accused were accused in that previous case. That the occurrence of this case was committed by them because some of the accused in the previous case were arrested by police and in order to take revenge for the previous case."

"Since after the removal of the girl, Mt. Kapahi, to Mahidhar's house, as I have already stated we have the evidence of no other except the girl herself. She says that from Mahidhar's house she was taken to Someswar's house by Dighala, Bhanu, Someswar, Debi, Gopal and Mahidhar. That Gopal and Debi dragged her by the hands and Bhanu and Dighala pushed her from behind. That there at Someswar's house, Debi snatched of her *thurias* from her wearing, and that the three women accused pressed her when the *thurias* were snatched off from her ears. But her father, Kolai, gives evidence that after the girl escaped and returned home, she reported to him that at Someswar's house her *thurias* were taken by Someswar . . . . ."

[7] Mr. Sen has drawn our attention to these passages to point out that in the entire evidence of the girl, which the learned Sessions Judge placed before the jury, there is no reference whatsoever to her having ever been secretly and wrongfully confined. Indeed it appears that apart from a passing reference to S. 365, Penal Code under the heading "The Law", there is nothing to show that the learned Sessions Judge had in mind the particulars which constitute an offence under S. 365, Penal Code. It is true that in the last paragraph of his charge to the jury, the learned Sessions Judge has stated :

"Therefore, on the evidence placed before you, you are to consider whether she was abducted with the requisite intention as contemplated under S. 366, Penal Code, or with intent to cause her to be wrongfully confined secretly so that her evidence might be shut out in the previous case of abduction, which was still under investigation. I have placed the law and the evidence of the case and you are to decide whether any of the accused persons could be held guilty under any of the sections of the Indian Penal Code I have explained above."

[8] We are unable to find from the evidence on record, even so much as a suggestion, that the girl was secretly and wrongfully confined.

[9] In connection with this aspect of the case, we are constrained to observe that having regard to the examination of the appellants under the provisions of S. 342, Criminal P. C., the learned Judge was not justified in referring to the particular inference upon which he invited the jury to act. If the learned Judge thought that the particular inference was an adequate piece of evidence to enable the jury to consider their verdict in relation to an offence under S. 365, Penal Code, he should have given an opportunity to the appellants, as he was required to do under the provisions of S. 342, Criminal P. C., to explain this piece of evidence, the more so when the appellants were not charged with an offence under S. 365, Penal Code.

[10] In the committing Magistrate's Court, the examination of the appellants was in these terms :

"Q. What is your defence ?

A. I did not commit any offence. I cannot say anything.

I was out for cutting thatch, I know nothing.

I was at Jorhat."

[11] At the trial in the Court of Session, the learned Judge put the following questions to the appellant :

'Q. Have you heard the depositions of the witnesses ?

A. Yes, I have heard.

Q. You may say what you have got to say. ?

A. I did not drag the girl. I am not guilty."

[12] By his reference to the terms of S. 365, Penal Code in his charge to the jury, merely on the strength of an equivocal inference upon which he invited the jury to consider the application of S. 365, Penal Code when there was no charge against the appellants under that section, the learned Judge, we think, misdirected the jury in law, in the absence of an explanation from the appellants in their examination under S. 342, Criminal P. C. It was not the prosecution case that the intention of the appellants in abducting the girl was secretly and wrongfully to confine her. The learned Judge should have warned the jury that there was no direct evidence as to the intention required for a conviction under S. 365, Penal Code. His giving prominence to the particular inference without making any reference to the absence of any direct evidence on the point, amounts on the facts of this case, particularly the failure to comply with the provisions of S. 342, Criminal P. C., to misdirection and has resulted in the erroneous verdict, a verdict which we regard as against the weight of evidence.

[13] Mr. Barua who appears for the prosecution, contends that the verdict of the jury under S. 365, Penal Code was justified in view of the provisions of S. 238, Criminal P. C. Section 238, Criminal P. C., is in these terms :

"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(2-A) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(3) Nothing in this section shall be deemed to authorise a conviction of any offence referred to in S. 198 or S. 199 when no complaint has been made as required by that section."

[14] The several particulars which constitute an offence under S. 366, Penal Code are these : (1) that a woman was compelled by force or deceitful means to go from any place, (2) that she was so compelled or induced with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse. Section 362, Penal Code, merely defines what 'abduction' is. It does not define an offence. Abduction becomes an offence only when it is accompanied by one of the 3 intentions described in Ss. 364, 365 and 366, Penal Code.

[15] Section 238 (1), Criminal P. C. applies when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and when such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. Section 238 (1), therefore, in terms has no application to a case when the offence charged under S. 366, Penal Code is sought to be reduced to one under S. 365, Penal Code. If any part of S. 238, Criminal P. C., applies to such a case, it is S. 238 (2), which is in these terms:

"When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it."

Illustration (b) to S. 238, Criminal P. C., elucidates the meaning of sub-s. (2) of S 238, Criminal P. C. We have already observed that we are unable to take the view that facts have been proved in this case which reduce the offence charged under S. 366, Penal Code to one under S. 365, Penal Code.

[16] Mr. Barua next contended that Ss. 236 and 237, Criminal P. C., applied to the facts of

the case. Section 236, Criminal P. C., reads as follows:

"If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences."

Section 237, Criminal P. C., says:

"(1) If, in the case mentioned in S. 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

Section 236, Criminal P. C., applies only when it is doubtful which of several offences upon the facts which can be proved will be constituted. In this case, it was attempted to prove that the girl was compelled by force to go from her house with the intent specified in S. 366, Penal Code. There is no doubt that if this fact could be proved, it would constitute an offenec under S. 366, Penal Code. The question, therefore, of the applicability of S. 365, Penal Code, did not arise.

[17] Mr. Barua has referred us to a decision of the Calcutta High Court reported in *Queen Empress* v. *Sita Nath*, 22 Cal. 1006. It is true that the decision in that case supports the view that where a charge had been framed against an accused person under S. 366, Penal Code and the charge fails, the Court could convict the accused person under S. 365, Penal Code in the absence of a formal charge having been framed against him. Macpherson J. observed:

"But the object of the outrage was, we consider, not to violate the complainant's person but to prevent her from prosecuting the complaint which she had made, to bring her under the influence of the person who had abducted her and to keep her away from the influence of those who might compel her to go on with the complaint and for that purpose it was necessary to keep her in confinement . . . . .

It is true that wrongful confinement is not an essential feature of the commission of an offence under S. 366, but it must often be involved in it, and the whole case for the prosecution is not only that there was abduction but confinement withthe view to force the complainant to illicit intercourse."

[18] With great respect, the words in S. 365, Penal Code are not 'confinement or wrongful confinement' but 'secret and wrongful confinement., Macpherson J., did not say under which sub-section of S. 238, Criminal P. C., such a case would fall, but Banerjee J, apparently applied sub-s. (2) of S. 238, Criminal P. C., to the facts of that case. He observed:

"Now S 238, Criminal P. C., Para. 2, says: "When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it."

[19] Assuming sub-s. (2) of S. 238, Criminal P. C., applies to the facts before us, we are of the view that facts have not been proved in this case which reduce the offence charged under S. 366, Penal Code to one under S. 365, Penal Code. Indeed I am more inclined to the view that when the two intentions as described in S. 365 can be proved by direct or inferential evidence, an accused person ought to be charged with both offences under S. 235, Criminal P. C., and that Ss. 236, 237 and 238, Criminal P. C., have no application. If the intention described in S. 366, Penal Code, fails and that described in S. 365, Penal Code is established, an accused person can be convicted under S. 365, Penal Code, provided a charge is framed against him under S. 365, Penal Code in accordance with the provisions of S. 235, Criminal P. C. But we leave this question open for a decision upon a more appropriate occasion.

[20] The result is that the appeal is allowed in respect of the conviction and sentence passed on the appellants under S. 365, Penal Code. They are acquitted of the offence under S. 365, Penal Code. So far as the conviction and sentence passed upon the appellant Bhanu under S. 325 Penal Code, is concerned, we see no reason to interfere. The conviction and sentence passed upon Bhanu under S. 325, Penal Code are confirmed.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Assam 40 *[C. N. 12.]*

RAM LABHAYA J.

Narayan Bedia — Appellant v. *Dambarunath Bargohain and others—Respondents.*

Second Appeal No. 35-A of 1948, Decided on 23rd June 1949.

(a) Assam Land and Revenue Regulation (1886), S. 82 — Sale under S. 91 of Regulation — Ss. 81 and 82 cannot govern such sale — Assam Land and Revenue Regulation (I [1] of 1886), Ss. 81 and 91.

Sections 81 and 82 cannot govern sales made or ordered under S. 91 of the Regulation. It is not, therefore, necessary for a person who is affected by a sale under S. 91 to institute a suit for having the sale annulled by the Civil Court under the provisions of S. 82 if he can show that the sale is a nullity. [Para 9]

(b) Assam Land and Revenue Regulation (1886), S. 91—Sale of land under section — Circumstances not justifying sale — Revenue Officer not authorised to order sale—Objections to sale not raised before Revenue Officer by defendant whose interests were affected by sale — Appeal by defendant to Revenue Tribunal—Tribunal ordering sale to be set aside on defendant depositing certain amount—Suit by auction-purchaser for possession —Orders of Revenue authorities held were without jurisdiction and sale was nullity—Defendant held could challenge orders in collateral proceedings—Assam Land and Revenue Regulation (I [1] of 1886), S. 151.

The land in suit was sold for recovery of arrears of land revenue under S. 91. The circumstances which justify action under S. 91 did not exist when the sale was ordered; nor was the Revenue Officer authorised in law to order the sale. The defendant whose interests were affected by the sale, without raising any objections to the sale in the Court of the Revenue Officer, appealed to the Revenue Tribunal which ordered that the sale would be set aside on defendant depositing a sum equal to the purchase money, though the defendant was not in arrears so far as the land revenue was concerned. The land in suit was also not a defaulting estate or part of it. In a suit by the auction purchaser of the land for possession thereof:

Held **that the orders of the Revenue authorities were without jurisdiction and the sale on the basis of which the plaintiff claimed title to the property was a nullity in law. The Revenue Tribunal could not validate a sale which was void under S. 151 and the mere fact that the defendant was a party to the proceedings before that Tribunal would not make its order binding on him. It was therefore open to the defendant to challenge the order of the Revenue Officer as well as of the Revenue Tribunal in collateral proceedings on the ground that they had no jurisdiction to pass the orders that they did: A. I. R. (23) 1936 Cal. 138, *Rel. on.*** [Para 10]

K. R. Barooah and R. K. Goswami—for Appellant.
K. R. Bora—for Respondents.

Judgment.—This appeal arises out of a suit for declaration of title to and *khas* possession of the land in suit measuring 33 B. 2 K. 15 Ls., covered by periodic *patta* No. 19 of 1927-28 of Pankialgaon, Mouza Marangi.

[2] The facts leading to the suit are as follows.

[3] The land in suit originally belonged to Juran, father of defendant 1. He sold it by a registered sale deed to the father of defendants 2-4 on 14th September 1933. Juran died soon after the sale. His son defendant 1 who was in possession of the land instituted a suit to establish his title against defendants 2-4. His attempt did not succeed. The suit was dismissed. He, however, continued to remain in possession of the property and thus forced defendants 2-4 to institute a suit against him for obtaining necessary redress on the basis of the sale deed which had been executed in favour of their father. The suit was for a declaration of title and *khas* possession. It was decreed after contest on 21st October 1941. Before defendants 2-4 could obtain delivery of possession in execution of the decree passed in their favour, the land in suit was sold under the Assam Land and Revenue Regulation for recovery of arrears of land revenue due from defendants 2-4. It is worthy of note that the arrears for which the land was sold were arrears due from defendants 2-4 in respect of land other than the land in suit. The sale, therefore, was under S. 91, Land and Revenue Regulation. Kankeswar Bargohain, father of the plaintiffs in the present case, purchased the land at the revenue sale. The revenue authorities could only give him symbolical possession and referred him to the civil Court for obtaining actual possession. This they could not deliver on account of resistance by defendant 1 who was in possession. It is in pursuance of this direction that plaintiffs instituted the suit which gave rise to this appeal.

[4] Defendant 1, who has contested the suit, was aware of the sale of the land by the revenue authorities. He did not apply to the officer ordering the sale for having the sale set aside but petitioned or appealed to the Revenue Tribunal against the order confirming the sale. The Tribunal found that the Bakijai officer (the Revenue Officer who ordered the sale) in ordering the sale of the land in suit acted in utter disregard of the provisions contained in S. 91 of the Regulation. It also expressed the view that the entire sale proceedings had been "vitiated by an utter disregard of the spirit as well as the letter of the law." In spite of taking this view of the matter, the Tribunal acting under S. 151, Land and Revenue Regulation directed that the sale be set aside on condition of the petitioner depositing a sum equal to the purchase money and any other payments made in respect of revenue, etc.

[5] Defendant 1 who alone is resisting the suit, pleaded that the sale was a nullity. It conferred no rights on the plaintiffs. He also claimed title on the basis of adverse possession extending over more than 12 years. The learned Munsiff of Golaghat found that defendant had not acquired title on the strength of adverse possession. He, however, found that the sale was a nullity as it had been ordered by an officer who had no jurisdiction to sell the property. In this view of the matter he dismissed the suit. In appeal the learned Additional Subordinate Judge, A. V. D., by his order dated 26th April reversed the order of the Trial Judge and decreed the claim holding that defendant 1 being a party to the order passed by the Revenue Tribunal was bound by it and was precluded from challenging its correctness.

[6] Defendant 1 has appealed to this Court. His learned counsel has frankly stated that he has got no case so far as plea of adverse possession is concerned. He, however, urges that the alleged sale, which is the foundation of plaintiff's title, has no existence in law and therefore it conferred no title of any description on the plaintiff. He has also urged that plaintiff is precluded from instituting this suit for *khas* possession as he is a representative of defendants 2-4 who had already obtained a decree against defendant 1 and had failed to execute it within the time allowed to them by law.

[7] The facts bearing on the first contention raised by the learned counsel for the appellant have been fully stated above. The sale of the

land by the Bakijai officer (Revenue Officer) was admittedly under S. 91 of the Land and Revenue Regulation. This section authorises the Deputy Commissioner to recover arrears by the sale of the estate of a defaulter, if such arrears are found to be irrecoverable by any of the processes described in sections which precede S. 91. It is admitted that no attempt had been made to recover arrears from the defaulter by means of processes described in sections other than S 91. It was possible under S. 70 to sell the estate in respect of which arrears were due. Moveable property could have been proceeded against.

[8] These methods were not availed of. In these circumstances, sale of the property in respect of which arrears were not due was not possible under S. 91. The officer who is authorised to recover arrears of revenue under S. 91 by sale of the property other than that in respect of which arrears are due is the Deputy Commissioner. The officer who ordered the sale in this case was not the Deputy Commissioner. It is also admitted that he had not been vested by the Provincial Government with powers to order sale of property under S. 91. He obviously had no jurisdiction to order the sale. The learned counsel for the respondent agrees that the sale was not ordered or held by an officer who had jurisdiction in the matter. He also concedes that the sale, in the circumstances, of this case would be nullity. He, however, answers this contention by relying on S. 82 of the Land and Revenue Regulation. He argues that a sale for arrears of revenue could be annulled by a civil Court on certain grounds only and if defendant 1 was aggrieved by the order of the Revenue Tribunal, he should have instituted a suit under S. 82. No such suit having been instituted by him, the sale even if irregular or illegal would be binding and this would be particularly so as defendant 1 being a party to the order of the Reuenue Tribunal is bound by it. He points out, further, that the order of the Revenue Tribunal was passed under S. 151 of the Regulation and that section gives very wide and unrestricted powers to the Tribunal.

[9] I have given my careful consideration to the argument advanced. I do not think it can prevail. As examination of the scheme of Chap. V of the Land & Revenue Regulation would show that under S. 70 a Depute Commissioner may sell certain estates by auction if arrears have accrued in respect of them. Sections 71 to 78 lay down the procedure for the sale by the Deputy Commissioner. Under S. 78A

"any person either owning such estate or a part thereof or holding an interest therein by virtue of a title acquired before such sale, may apply on or before the thirtieth day from the date of sale to have the sale set aside on depositing in the Deputy Commissioner's Court."

Certain sums of money as laid down in the section. Under S. 79, an application for setting aside a sale within 60 days of the sale could be made to the Commissioner, or (where there is no Commissioner) to the Provincial Government on the ground of some material irregularity or mistake in publishing or conducting it. If the sale is not set aside under the provisions of S. 78A or 79, it becomes final after the expiry of the period of time laid down in S. 80. But the finality is subject to the provisions of Ss. 81 and 82. Section 81 empowers the Provincial Government on an application made to it at any time within one year of the date of sale becoming final under S. 80 to set it aside on grounds of hardship or injustice. Section 82 authorises a civil Court to annul a sale for arrears of revenue if the sale is contrary to the provisions of the Regulation and on proof that the plaintiff has sustained substantial injury by reason of the neglect of those provisions. It is clear that these sections lay down the procedure for conducting the sale of an estate with respect to which arrears have accrued and for having that sale set aside. Reading Ss. 81 and 82 together, it is also clear that the sale of a defaulting estate which becomes provisionally final under S. 80 can be set aside under Ss. 81 and 82. There is no doubt that S. 82 permits the civil Court to annul such a sale. The question, however, is whether S. 82 will also govern sales made or ordered under S. 91, Land and Revenue Regulation. There is nothing in S. 82 which could suggest even remotely that sales under S. 91 could also be covered by it. The express direction contained in S. 91 with regard to procedure is that the Deputy Commissioner may proceed against any of the other property of the defaulter situated within his district according to law for the time being in force for the attachment and sale of immoveable property under the decree of a civil Court. There can be no manner of doubt that the procedure for the sale of a defaulting estate is different from procedure which would be adopted where an estate is to be sold under S. 91 for arrears due from its owner though the arrears are due with respect to some other estate. The procedure which will govern the attachment and sale of immovable property other than the defaulting estate is the procedure provided in the Civil Procedure Code for the attachment and sale of immovable property under a decree of the civil Court. It is again obvious that the two sets of procedure are very different. Under the Civil Procedure Code the Provincial Government will have no special power to set aside a sale within one year of date on the ground of

hardship or injustice. According to the procedure provided in the Civil Procedure Code a separate suit for setting aside the sale like the one provided for by S. 82 would not lie. Sections 81 and 82, therefore, could not govern sales made or ordered under S. 91 of the Regulation. In these circumstances, it would not be necessary for defendant 1 to institute a suit for having the sale annulled by the civil Court under the provisions of S. 82 if he can show that the sale is a nullity.

[10] It has been found that the circumstances which justify action under S. 91 did not exist when the sale of the property in suit was ordered; nor was the Officer concerned authorised in law to order the sale. The learned counsel has also agreed that the sale is without jurisdiction. The only question that remains to be determined therefore is whether the order of the Revenue Tribunal has any binding force. An appeal to the Revenue Tribunal would be competent if an application for setting aside the sale had been made and had been refused or disallowed. The learned counsel for plaintiff-respondent is unable to point to any such application. It follows, therefore, that no objections were raised to the sale in the Court of the Officer under whose order the property was sold. In these circumstances the appellate jurisdiction of the Revenue Tribunal could not be invoked. There was no order by the Deputy Commissioner refusing to set aside the sale. An appeal against the order directing sale would not be competent in view of the procedure laid down in the Civil Procedure Code. But, even if an appeal was competent the defect of jurisdiction could not be cured. The order of the Revenue Tribunal also suffers from the same defect which vitiates the order of the Bakijai Officer (Revenue Officer) who ordered the sale. The Revenue Tribunal could not validate a sale which was void *ab initio* even under S. 151 of the Regulation. The defect of jurisdiction could not cure, much less could the Revenue Tribunal order that the sale would be set aside on defendant 1 depositing a certain sum of money. Defendant 1 was not in arrears so far as land revenue was concerned. The land in suit was also not a defaulting estate or part of it. This condition too was *ultra vires* of the Revenue Tribunal. In these circumstances the mere fact that defendant 1 was a party to the proceedings before the Revenue Tribunal would not make the order binding on him. It will be open to him to challenge the order of the Revenue Officer as well as of the Revenue Tribunal in collateral proceedings on the ground that they had no jurisdiction to pass the orders that they did. This view of the law finds support from a Division Bench of the Calcutta High Court reported in *Tajmul Ali* v. *Kamala Ranjan*, A. I. R. (23) 1936 Cal. 138 : (161 I. C. 744). The learned Judges held that an order made by a Court which has no jurisdiction to deal with the subject-matter of the suit has no binding effect on the person who is effected by the order. It is absolutely void and is open to challenge in collateral proceedings. I am in full agreement with this view and hold that the orders of the Revenue authorities are without jurisdiction and the sale on the basis of which the plaintiff claims title to the property is a nullity in law.

[11] The suit, therefore, must fail on this ground alone. It is not necessary to consider the second contention raised by the learned counsel for the appellant. This appeal is, therefore, allowed, the order of the learned Additional Subordinate Judge is reversed and that of the trial Court restored. I shall leave the parties to bear their own costs throughout.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Assam 43 *[C. N. 13.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Province of Assam—*Petitioner*—*Appellant* v. *Lakhi Nayak and others*—*Accused*—*Respondents.*

Criminal Revn. No. 18 of 1949, Decided on 18th July 1949, from order of Political Officer, Sadiya Frontier Tract, D/- 11th June 1948.

(a) Assam Frontier (Administration of Justice) Regulation (I [1] of 1945), S. 26—"In other cases" —Words do not cover appeals against orders of acquittal.

The words "in other cases" in S. 26, cannot be considered to cover appeals against orders of acquittal. If the words are held to include orders of acquittal any one dissatisfied with the order will have the right of appeal. The result will be that while a party dissatisfied with an order of acquittal will have a right of appeal, it will be questionable whether the Government can exercise that right. It is obvious that this result could not have been contemplated. It would be a gross violation of the salutary principle which finds statutory recognition in S. 417, Criminal P. C. It could not have, therefore, been intended that instead of the Government having the right of appeal in suitable cases against orders of acquittal, a party considering himself adversely affected by the order may appeal from that order as of right. [Para 10]

(b) Assam Frontier (Administration of Justice) Regulation (I [1] of 1945), S. 32 —Principle of S. 404, Criminal P. C., is binding on Courts acting under Regulation —No right of appeal against order of acquittal exists—Criminal P. C. (1898), S. 404.

The principle of S. 404, Criminal P. C. is binding on the Courts acting under the Regulation. There can be no right of appeal unless it is expressly provided for it either in the Criminal Procedure Code or in any other special law. The right of appeal must be expressly conferred. It cannot be extended by a process of inferential reasoning. Where it is not given by the law, it does not exist. The Regulation contains no provision for an appeal against an order of acquittal. In these circumstances no right of appeal against orders of acquittal can be said to exist either in the Government or in any one

else. Section 32 of the Regulation cannot be utilised to extend the jurisdiction of the appellate or the revisional authorities under the Regulation. [Para 11]

Annotation: ('46-Com.) Cr. P. C., S. 404, N. 4.

(c) Assam Frontier (Administration of Justice) Regulation (I [1] of 1945), S. 28 — Section does not give right of appeal against orders of acquittal— High Court cannot set aside order of acquittal under section.

Section 28 deals with cases of conviction only as distinguished from those of acquittal. It does not give any right of appeal even to the Government against orders of acquittal. It would not be conceivable that in these circumstances, it would permit anyone feeling aggrieved by the order to move the High Court for its reversal in the exercise of its revisional jurisdiction. It is for this reason that the revisional jurisdiction is as circumscribed as the appellate jurisdiction. The Court may draw on its revisional jurisdiction in cases of conviction where no appeal lies to it. But it has no power to pass any order or to give any direction except such as affects the sentence or conviction. A sentence may be enhanced, reduced or cancelled; a conviction may be set aside and a retrial ordered. These are the only orders which can be passed under the section. There is thus no power in the High Court to set aside an order of acquittal under the section. [Para 13]

(d) Criminal P. C. (1898), S. 439—Applicability— Section does not apply to cases covered by Assam Frontier (Administration of Justice) Regulation (I [1] of 1945) — Assam Frontier (Administration of Justice) Regulation (I [1] of 1945), Ss. 28 and 32.

High Court cannot have recourse to its revisional jurisdiction under the Code of Criminal Procedure when exercising jurisdiction in a case under the Regulation. Such a course of action would involve a clear contravention of the provisions of Ss. 28 and 32 of the Regulation. The revisional powers of the High Court under S. 28 of the Regulation are very limited and contain no provision for interference with orders of acquittal and S. 32 of the Regulation affords no justification for extending the jurisdiction either appellate or revisional of the High Court. Such a course cannot be regarded as consistent with the Regulation. S. 439, therefore, has no application to cases covered by the Regulation. [Para 15]

Annotation: ('46-Com.) Cri. P. C., S. 439, N. 8.

R. K. Barman, Govt. Advocate (Sr.)—for Petitioners.
B. N. Choudhary—for Accused.

Ram Labhaya J.—This is a revision petition against the order of the Political Officer, Sadiya Frontier Tract, dated 11th June 1948 by which he acquitted the three accused who are respondants in this petition and who were tried under a charge of murder for intentionally causing the death of Mt. Niang, a Khasi lady.

[2] Mt. Niang was murdered in the early hours of the morning of 12th June 1947. Metilda, who was living with the deceased as her adopted daughter, was in her room on the night of the occurrence. She reported at 6 A. M. that Lakhi Bangali and Ekadasi, respondents 1 and 2, had committed burglary by breaking open the house and had caused grievious hurt to Mt. Niang, who was alive till then. She died later.

[3] On 18th June 1947, Metilda took Jogendra K. Chaudhury, Officer-in Charge, Sadiya Police Station, to the house and pointed out a hole in the wooden post. From this some ornaments and cash were recovered. She also pointed out the blood stained *dao* which was also concealed in the room behind that post.

[4] On 19th June 1947, Metilda, accused, was produced before Mr. B. M. Roy, Magistrate, 1st Class, who after satisfying himself that Metilda wanted to confess voluntarily recorded her confession. She revealed that Lakhi, accused, met her at 12 noon on the day preceding that of murder and they both decided to kitl Mt. Niang in the course of the following night. At about 1 A. M. he (Lakhi) came and knocked at the door which was opened by her. He entered the room. The deceased was sleeping. Ekadasi, accused, who came with Lakhi, did not entered the house. He remained outside in the compound all the time. She and Lakhi both caused injuries to the deceased as a result of which she died. She then informed Lakhi as to where cash and ornaments were. Lakhi took his share and left the house together with Ekadashi. She concealed her share of the stolen property in a hole in the wooden post inside the house.

[5] Ekadashi was wearing a blood stained shirt on 13th June when he was in the hajat. This was seized and sent to the Chemical Examiner, who reported that traces of human blood had been found on it.

[6] The confession made by Metilda before the Magistrate was retracted at the trial. All the three accused pleaded not guilty. No defence evidence was produced. The learned Political Officer, who tried the case, came to the conclusion, in these circumstances, that the recovery of ornaments and cash from the wooden post was an inconclusive circumstance. His finding was that nothing had been proved which would connect the accused with the murder. He thought Metilda mentally deficient. He described her as a "crack." He regarded it as improbable that she herself should have participated in the murder and caused injuries which she had confessed to have caused when making her confessional statement. In consequence he acquitted all the accused.

[7] The correctness of the finding arrived at by the Political Officer is assailed by the learned Government Advocate and the revisional jurisdiction of the Court is invoked for setting aside the order of acquittal and ordering a retrial either under S. 28 of the Regulation, I [1] of 1945. [The Assam Frontier (Administrotion of Justice) Regulation 1945] or under S. 439, Criminal P. C.

[8] The first question that arises for consideration is whether this revision petition is competent. In order to answer this question, it is necessary to examine the Scheme of the Regulation (I [1] of 1945) under which the trial was held. Sections 24

to 26 of the Regulation deal with appeals. Any party aggrieved by a decision of a village authority may appeal within seven days to the Assistant Political Officer, who, on receipt of such appeal shall try the case *de novo*. From every original decision of the Assistant Political Officer an appeal lies to the Political Officer. Section 26 of the Regulation provides for appeals to the Governor. It is only in case of sentences of three years' imprisonment and upwards, and sentences of death or transportation that an appeal lies to the Governor. In other cases there is no right of appeal, but the Governor may entertain an appeal at his discretion. Section 28 confers on the Governor powers of revision. Under this section, the Governor or the Political Officer may call for proceedings of any officer subordinate to him and reduce, enhance or cancel any sentence passed, or remand the case for retrial, but they cannot punish any offence by a sentence exceeding that warranted by law. It is under this section that interference with the order of the Political Officer is sought.

[9] The powers of the Governor under Ss. 26 and 28 of the Regulation are now exercisable by the High Court.

[10] It is clear that the Regulation contains no provision for appeals against orders of acquittal. Section 26 provides for appeals against convictions. It lays down that an appeal shall lie to the Governor against sentences of three years' imprisonment and upwards, and sentences of death or transportation. There is no right of appeal in other cases, but the Governor may entertain an appeal at his discretion. It is obvious that Part 1 of the section authorises appeals against sentence of three years' imprisonment and upwards and sentences of death or transportation. Clause 2 necessarily refers to orders of convictions which are not covered by the preceding clause. It provides that:

"In other cases there shall be no right of appeal but the Governor may entertain an appeal at his discretion."

The reason for the interpretation given above is obvious. Certain orders of conviction resulting in sentences passed by the Political Officer are not covered by cl. 1 of S. 26. They had to be provided for this clause merely covers these cases. By no stretch of imagination can the words "in other cases" be considered to cover appeals against orders of acquittal. The reasons for this view are also apparent. Under the Criminal Procedure Code, the right of appeal against orders of acquittal has been conferred only on the Government in order that interested parties may not indulge in vindictive prosecution. This right is not enjoyed by a private party to the case who may feel aggrieved by an order of acquittal. If, therefore, it had been intended that there should be a right of appeal against orders of acquittal, the right would have been conferred on the Government only in conformity with the principle on which S. 417, Criminal P. C., has been founded. The right could not have concsivably been given to any one else. To confer the right on the Government alone, it would have been necessary to enact an express provision on the lines of S. 417, Criminal P. C. Such a course would have been found necessary in order to maintain the essential distinction between orders of acquittal and orders of conviction. If the words "in other cases" which find place in S. 26 of the Regulation are held to include orders of acquittal, anyone dissatisfied with the order will have the right of appeal. The result will be that while a party dissatisfied with an order of acquittal will have a right of appeal, it will be questionable whether the Government can exercise that right. It is obvious that this result could not have been contemplated. It would be a gross violation of the salutary principle which finds satutory recognition in S. 417, Criminl P. C. It could not have, therefore, been intended that instead of the Government having the right of appeal in suitable cases against orders of acquittal, a party considering himself adversely affected by the order may appeal from that order as of right.

[11] Section 32 of the Regulation directs that the Governor and the Political Officers exercising the jurisdiction under the Regulation shall be guided in regard to procedure by the principles of the Code of Criminal Procedure, so far as they are applicable to the circumstances of the Tracts (to which the Regulation applies) and consistent with the provisions of this Regulation. Section 404, Criminal P. C. lays down that

"No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force."

The principle of this section is binding on the Courts acting under the Regulation. There can be no right of appeal unless it is expressly provided for it either in the Criminal Procedure Code or in any other special law. The right of appeal must be expressly conferred. It cannot be extended by a process of inferential reasoning. Where it is not given by the law, it does not exist. The Regulation contains no provision for an appeal against an order of acquittal. In these circumstances, no right of appeal against orders of acquittal can be said to exist either in the Government or in anyone else. Section 32 of the Regulation cannot be utilised to extend the jurisdiction of the appellate or the revisional authorities under the Regulation. All that it lays down is that the Courts and Officers acting

under the Regulation shall be guided in regard to their procedure by the principles of the Code of Criminal Procedure which are consistent with the provisions of the Regulation. They cannot enlarge their jurisdiction by reference to the provisions contained in the Criminal Procedure Code as doing so would not be consistent with the express provision of the Regulation. These observarions apply in particular to powers to hear and dispose of appeals and revision petitions.

[12] The learned Government Advocate does not claim that the Government have any right of appeal against the order of acquittal. He was conscious of this lacuna in the law as contained in the Regulation and has, therefore, tried to invoke the revisional jurisdiction of the Court under S. 28 of the Regulation and in the alternative under S. 439, Criminal P. C.

[13] We do not think it is open to this Court to interfere with an order of acquittal in revision either. Under S. 28 of the Regulation, this Court may call for the record of the proceedings of any subordinate officer and may reduce, enhance or cancel any sentence passed, or it may remand a case for re-trial, but it cannot pass any sentence not warranted by law. The powers given to the Court to enhance, reduce or cancel a sentence can only be exercised in cases which have ended in conviction. In some cases of conviction, it may be found necessary to order a retrial. This contingency is also provided for. The last clause indicates the maximum limit of sentence that may be imposed in a particular case. It is clear that like S. 26, this section also deals with cases of conviction only as distinguished from those of acquittal. This interpretation of the section is in consonance with the scheme of the Regulation. It does not give any right of appeal even to the Government against orders of acquittal. It would not be conceivable that, in these circumstances, it would permit anyone feeling aggrieved by the order to move the High Court for its reversal in the exercise of its revisional jurisdiction. It is for this reason that the revisional jurisdiction is as circumscribed as the appellate jurisdiction. The Court may draw on its revisional jurisdiction in cases of conviction where no appeal lies to it. But it has no power to pass any order or to give any direction, except such as affects the sentence or conviction. A sentence may be enhanced, reduced or cancelled; a conviction may be set aside and a retrial ordered. These are the only orders which can be passed under the section. There is thus no power in the High Court to set aside an order of acquittal under the section also.

[14] The revisional jurisdiction of the Court like its appellate jurisdiction has to be exercised within the limit set on it by the Regulation. The Court cannot utilise its powers of revision under S. 439, Criminal P. C. In the exercise of its revisional jurisdiction in cases tried under the Regulation, it shall no doubt be guided by such principles as are recognised by the Code of Criminal Procedure but the jurisdiction itself cannot be exceeded. Section 28 is exhaustive of the cases in which revisional jurisdiction may be exercised. It defines the limits of the revisional jurisdiction. Therefore the Court acting under it cannot pass any order not contemplated by it just as this Court cannot pass any order under S. 439, Criminal P. C., which is not expressly permitted by that section. The interpretation of S. 28 will be governed by exactly the same rules which have been applied in construing S. 26 and the result, therefore, cannot be different. In consequence it must be held that the revisional jurisdiction of the Court under the Regulation is as restricted as its appellate jurisdiction.

[15] The process of reasoning which has led to the above result indicates that this Court cannot have recourse to its revisional jurisdiction under the Code of Criminal Procedure when exercising jurisdiction in a case under the Regulation. Such a course of action would involve a clear contravention of the provisions of Ss. 28 and 32 of the Regulation. The High Court acting under S. 439, Criminal P. C., can set aside an order of acquittal as it is expressly authorised to exercise all its powers under S. 423, Criminal P. C., S. 423 empowers to it to set aside an order of acquittal. Clause 4 of S. 439, Criminal P. C., prohibits the conversion of an order of acquittal into one of conviction on revision in cases of acquittal. This power is expressly conferred on the High Court when acting under the Criminal Proceedure Code and one reason for this may be that an appeal against an order of acquittal, though expressly provided, can be preferred only by the Government. The revisional powers of this Court under S. 28 of the Regulation are very limited and contain no provision for interference with orders of acquittal and as stated above S. 32 of the Regulation affords no justification for extending the jurisdiction either appellate or revisional of the High Court. Such a course cannot be regarded as consistent with the Regulation. Section 439, Criminal P. C, therefore, cannot be utilised. It has no application to cases covered by the Regulation.

[16] The result of the foregoing discussion is that the order in question is not liable to interference either in appeal or in revision, even if it is found on examination to be wholly untenable. In the view of the law we take, it is not necessary to examine the merits of the order.

[17] In view of the interpretation we have placed on Ss. 26 and 28 of the Regulation it would appear that the Regulation is lacking in some essential provisions. The Officers entrusted with criminal jurisdiction under the Regulation are not bound by the provisions of the Criminal Procedure Code. They have to be guided merely by the principles behind the statutory directions. They, therefore, enjoy wide powers they are not hampered in their work by elaborate rules of procedure which though they may tend to prolong cases semetime are intended to help the Courts in getting at the truth. The chances of their coming to a decision leading to a miscarriage of justice and thus bringing the administration of justice into disrepute are immeasurably greater. The necessity of the Government having the right of appeal against order of acquittal is obvious. The absence of a specific provision to that effect does not appear to us to be deliberate or intentional. Similarly, we think that it was not contemplated that the highest authority under the Regulation should have such restricted powers of revision as are now vested in it. As the law stands now revisional jurisdiction is available only in cases which have ended in conviction. These, however, are matters for the Governor of the province to consider.

[18] For reasons given above, the petition is dismissed.

Thadani Ag. C. J.—I agree

V.R.B. *Petition dismissed.*

A. I. R. (37) 1950 Assam 47 *[C. N. 14.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Raja Bhairabendra Narayan Deb — Appellant v. *Kumar Punyenara Narayan Deb — Respondent.*

F. M. A. No. 121 of 1947, Decided on 15th July 1949, from order of Dist Judge, D/- 29th May 1947.

Civil P. C. (1908), O. 9, R. 8—Petition by respondent in pending suit — Objections put in by appellant — Presiding officer not present— Sheristadar directing that case be put up on certain date for orders — Direction not intimated to respondent — Respondent absent on such date—Petition dismissed for default — Order of dismissal held was illegal and could be reviewed — Civil P. C. (1908), O. 47, R. 1.

It cannot be held as a general rule that an order purporting to have been passed under O 9, R. 8 is not at all subject to review: A. I. R. (12) 1925 Bom. 521, *Expl.* [Para 7]

The respondent applied under S. 4, Bengal Regulation V (5) 1799, praying that security be taken from the appellant against whom a title suit was pending. On 23rd November 1946 objections against the petition were put in by the appellant The presiding officer of the Court not being present on that date his Sheristadar directed that the case be put up on 14th December in the presence of the parties' pleaders for orders. This direction was not intimated to the respondent who was not present that day. On 14th December the respondent and his counsel were absent. The petition was dismissed under O. 9, R. 8:

Held that the Sheristadar's direction not being the order of the Judge had no binding force. The respondent was therefore under no obligation to appear on 14th December when his petition was dismissed in default and, therefore, the petition could not be dismissed for default: A. I. R. (21) 1934 Lah. 984 and A. I. R. (23) 1936 Lah. 1000, *Rel. on.* [Para 8]

Held further that the order of dismissal for default being patently illegal, the illegality might well be regarded as mistake or error apparent on the face of the record and, therefore, could be reviewed. Even if the error be not regarded as apparent, it would certainly be a sufficient reason for review for the ground was undoubtedly analogous to a mistake or error apparent on the face of the record. But evidence bearing on the cause of nonapperance could not form a valid ground for review: A.I.R. (9) 1922 P. C. 112, *Foll.*; A.I.R. (12) 1925 Bom. 521, *Rel. on.* [Paras 11, 13 and 14]

Annotation : ('44-Com.), C. P. C., O. 9, R. 8, N. 3; O. 47, R. 1; N. 15 and 16a.

K. P. Mukherjee and B. C. Barua—for Appellant.

P. K. Gupta — for Respondent.

Ram Labhaya J.—This is an appeal from the order of the learned District Judge, A. V. D., dated 29th May 1947 by which he on review reversed his previous order dated 14th December 1946, dismissing in default a petition of Kumar Punyendra Narayan Deb, who is the respondent in this appeal.

[2] The respondent had applied under S. 4, Bengal Regulation, V [5] of 1799, praying that security be taken from Kumar Bhairabendra Narayan Deb, opposite party, (now appellant) against whom title Suit NO. 42 of 1940 was pending in the Court of the Subordinate Judge, Alipore.

[3] On 23rd November 1946 objections against the petition were put in by the appellant. The presiding officer of the Court (District Judge) was not present on that date. He was out on tour His Sheristadar noted the fact that objection petition supported by an affidavit had been put in by opposite party No. 1 and then directed that the case be put up on 14th December in the presence of the pleaders 'for orders.' Petitioner's counsel evidently was not present when this order was written. His presence is not noted.

[4] On 14th December petitioner and his counsel were absent. Opposite party No 1 only was present. The petition was dismissed under O. 9, R. 8, Civil P. C. On 25th February 1947, an aplication was put in on behalf of the petitioner for restoration of the proceedings The petition does not show whether it was under O. 9, R. 9 or under O. 47, R. 1, Civil P. C. In the body of the petition the order of 14th December dismissing the petition in default was challenged on the

ground that the petitioner was not bound to attend as there was no order from the Court for his appearance on that date. Besides this the petitioner alleged that there was sufficient cause for his non-appearance on that date, assuming that he was under an obligation to appear. The application for restoration was resisted.

[5] The learned District Judge held that the application for restoration treated as one under O. 9, R. 9 could not succeed. It was put in more than 30 days after the order and therefore it was time barred. He treated the petition as one under O. 47, R. 1 and found that there was sufficient cause for non appearance of the petitioner on 14th December. He also came to the conclusion that the order recorded by the Sheristadar on 23rd November was not binding on the petitioner and therefore he was not bound to attend on 14th December. On these findings he ordered the application to be restored. Opposite party No. 1 felt aggrieved by the order and has appealed to this Court.

[6] The learned counsel for the appellant contends that respondent's petition had been dismissed under O. 9, R. 8. Restoration was possible only under O. 9, R. 9 and O 47, R. 1 has absolutely no application to the facts of the case. He has relied on *Mahadeo Gavind* v. *Lakshminarayan*, 49 Bom. 839 : (A. I. R. (12) 1925 Bom. 521), in support of his contention. He has also urged that there was no valid ground for review and the Court below had no justification for considering whether there was sufficient cause for non-appearance on 14th December under O. 47, R. 1 as evidence bearing on this point could not be regarded as discovery of new and important matter or evidence within the meaning of O. 47, R. 1.

[7] The first contention raised by the learned counsel cannot prevail. It cannot be held as a general rule that an order purporting to have been passed under O. 9, R. 8 is not at all subject to review. No such proposition was laid down by their Lordships of the Bombay High Court in the case relied on by the learned counsel in support of his contention. In that case a suit was dismissed for plaintiff's default. He applied for its restoration to the file. The application was made one day too late. This delay was excused by the trial Court which ordered the suit to be restored. When excusing the delay, the trial Judge observed that it was open to him to treat the application as one for review and there would be no difficulty about limitation in that case. The learned Judges of the High Court (Bombay) held that the application was barred by time under O. 9, R. 9 and an application for review was not comptent in view of the decision of their Lordships of the Privy Council in *Chhajju Ram* v. *Neki*, 49 I. A. 144 : 3 Lah. 127: (A. I. R. (9) 1922 P. C. 112). They observed that

> "A plaintiff whose suit had been dismissed for want of appearance under O. 9, R. 8 has no remedy by way of review, because the grounds on which a review can be granted are specified in O 47, R. 1. The words "any other sufficient reason" in sub-s. (1) mean a reason sufficient on grounds at least analogous to those specified in the rule."

The cause for non-appearance could not be a sufficient reason within the meaning of O. 47, R. 1, nor could it be described as discovery of new and important matter or evidence or an error apparent on the face of the record. The order in that case was, therefore, held to be not open to review.

[8] This case is obviously distinguishable. The plaintiff was bound to appear and was admittedly absent. The order of dismissal of the suit for default was in these circumstances perfectly legal. Plaintiff could have the suit restored only on showing sufficient cause for his non-appearance. In the case before us the position is very different. On 23rd November the presiding officer of the Court was not present. His Sheristedar received objections from one of the opposite parties. The petitioner was not present. As the Judge was absent, he was not bound to appear. The petition could not have been dismissed in default that day. The Sheristadar's direction that the case be put up on 14th December in the presence of parties' pleaders for orders, not being the order of the Judge, had no binding force. It had not been intimated to the petitioner who was not admittedly present that day. He had no knowledge of the order and it was not binding on him. He was evidently under no obligation to appear on 14th December when his petition was dismissed in default. The provisions of O. 9, R. 8 were, therefore, applied to the case under a misapprehension of the law or of facts or of both. In law there was no default at all as the petitioner was not bound to attend. It follows that the petition could not be dismissed for default.

[9] This view finds support from *Hukumchand* v. *Mani Shibrat Dass*, A. I. R. (21) 1934 Lah. 984 : (155 I. C. 514) and also from *Ghulam Haidar* v. *Iqbal Nath*, A. I. R. (23) 1936 Lah. 1000 : (167 I. C. 520). In *Ghulam Haidar* v. *Iqbal Nath*, A. I. R. (23) 1936 Lah. 1000 : (167 I. C. 520), the order of the Reader had been signed by a Subordinate Judge who was not seized of the case. It was held that plaintiff was not bound to appear before the Judge when he fixed the next date of hearing and the suit, therefore, could not have been dismissed on his failure to appear on the next date.

[10] The learned counsel has not been able to show that the Sheristadar of the Court had any

authority to adjourn the case to a future date in the absence of the Judge. No such power has been delegated to the Sheristadar under the rules. Two things are, therefore, obvious. Plaintiff had no intimation that the case was to be put up for orders on 14th December. He was also not bound to appear on this date in the absence of any order from any competent authority. There was in these circumstances no default and O. 9, R. 8 had no application. Besides, it is also clear from the order of the Sheristadar that the case was to be put up in the presence of the parties' pleaders for orders of the Judge. The next date in the case viz., 14th December was therefore not for the hearing of the case. It was merely for taking orders of the Court. If the parties or any one of them did not appear on that date, another date should have been fixed and they should have been informed of this date. The Court should then have given orders as to the hearing of the matter in controversy or for taking such further steps that may have been considered necessary in the course of the proceedings. The order of dismissal of the petition in default, in these circumstances was illegal. Such an order may be reviewed if valid grounds for review exist. We have not been shown any authority against this view.

[11] The next question is whether there was any valid ground for the review of the order. It is obvious that the order was passed by some oversight. The learned Judge may not have noticed that the previous order was passed by his Sheristadar. He may not have realised that it had no binding force in law, as the order is petently illegal. The illegality may well be regarded as a mistake or error apparent on the face of the record.

[12] In *Natesa Naicker* v. *Sambanda Chettiar*, A. I. R. (28) 1941 Mad. 918 : (1941-2 M. L. J. 390), it was held that :

"When there is a legal position clearly established by a well-known authority and by some unfortunate oversight the Judge has gone palpably wrong by the omission of those concerned to draw his attention to the authority, it may in a proper case be a ground coming within the category of an error apparent on the face of the record."

[13] In this case, the petitioner and his counsel were not present on 23rd November. The obvious legal course for the Judge was to intimate to them the next date when the case was to come up for hearing instead of dismissing it in default. This was not done. The omission was inadvertent and the order of dismissal wrong. The learned Judge had no difficulty in realising this mistake and hastened to set aside his order on review. Even if the error be not regarded as apparent, it will certainly be a sufficient reason for review for the ground is undoubtedly analogous to a mistake or error apparent on the face of the record. All that their Lordships of the Privy Council laid down in *Chhajju Ram* v. *Neki*, A. I. R. (9) 1922 P. C. 112 : (3 Lah. 127) was that the expression "any other sufficient reason" should be interpreted as meaning a reason sufficient on grounds at least analogous to those specified in the Rule. One of the grounds on which review has been granted does certainly satisfy the requirements laid down by their Lordships of the Privy Council. The learned Judge, therefore, was fully justified in reviewing his order.

[14] It must, however, be remarked that the learned Judge was not justified in considering whether there was sufficient cause for non-appearance after treating the petition for revival of the case as one for review. As held by their Lordships of the Bombay High Court in *Mahadeo Govind* v. *Lakshminarayan*, 49 Bom. 839 : (A. I. R. (12) 1925 Bom. 521), evidence bearing on the cause for non-appearance could not form a valid ground for review. The order could be reviewed only on the basis discussed above.

[15] An objection was raised in the memo of appeal that the petition which was treated as one for review of the previous order did not conform to the requirements of the Civil Procedure Code inasmuch as it was not accompanied by a copy of the previous order. This objection has not been pressed at the hearing.

[16] For the reasons given above, the appeal must fail and is dismissed with costs.

Thadani Ag. C. J.— I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 49 *[C. N. 15.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Benoy Bhusan Chakravarty—*Petitioner* v. *Government of Assam*—*Opposite Party.*

Criminal Misc. No. 5 of 1949, Decided on 8th July 1949.

Public Safety — Assam Maintenance of Public Order Act, (V [5] of 1947), S. 4—Grounds furnished to detenu stating that detenu engaged himself to put communist directives into effect for political struggle and that he urged violent methods among labour classes—Ground held sufficient.

Where the grounds furnished to the detenu, inter alia, stated that he threatened public peace and tranquillity in a certain district by urging violent methods specially among the labour classes and that he professed communist ideology and had actively engaged himself to put communist directives into effect for a political struggle by bringing a revolution :

Held that these grounds were sufficient to enable the detenu to make a representation to the Provincial Government. [Para 2]

K. R. Barman, Senior Government Advocate —for the Government.

Judgment.— [Facts: This was a case of a detention under S. 2 (1) (a), Assam Maintenance of

Public Order Act, 1947. The grounds of detention furnished to the detenu were stated in these terms:

"(a) That you are an active member of the Communist Party of India in Lakhimpur District, the present aim and object of which is anti-Government activity subversive of law and order.

(b) That you threatened public peace and tranquillity in Lakhimpur District by urging violent methods specially among the labouring classes.

(c) That your activities, e. g., speeches at public meetings and demonstrations etc., are prejudicial to the public safety and the maintenance of public order in Lakhimpur District.

(d) That you profess Communist ideology and have actively engaged yourself to put Communist directives into effect for a 'political struggle' by bringing a revolution."

[2] In holding that the grouuds furnished were sufficient to enable the detenu to make a representation to the Provincial Government under S. 4 of the Act their Lordships observed as follows:] In the beginning of this year, a Division Bench of this Court consisting of Lodge C. J. (retired) and myself, had occasion to deal with grounds similar to the grounds which have been communicated to the petitioner in this case. In our judgment in that case *(Prafulla Ranjan Dhar* v. *The Government of Assam)*, we referred to the implications of the power of the Provincial Government to withhold facts which the Provincial Government considered as being against the public interest to disclose, and illustrated the implications of the power by an example. We do not wish to repeat what has been stated in that judgment. It is sufficient to say that the grounds (b) and (d) furnished to the petitioner are such as would have enabled the petitioner to make a representation to the Provincial Government.

[3] We are satisfied that the order of the Provincial Government, on the face of it, is a valid order made under the provisions of S. 2 (1) (a) of Act V [5] of 1947. We see no reason, therefore, to interfere in the order of detention passed against the petitioner. In our view, the petitioner has not been illegally detained. The petition is accordingly dismissed and the Rule discharged.

D.H. *Petition dismissed.*

A. I. R. (37) 1950 Assam 50 *[C. N. 16.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Bireswar Banerjee and another—*Appellants* v. *Sadhiram Atoi* — *Respondent.*

Second Appeal No. 2111 of 1947, Decided on 22nd July 1949.

Limitation Act (1908), S. 16, Arts. 138, 144 — Symbolical possession given to auction-purchaser — Auction-purchaser's suit for possession is governed by Art. 144 —Section 16 and Art. 138 are not applicable.

Symbolical possession, if given, even when actual possession should have been given under the law will interrupt the running of time and give a fresh start of limitation as against the judgment-debtor and his representative. The same principle will apply to the case of a defaulting proprietor whose land is sold for recovery of land revenue. The auction-purchaser will be in a position to sue for possession on the basis of his title by purchase within 12 years of the delivery of possession to him if the defaulting proprietor remains in adverse possession. Section 16 and Art. 138 do not apply to such a case. Both these provisions apply to the case of a purchaser at a sale in execution of a decree. They do not apply to the case of a plaintiff who has obtained possession, even though symbolical, in execution of his decree. The suit by the purchaser would be an ordinary suit for possession by the owner of the property whose title had become complete and effective by the confirmation of sale and delivery of symbolical possession. The proper article to apply to such a case would be Art. 144 : A. I. R. (33) 1946 Pat. 202 and A. I. R. (8) 1921 Cal. 385, *Rel. on* ; *Case law referred.* [Paras 7, 12 and 13]

Annotation : ('42-Com.) Limitation Act, S. 16, N. 1, Pt. 1; Art. 138, N. 8, Pts. 1, 2; Art. 144, N. 65.

M. N. Roy and J. C. Sen —for Appellants.

J. N. Borah —for Respondent.

Ram Labhaya J.—The facts leading to this appeal are these. Some land measuring 5 B. 3 K. 5 Ls. belonged to the defendant. The land was sold for recovery of arrears of land revenue. At the revenue auction sale, it was purchased by one Kunja Babu. He died. The plaintiffs are the executors under his will and are managing the estate. They instituted the suit, out of which this appeal has arisen, originally for possession of 3 kathas situated towards the south-western side of the plots purchased at the auction sale by Kunja Babu.

[2] The defendant resisted the claim. He pleaded that the land in suit had not been purchased by Kunja Babu as alleged in the plaint. It was also contended that the suit was barred by limitation both under Arts. 142 and 144, Limitation Act.

[3] A Survey Commissioner was sent for local investigation. He had to find out the exact area in possession of the defendant. He reported that he was in possession of 3 K. 1 L. and not 3 katha only as plaintiffs had alleged. During the course of this investigation, defendant claimed that he was also in possession of 2 vacant plots measuring 3 K. 8 Ls. adjoining the bustee land to which the suit related. These plots were also included in the land purchased by Kunja Babu at the auction sale.

[4] In consequence of the Commissioner's report, the plaint had to be amended. The result of the amendent was that plaintiffs claimed 3 K. 1 L. of bustee land found to be in defendant's possession by the Survey Commissioner. They also included in the claim the two vacant plots measuring 3 K. 8 Ls. on the ground that defendant's claim to the possession of these vacant

plots after the institution of their suit amounted to their ouster. The two vacant plots are shown in Sch. Ga attached to the amended plaint.

[5] The sale of the land auctioned, of which the lands in suit form part was confirmed on 24th January 1930. The possession was delivered to the auction purchaser on 6th February 1930. This possession was symbolical. The defendant instituted a civil suit on 9th January 1931 for having the revenue sale set aside. This suit went up to the High Court and was finally decided on 10th March 1942. The sale was not set aside. The present suit was instituted on 7th March 1945, more than 12 years after the delivery of possession to the auction purchaser, whose estate the plaintiffs represent. The plaintiffs claim that the sale, though confirmed on 24th January 1930, was subject to the result of the suit subsequently instituted by the defendant and the sale, therefore, became final on 10th March 1942, and plaintiffs were entitled to a deduction of the time spent in the litigation which defendant commenced in 1931 and was terminated by the order of the Calcutta High Court on 10th March 1942.

[6] The learned Special Subordinate Judge, A. V. D. heard the suit. He found that symbolical possession had been delivered to the auction purchaser. Section 16, Limitation Act therefore could not apply to the case. Article 138, Limitation Act similarly had no application. Finding further that defendant had remained in continuous possession of the bustee land for over 12 years he dismissed plaintiffs' suit with respect to this portion of the claim as barred by time under Art. 144, Limitation Act. Defendant's possession was held adverse from the day symbolical possession was delivered to the auction purchaser. As regards the two vacant plots described in Sch. Ga, the finding was that defendant tried to take possession of these plots after the institution of the suit by the plaintiffs. This portion of the claim was, therefore, decreed. In coming to the conclusion that Art. 144, Limitation Act applied to the case and not Art. 138, the learned Judge relied on *Brojendra Kumar* v. *Ashutosh Roy*, 26 C. W. N. 364 : (A. I. R. (8) 1921 Cal. 385) and *Bal Gobind Prasad* v. *Lila Kuer*, A. I. R. (33) 1946 Pat. 202 : (24 Pat. 717). This order of the trial Judge was affirmed in appeal. Plaintiffs' appeal with regard to the bustee lands and defendant's cross-objections as regards the two vacant plots were dismissed. Plaintiffs have again applealed to this Court so far as the bustee lands are concerned, and defendant has put in cross-objection in respect of the vacant plots regarding which the suit has been decreed.

[7] The learned counsel for plaintiff appellants had tried to place the case under Art. 138, Limitation Act. He has also claimed that the period of time taken by the suit instituted by the defendant should be excluded from computation under S. 16 of the Act. Both Art. 138 and S. 16 of the Act do not apply in terms to this case. Article 138 covers suits by a purchaser at a sale in execution of a decree when the judgment-debtor was in possession at the date of sale. It allows a period of 12 years to be computed from the date on which the sale becomes absolute. If a suit is covered by this Article, any period of time during which a proceeding to set aside a sale was being prosecuted is to be excluded when computing the period of limitation for the suit under S. 16. Both these provisions of the Limitation Act apply to the case of a purchaser at a sale in execution of a decree. They do not apply to the case of a plaintiff who has obtained possession, even though symbolical, in execution of his decree. These provisions were interpreted in *Bal Gobind Prasad* v. *Lila Kuer*, A. I. R. (33) 1946 Pat. 202 : (24 Pat. 717). It was held that S. 16 could help an auction purchaser only when he had not obtained possession through Court. Where a plaintiff has obtained symbolical possession he cannot avail of the provisions contained in S. 16. Similarly, Art. 138 will have no application as the suit by such a plaintiff would not be by an auction-purchaser. It would be an ordinary suit for possession by the owner of the property whose title had become complete and effective by the confirmation of the sale and delivery of symbolical possession. It was further held that the possession of the judgment-debtor becomes adverse from the date of the delivery of symbolical possession and a suit against him, if brought more than 12 years after that date, would be barred by Art. 144.

[8] The same view was taken in *Brojendra Kumar* v. *Ashutosh Roy*, 26 C. W. N. 364 (A. I. R. (8) 1921 Cal. 385), where the learned Judges of the Calcutta High Court held that after symbolical possession has been delivered, Art. 138 can have no application and that the proper article to apply to such a case would be Art. 144, Limitation Act.

[9] The two provisions of the Limitation Act considered in the Patna and Calcutta cases referred to above do not in terms apply to the present case as said above. They apply only to a suit for possession by a purchaser at a sale in execution of a decree. The sale in this case was for recovery of arrears of land revenue under the Assam Land and Revenue Regulation. In spite of this, the principle enunciated in the two cases was applied to sales for arrears of land revenue in *Baikuntha Nath* v. *Sh. Azidulla*, 32 C. W. N. 778 : (A. I. R. (15) 1928 Cal. 870). It was held by a Division Bench of the Calcutta

High Court that a purchaser at a sale for arrears of revenue under S. 70, Assam Land and Revenue Regulation is entitled to sue the defaulting proprietors for recovery of possession within twelve years from the date of delivery of symbolical possession to him, and that the article of the Limitation Act applicable to such suits was either 142 or 144.

[10] The learned counsel for the plaintiffs does not dispute the correctness of this view. He, however, urges that these authorities are all distinguishable. The distinction pointed out is that though symbolical possession was delivered to the predecessor-in-interest of the plaintiffs, the delivery of symbolical possession was not according to law. In this case the defaulting proprietor was in possession of at least a part of the property in suit. Actual possession of this property could have been delivered. Where the law requires that actual possession should be delivered, the delivery of symbolical possession has no legal effect and therefore the period of limitation would not start from the date on which symbolical possession was delivered. It would only commence when the sale became final. This, according to him, happened in 1942 when the defendant's suit for getting the sale annulled was finally dismissed. In support of his contention he has relied on *Jang Bahadur Singh* v. *Hanumant Singh*, 43 ALL. 520 : (A. I. R. (8) 1921 ALL. 9 F. B.). A Full Bench of the Allahabad High Court held in the case that the delivery of possession in that case was not in the manner required by law and therefore the mere fact of formal delivery of possession was not available to the plaintiff for saving the operation of limitation. Another case relied on by him in this connexion is a decision from the Bombay High Court reported in *Krishnaji* v. *Gajanan*, 36 Bom. 373 : (2 I. C. 489).

[11] The learned counsel concedes that there is an acute divergence of judicial opinion on this point and there are authorities against this view from other High Courts.

[12] Actually there is a preponderance of authority against this view. The general trend of opinion seems to be that symolic possession, if given, even when actual possession should have been given under the law, will interrupt the running of time and give a fresh start of limitation. The *ratio decidendi* has been that delivery of possession through Court should give fresh starting point of limitation as against the judgment-debtor who is a party to the proceedings, and is thus bound by it. According to this view, delivery of symbolical possession has the same effect in law as delivery of actual possession so far as the judgment-debtor is concerned. This view has found favour with the High Courts of Calcutta: *Bhulu Beg* v. *Jatindra Nath Sen*, A. I. R. (10) 1923 Cal. 138 : (77 I. C. 1035), Lahore *Surja* v. *Mul Chand*, A. I. R. (17) 1930 Lah. 823 : (126 I. C. 526), Madras: *Kamayya* v. *Mahalakshmi*, A. I. R. (14) 1927 Mad. 849 : (105 I. C. 243) and Patna: *Udai Nath Sahi Deo* v. *Sunderbans Koer*, A. I. R. (10) 1923 Pat. 76 : (24 Cr. L. J. 279).

[13] The weight of authority and of reason both is on the side of this view and we are in respectful agreement with it. Symbolical possession if delivered under the Civil Procedure Code, even though erroneously, should operate as actual possession against the judgment-debtor and his representatives. The same principle will apply to the case of a defaulting proprietor. If symbolical possession has been delivered, it will be as effective against him as if actual possession had been delivered. There will be a fresh start for the period of limitation and the purchaser will be in a position to sue for possession on the basis of his title by purchase to sue within 12 years of the delivery of possession to him if the defaulting proprietor remains in adverse possession.

[14] The distinction pointed out by the learned counsel for the plaintiff, therefore, does not avail and plaintiff now cannot claim that he is suing merely as an auction purchaser. In that capacity he got his sale certificate and also the delivery of possession. He is now suing on the basis of his title and his case, therefore, would be covered either by Art. 142 or Art. 144 as held in *Baikuntha Nath* v. *Sh. Azidulla*, 32 C. W. N. 778 : (A. I. R. (15) 1928 Cal. 870).

[15] In this view of the law, there will be no ground for interference with the orders of the Courts below. Defendant has admittedly continued in adverse possession from the date of the formal delivery of possession to the plaintiff so far as the bustee land is concerned. The suit, therefore, is time barred so far as this part of the claim is concerned. As regards the two vacant plots, it has been found concurrently by the Courts below that defendant tried to take possession of these plots after the institution of the suit. Plaintiff would be deemed to be in possession of these plots by reason of his title since the delivery of symbolical possession to him. His possession was disturbed after the institution of the suit according to the findings of the Courts below. His suit as regards this part would, therefore, be within time. The conclusion arrived at by the Courts below, therefore, is correct.

[16] We, therefore, dismiss both the appeal and the cross-objection. Parties shall bear their own costs in this Court.

Thadani Ag. C. J.—I agree.

D.H. *Appeal & cross-objection dismissed.*

A. I. R. (37) 1950 Assam 53 *[C. N. 17.]*

THADANI AND RAM LABHAYA JJ.

Aravinda Sarma and others — *Appellants* v. *Payodhar Barua and others*—*Respondents.*

Second Appeal No. 941 of 1944, Decided on 12th April 1949.

Civil P. C. (1908), O. 22, R. 3; O. 41, R. 4 —Joint and indivisible decree against all defendants — All defendants appealing—One of the appellants dying — No legal representatives brought on record — Appeal abates in its entirety — Order 41, R. 4 does not apply to such a case.

Where a decree is joint and indivisible and one of the appellants dies but his legal representatives are not impleaded, the abatement will not be limited to the deceased appellant alone. The appeal would abate in its entirety as on account of the absence of necessary parties, appellants against whom a joint decree was passed, cannot get any relief. Order 41, R. 4 applies to a properly constituted appeal. Where necessary parties are not impleaded or where by reason of the failure to bring legal representatives of a deceased appellant or respondent the appeal has become imperfectly constituted, O. 41, R. 4 cannot apply. O. 41, R. 4 does not qualify or override O. 22, R. 3 : *Case law referred.* [Paras 3 and 5]

Annotation : ('44-Com.) Civil P. C., O. 22, R. 3, N. 23, Pt. 2; O. 41, R. 4, N. 8.

M. N. Roy and K. R. Barooah —for Appellants.

J. N. Borah —for Respondents.

Ram Labhaya J.—This appeal arises out of a suit for declaration. The case for the plaintiff was that some land, which had been acquired by the Government, belonged to him and was in his possession. The compensation for this land amounting to Rs. 874 8-0 was held to be payable to defendants 1 to 7. On the date of the suit, the amount was still lying in Court. He, therefore, prayed for a declaration that he was entitled to the amount of compensation for the land in question. The suit was resisted by the defendants. The Sadar Munsiff, Gauhati, decreed the claim. On appeal, the amount declared due to the plaintiff by the decree of the trial Court, was reduced. Defendants 1 to 7 have appealed to this Court.

[2] During the pendency of the appeal in this Court, Chandinath Deb one of the appellants died. His legal representatives were not brought on the record within the time allowed by law. The appeal, therefore, automatically abated so far as the deceased was concerned. It is now contended by the learned counsel for the respondents that the appeal should be taken to have abated as a whole, as in the absence of legal representatives of the deceased appellant, the appeal is imperfectly constituted.

[3] It is clear from the plaint that the cause of action against the defendants was joint and indivisible. A declaration against all 7 defendants was prayed for. Till the date of the institution of the suit, defendants had not received, jointly or individually, any money from the Court. A joint declaration against all the defendants that the plaintiff was entitled to the whole of the amount claimed by them in acquisition proceedings was enough. Defendants resisted the suit on the same basis. The decree that was passed was joint and indivisible even though during the pendency of the suit the amount in question had been paid to the defendants. The decree passed by the lower appellate Court was also joint and indivisible. The modification was only in respect of the amount. Separate interest or the separate liability of different defendants was not indicated. The extent of their separate liability was never ascertained. It was not necessary for granting appellant the declaration sought for. It is not ascertainable now in the absence of any material on the record. Where a decree is joint and indivisible as in this case, one of the appellants dies and his legal representatives are not impleaded, the abatement will not be limited to the deceased appellant alone. The appeal would abate in its entirety as, on account of the absence of necessary parties, appellants against whom a joint decree was passed, cannot get any relief. Rule 3 of O. 22, Civil P. C., applies to appeals. By virtue of this rule, if one of two or more appellants dies and the right to sue does not survive to the surviving appellants or appellants alone and no application is made for substitution of legal representatives, the appeal abates so far as the deceased appellant is concerned. In this case, one of the appellants died. The right to sue did not survive to the surviving appellants. It was necessary, therefore, to implead the representatives of the deceased appellant. They have admittedly not been brought on the record. The consequence is that the appeal has abated against him. The decree being joint and indivisible, the appeal is imperfectly constituted in the absence of the legal representatives of the deceased appellant who are necessary parties to the appeal. The surviving appellants alone cannot urge that the decree be set aside so far as they are concerned, or to the extent of their shares in the money in dispute. Their share is unascertained and is unascertainable. Beside, if such a contention were to succeed, there will be two conflicting decrees. In these circumstances, the abatement of the appeal would be entire and not parital.

[4] This view of the law finds ample support from authority, vide : *Chunilal Tulsi Ram* v. *Aminchand*, A. I. R. (20) 1933 Lah. 356 (2) : (14 Lah. 543), *Pir Bakhsh* v. *Kidar Nath*, A. I. R. (22) 1935 Lah. 478 : (155 I. C. 610), *Rameshwar Singh* v. *Ramcharan*, A. I. R. (19) 1932 Pat. 327 : (11 Pat. 538), *Ghulam Mohd. Syed Khan* v. *Sherdil Khan*, A. I. R. (29) 1942 Sind 167 : (I. L. R.

(1942) Kar. 435). In fact there is a general consensus of authority on the point that where a necessary party is not before the Court by reason of abatement, the suit or appeal as the case may be shall abate as a whole. The learned counsel for the appellants has not seriously questioned the correctness of this view. He has, however, tried to get over the difficulty by raising another contention. He argues that the decree against the appellants proceeds on a basis common to all and should be set aside under O. 41, R. 4, Civil P. C. The death of one the deceased appellant does not prevent the Court from taking action under O. 41, R. 4. The decree can be set aside in its entirety. There will be no question of conflicting decrees nor will it be necessary to ascertain the shares of different appellants.

[5] There is considerable divergence of judicial authority on this point. We have given the question our careful consideration. We do not think that O. 22, R 3 is qualified by O. 41, R. 4. Rule 3 of O. 22 provides that in the case of a death of a plaintiff or appellant, the suit or appeal shall abate if his legal representatives are not brought on the record and the right does not survive to the surviving plaintiffs or appellants. The effect of abatement is that the suit or appeal so far as the deceased is concerned stands dismissed. The other side thereby secures a valuable right. In these circumstances, if acting under O. 41, R. 4 the Court sets aside the decree even against a deceased appellant, it is for all practical purposes, setting aside a decree which has become final by reason of the abatement of the appeal so far as the deceased appellant is concerned. This does not seem to have been contemplated by O. 41, R. 4. The language of O. 41, R. 4 suggests that it can apply where plaintiffs or defendants are alive at the time when the decree of the appellate Court is passed. There is nothing in it which would support the view that the Court acting under this provision could set aside a decree which became final by abatement after it was passed. In such case, the Court would be granting relief to representatives who are not before it or to a dead person. It will also be depriving the other party of a right, which it has secured during the pendency of the appeal by reason of abatement, which undoubtedly would take place if legal representatives are not substituted. In fact, one may go further and state that O. 41, R. 4 applies to a properly constituted appeal. Where necessary parties are not impleaded or where by reason of the failure to bring legal representatives of a deceased appellant or respondent, the appeal has become imperfectly constituted, O. 41, R. 4 cannot apply. The case law on the point was fully reviewed in the Full Bench case reported in *Ram Phal Sahu* v. *Satdeo Jha*, A. I. R. (27) 1940 Pat. 346 : (19 Pat. 870). It was held by the learned Judges constituting the Full Bench that by reason of provisions of Rr. 3 and 11 of O. 22, the appeal in so far as it concerns the deceased appellant abates and if the abatement is not set aside in course of time, the matter becomes final as against the deceased appellant. There is nothing in O. 41, R. 4 which permits the Court to disturb the finality of the decree as against the deceased appellant. The same view was taken by a Division Bench of the Sind Chief Court. Vide *Ghulam Mohd. Syed Khan* v. *Sherdil Khan*, A. I. R. (29) 1942 Sind 157: (I.L.R. (1942) Kar. 435). We are in respectful agreement with the view expressed in these cases and, following these authorities, hold that an appellate Court has no power to proceed with the hearing of an appeal and to reverse or vary the decree in favour of the plaintiffs or defendants under O. 41, R. 4, if all the plaintiffs or defendants appeal from the decree, and one of them dies and no substitution is effected within time. Order 41, R. 4 does not qualify or override O. 22, R. 3. A joint decree against all the defendants, therefore, cannot be set aside at the instance of appellants who are alive, under O. 41, R. 4.

[6] In the view of the law that we take, this appeal abates in its entirety and is, therefore, dismissed. We shall leave the parties to bear their own costs in this Court.

Thadani J.—I agree.

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 54 *[C. N. 18.]*

RAM LABHAYA J.

Joygnoram Patwa and others— *Appellants* v. *Dayaram Das and others*—*Respondents.*

Second Appeal No. 505 of 1944, Decided on 5th May 1949.

Civil P. C. (1908), O. 22, R. 3 — Order 22, R. 3 is not qualified by O. 41, R. 4—Civil P. C. (1908), O. 41, R. 4.

Order 22, R. 3 is not qualified by O. 41, R. 4 which can apply only to a properly constituted appeal. Where one of the necessary parties to the appeal is not before the Court, the provisions of O. 41, R. 4 cannot be invoked : A. I. R. (37) 1950 Assam 53 ; A. I. R. (27) 1940 Pat. 346 (F. B.) and A. I. R. (29) 1942 Sind 157, *Rel. on.* [Para 1]

Annotation : ('44 Com.) Civil P. C. O. 22, R. 3 N. 23 Pt. 5; O. 41, R. 4 N. 8.

B. C. Barua—for Appellants.

Sarat Chandra Das—for Respondents.

Judgment.—This appeal arises out of a suit for specific performance of a contract of sale. The claim was decreed in the Courts below. The learned trial Judge directed defendants 6 and 7

to execute a sale deed in favour of the plaintiff after the balance of the money due from him had been deposited in Court. In appeal the learned Judge modified the decree of the trial Court and while decreeing plaintiff's claim to the specific performance of the contract of sale directed that on plaintiff's depositing the balance of the money due from him by the due date defendants 1, 2, 3 and 4 shall execute a deed of sale within a month of the deposit and withdraw the money, the question of adjustment of dues between defendants 1-4 and defendants 6-7 was left open. Three out of the defendants appealed from the decree. Jitram defendant 2 died during the pendency of the appeal. His legal representatives were not brought on the record within the period allowed by the law of limitation. His appeal has abated. An application for setting aside the abatement was made, but this was disallowed. It is not (*sic*) contended on behalf of the plaintiff-respondent that the appeal has abated in its entirety. It is clear that the decree was against defendants 1 to 4. It was joint and indivisible. It directed all the four defendants to execute a sale deed on plaintiff depositing the balance viz., Rs. 114-9-0. In these circumstances the appeal cannot be heard in the absence of one of the necessary parties to the appeal. Mr. Barua on behalf of the defendant-appellants contends that the decree is no doubt joint and indivisible but it is open to the Court under O. 41, R. 4 to set aside the decree as it proceeds on a ground common to all the defendants. The decree he urges could be reversed in favour of all the defendants at the instance of any one of them. The contention raised has been considered by a Division Bench of this Court in *Aravinda Sarma* v. *Payodhar Barua*, S. A. No. 941 of 1944 : (A.I.R. (37) 1950 Assam 53) It was held that O. 22, R. 8 was not qualified by O. 41, R. 4 which could only apply to a properly constituted appeal. Where one of the necessary parties to the appeal was not before the Court, the provisions of O. 41, R. 4 could not be invoked. This view was based on a Full Bench case from the Patna High Court reported in *Ramphal Sahu* v. *Satdeo Jha*, A. I. R. (27) 1940 Pat. 346 : (19 Pat. 870 F. B.) and a Division Bench Court of the Sind Chief Court reported in *Ghulam Mahomed* v. *Sher Din Khan*, A. I. R. (29) 1942 Sind 157 : (I. L. R. (1942) Kar. 435). The judgment in the case decided by this Court was delivered by me and I am still of the view taken in that case. Order 41, R. 4, therefore, does not avail the appellants.

[2] The learned counsel concedes that if the decree could not be set aside at the instance of appellants, who are alive, it being joint and indivisible, the abatement would be entire and total. In these circumstances I hold that the appeal has abated and is dismissed.

[3] I make no order as to costs in this Court.

G.M.J. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 55 *[C. N. 19.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Premeswar Das — *Appellant* v. *Madhab Chandra Das and others* — *Respondents.*

A. A. D. No. 2080 of 1945, Decided on 8th April 1949.

Limitation Act (1908), Art. 142 — Plaintiff alleging permissive character of defendant's possession but failing to prove — Plaintiff in order to succeed has to prove title and possession within 12 years — Art. 142 applies — Defendant not required to prove adverse possession if plaintiff's subsisting title not proved.

A plaintiff out of possession cannot succeed in a suit for possession without proof of a subsisting title. It would not be enough to prove that plaintiff had title 15 or 20 years before suit. A subsisting title would involve proof of title in addition to possession within 12 years. If, therefore, a plaintiff bases his case on the permissive character of defendant's possession and fails to prove it, he may succeed if his title and possession within 12 years have been proved. It is only on proof of subsisting title that a defendant can be called upon to prove his adverse possession. It would not be necessary to go into the question of defendant's adverse possession if plaintiff has not proved his subsisting title in the suit property. Article 142 covers cases of actual and constructive possession and dispossession. A person can remain in possession of the property through a licensee or a tenant. He is not in actual possession but his possession in law is there. Such a person can certainly be dispossessed and his dispossession in such a case would occur immediately his title is repudiated. There is no reason why Art. 142 should not apply to such a case: A. I. R. (27) 1940 Mad. 798 (F. B.) and A. I. R. (22) 1935 Lah. 475 (F. B), *Rel. on.* [Paras 7 and 8]

Annotation : ('42-Com.), Lim. Act, Arts. 142 and 144, N. 2 and 5.

S. K. Ghose and Purnendu Chaudhuri — for Appellant.

D. N. Medhi and Bipin Behari Das — for Respondents.

Ram Labhaya J. — This appeal arises out of a suit for a declaration of title and khas possession. Plaintiff purchased the land in dispute by a sale deed, Ex. 1, dated 30th July 1917. To the south and west of this land was Maheswar's land. Maheswar was the father-in law of the defedant in the case.

[2] Plaintiff averred that defendant came into possession of the land by his permission some 5 years before suit on condition that he would vacate the land when plaintiff required it. Some three months before suit, a notice to quit was served on the defendant. He refused to quit setting up a title in himself.

[3] The defence was that defendant had acquired title by adverse possession against the true

owner. He had entered the land without any arrangement with the plaintiff and in the belief that the land was Sarkari khas. The Sadar Munsiff of Gauhati held that plaintiff had failed to substantiate his pleas that defendant entered on the lands with his permission and was a licensee for a period of five years before suit, that he repudiated his title only when he was asked by notice to deliver possession of the land. He further held that in view of the allegations made in the plaint, it was for the plaintiff not only to prove title but his possession within 12 years before suit. This also he could not prove. The plea of the defendant that he had been in adverse possession for over 12 years was also considered and the finding arrived at was in his favour. As a result of these findings, the suit was dismissed. On appeal the order was affirmed by the District Judge, A.V.D. Plaintiff has appealed to this Court.

[4] The learned counsel for the plaintiff contends that plaintiff could succeed on proof of his title without proving that defendant occupied the land as a licensee within 12 years of the suit, unless defendant could prove that his possession was adverse, for a period of 12 years. His grievance is that the Courts below have approached the case from a wrong view-point. The view taken by them was that the allegations in the plaint and the proved facts of the case attracted the application of Art. 142 and finding that plaintiff was not in possession within 12 years, they came to the conclusion that defendant's possession was adverse. He urged that whether plaintiff was in possession or not, he was undoubtedly the owner of the land. He purchased it by a registered deed in 1917 and defendant, even if in possession, could non-suit the plaintiff only on proof of his adverse possession. The correctness of the finding of the Courts below on the question of defendant's adverse possession was challenged.

[5] The decision of the case turns on the question whether Art. 142, Limitation Act governs the case or it is Art. 144. Article 144 is a residuary article and can be invoked only if no other article applies to the case. It is, therefore, to be seen whether Art. 142, on which reliance is placed by the defendant, has been rightly applied to this case by the Courts below.

[6] The question is by no means free from difficulty. There is divergence of judicial opinion on it. A Full Bench of the Madras High Court reported in *Official Receiver of East Godavari* v. *Govinda Raju*, A. I. R (27) 1940 Mad. 798 : (I. L. R (1940) Mad. 953 F. B), had to consider this question. Horwill J. before whom the case came up for disposal first, in his order of reference formulated the question in these words:

"Whether in a case where a plaintiff sets up a case of permissive possession and fails to prove it, the burden then lies upon the plaintiff to prove that he was in possession within 12 years of suit or whether the onus is upon the defendant to prove adverse possession for a period of 12 years."

It is clear from the question referred to the Full Bench that the question involved in that case was the same as in the case before us. The Full Bench, after a careful consideration of the matter and relying on three Privy Council cases, *Mohima Chunder* v. *Mohesh Chunder*, 16 Cal. 473 : (16 I. A. 23 P. C); *Mohd. Amanulla Khan* v. *Badan Singh*, 17 Cal. 137 : (16 I. A. 148 P.C.) and *Dharani Kanta* v. *Gabar Ali*, 18 I. C. 17: (17 C. L. J. 277 P. C.) held that it was wrong to say that a person who could prove title in a suit for ejectment had the right to a decree unless defendant proved adverse possession for 12 years. The plaintiff could succeed only if he could say in addition to his title that he had been in possession of the property within 12 years of the suit. The burden lies upon the plaintiff to prove that he was in possession within 12 years of the suit. The onus is not upon the defendant to prove adverse possession for a period of 12 years. Two previous decisions of the Madras High Court were overruled.

[7] An unproved allegation that defendant was a tenant or say, a licensee was not considered sufficient to shift the onus to the defendant. The reason for the view is obvious. If a person, who is out of possession, can shift the burden of proving adverse possession to the defendant by simply alleging without being under any obligation to prove his allegation that defendant is a tenant or a licensee, the device would be resorted by all persons who are out of possession. A plaintiff out of possession cannot succeed in a suit for possession without proof of title. This title which he must prove is not title anterior to the suit. It would not be enough to prove that plaintiff had title say 15 or 20 years before suit. It should be a subsisting title. A subsisting title would involve proof of title in addition to possession within 12 years. If, therefore, a plaintiff bases the case on the permissive character of his defendants' possession and fails to prove it, he may succeed if his title and possession within 12 years have been proved. It is only on proof of subsisting title that a defendant can be called upon to prove his adverse possession. It would not be necessary to go into the question of defendant's adverse possession if plaintiff has not proved his subsisting title in the suit property. The view of the learned Judges of the Madras High Court is founded on three important pronouncements from their Lordships of the Privy Council and we are in respectful agreement with it.

[8] A Full Bench of the Lahore High Court also came to the same conclusion in *Behari Lal* v. *Narain Das*, A. I. R. (22) 1935 Lah. 475 : (16 Lah. 442 F. B.). In that case, the plaintiffs sued for possession of the property alleging that they were the owners of the house in dispute and that they had given the same on lease to Nabi Bakhsh defendant 2 in 1927, and subsequently Nabi Bakhsh had given a sub-lease to defendant 1, that thereafter they had sued Nabi Bakhsh and defendant 1 for rent and defendant 1 had denied their title and also denied that he was a tenant under Nabi Bakhsh. In other words, the case of the plaintiffs was that the contesting defendant was a sub-tenant and he denied their title sometime before suit. On these facts, it was held that plaintiff's case was governed by Art. 142 and not Art. 144. The plaintiff's averments were held to imply a plea of possession and dispossession. It was not considered necessary that possession and dispossession be pleaded in express terms. Allegations of fact, from which that inference of possession and dispossession could be drawn, were considered enough for attracting the applicability of Art. 142. The view of the learned Judges was that when plaintiffs alleged that defendants were tenants, they were pleading their possession through the tenants and when they stated that their title was denied by those who were in permissive possession, the allegation amounted to a plea of dispossession. The reason for the view was that dispossession could be actual in the sense of existing actual possession being forcibly terminated by actual dispossession, and it could also be a legal constructive possession terminated by legal dispossession. In other words, it was held that Art. 142 covered cases of actual and constructive possession and dispossession. The result arrived at was the same as in the Full Bench case of the Madras High Court, though the process of reasoning is different. A person can remain in possession of the property through a licensee or a tenant. He is not in actual possession but his possession in law is there. Such a person can certainly be dispossessed and his dispossession in such a case would occur immediately his title is repudiated. There is no reason why Art. 142 should not apply to a case like this as held by the learned Judges of the Lahore High Court. In this view of the matter, the plaint in the present case would by necessary implication contain the allegations of possession and dispossession.

[9] Following the Full Bench decisions referred to above, we hold that on the pleadings and also on the proved facts of the case, Art. 142 applies to facts of this case and plaintiff could succeed only on proving that defendant was in permissive possession for about 5 years before suit as alleged by him or on proof of his possession within 12 years. There is no dispute that plaintiff acquired title to the property in 1917. But so far as possession within 12 years of the suit is concerned, the Courts below are clear and emphatic in their finding that this has not been proved. Defendant, it has been held, came in possession of the property more than 12 years before suit. He did not come in as a licensee. Plaintiff thus was not in possession at any time within 12 years before suit. The finding of the Courts below on the point is not open to question and it has not been seriously disputed. In these circumstances it is not necessary to consider whether defendant has succeeded in showing that his possession was adverse for a period of 12 years. That question does not arise and is not necessary for the disposal of the case.

[10] The appeal, in the circumstances, fails and is dismissed with costs.

Thadani Ag. C. J.— I agree.

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 57 *[C. N. 20.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Rosmat Ali and others — *Appellants* v. *Bigaru Mandal and others* — *Respondents.*

Second Appeal No. 1134 of 1947, Decided on 5th August 1949.

Limitation Act (1908), Art. 142—Applicability — Suit for possession—Plaintiff found dispossessed or discontinued in possession — Onus of proof—Burden to show that suit was brought within 12 years of such dispossession is on plaintiff—Failure to discharge burden - Suit is to be dismissed under Art. 142.

Where a plaintiff, in a suit for possession has been found to have been dispossessed or has discontinued possession on a certain date, the burden lies on him to prove that the suit was brought by him within 12 years of that date, and upon his failure to discharge the burden, his suit is liable to be dismissed by reason of Art. 142 : *Case law referred.* [Para 9]

Annotation : ('42 Com.) Lim. Act, Arts. 142 and 144 N. 2, 9.

J. N. Borah — for Appellants,

B. N. Deka — for Respondents.

Judgment. — On 17th February 1949, we remanded this appeal to the lower appellate Court to record its findings on the following two issues without taking any further evidence and to submit its findings within 4 weeks from the receipt of the records : (1) whether the plaintiff-appellants were in possession of the property in suit within 12 years of the institution of the present suit ? (2) Whether the defendant-respondent, Bigaru, had perfected his title by reason of adverse possession for the statutory period ? The finding on the first issue is that the plaintiffs-appellants were not in possession of

the property in suit within 12 years of the institution of the suit.

[2] On the 2nd issue, the finding of the lower appellate Court is that the defendant—respondent has not perfected his title by adverse possession for the statutory period.

[3] The date of dispossession alleged in the plaint was 15th Magh 1349, B. S. The lower appellate Court, however, did not accept the date of dispossession as given by the appellant. It held that the appellant was dispossessed or discontinued to be in possession in 1928 or 1929. The present suit was instituted in 1944. It appears that the appellants' advocate had urged before the lower appellate Court that assuming the appellants' possession was not actual physical possession, nevertheless such possession as they had was sufficient to take the suit out of the operation of Art. 142, Limitation Act. The lower appellate Court did not agree with this contention; it took the view that having regard to the nature of the lands in suit, the appellants were bound to prove actual possession by user and enjoyment.

[4] Mr. Borah who appeared for the appellants before us did not challenge the finding of the lower appellate Court on the first issue. His contention is that having regard to the fact that the plaintiffs sued for possession, basing their case upon title, the proper article applicable to the case was Art. 144, and not Art. 142, Limitatation Act, that the finding of the trial Court on Issue 2 being against the respondent, the appellants were entitled to a decree.

[5] In support of his contention, Mr. Borah has referred us to certain decisions reported in *Kallan* v. *Mohammad Nadi Khan*, 55 ALL. 209 : (A. I. R. (20) 1933 ALL. 775); *Jauhair* v. *Tunday*, 54 ALL 975 at p. 984:(A. I. R. (20) 1933 ALL. 21); *Jonab Sheikh* v. *Surya Kant*, 33 Cal. 821:(10 C.W.N. 1081); *Protap Chandra* v. *Durga Charan*, 9 C. W. N. 1061; *Nageshwar Bux* v. *Bengal Coal Co*, 35 C. W. N. 265 : (A. I. R (18) 1931 P. C. 186) and *Secy. of State* v. *Chelli Kani Rama Rao*, 39 Mad. 617 : (A. I. R. (3) 1916 P. C. 21), bearing upon the existence of conditions which attract the applicability of Art. 142 or 144. This aspect of the case has been epitomised by Rustomji in his Law of Limitation, Edn. 5, at p. 1403. The learned author says :

"On the supposed authority of *Secretary of State* v. *Chellikani Rama Rao*, 39 Mad. 617:(A. I. R. (3) 1916 P. C. 21) (which was a case falling definitely under Art. 144), it has been held in numerous cases that Art. 142 is confined to suits for possession based on a mere 'possessory title,' and that where the plaintiff sues for possession on the basis of his title (i.e. proprietary title) and on the ground of his possession having been disturbed by the defendant, i.e., where he sues as an owner to dispossess a trespasser, the case comes within Art. 144, and accordingly that when plaintiff's title is admitted or proved, the onus lies on the defendant to establish adverse possession for the statutory period. But this view is based on a misapprehension of the true effect of the Privy Council decision in *Secretary of State* v. *Chellikani Rama Rao*, 39 Mad. 617 : (A. I. R. (3) 1916 P. C. 21). In the earlier Privy Council cases (where Art. 142 was admittedly applied), the suits were brought on the basis of plaintiff's title, and their Lordships pointed out that it is not enough for the plaintiff in an action of ejectment (falling under Art. 142) to establish his title or his possession at some remote time, but that it is essential for him to prove that he was in possession within 12 years antecedent to the suit. (vide *Mohima Chunder* v. *Mohesh Chunder*, 16 Cal. 473 : (16 I. A. 23 P. C.), *Md. Amanulla Khan* v. *Badan Singh*, 17 Cal. 137 : (16 I.A. 148 P.C.); and *Dharani Kanta* v. *Gabar Ali*, 17 C. W. N. 389 : (18 I. A. 17 P. C.).)"

The learned auther goes on to say :

"It is submitted that the later decision of the Privy Council in *Secretary of State* v. *Chellikani Rama Rao*, 39 Mad. 617 : (A. I. R. (3) 1916 P. C. 21) is not in conflict with their Lordships' earlier pronouncements (vide *Bhindhyachal* v. *Ramgharib*, 57 All. 278: (A.I.R. (21) 1934 All. 993 F. B.)). Observations of the Indian High Courts founded on *Secretary of State* v. *Chellikani Rama Rao*, 39 Mad. 617 : (A. I. R. (3) 1916 P. C. 21)) that cases in which the plaintiff claims relief on the basis of his title, Art. 142 has no application, and that in all suits for possession of immovable property, as soon as plaintiff's title is either admitted or proved the burden of establishing adverse possession lies on or shifts to the defendant, or again that 'Art. 144 applies to all suits for possession based on plaintiff's title and to all cases where the plaintiff has proved his title,' are incautiously wide and apt to mislead. See *Bhindhyachal* v. *Ramgharib* 57 All. 278.(A. I. R. (21) 1934 All. 993 F. B.). The correct view is that Art. 144 (being only a residuary article) cannot apply to cases of dispossession which come properly under Art. 142 (see *Md. Amanulla Khan* v. *Badan Singh*, 17 Cal. 137 at p. 143 : (16 I. A. 148 P. C) and that the application of Art. 142 is not excluded (in such cases, i. e. of dispossession) merely because the plaintiff is suing on the basis of his title. Indeed, as the Privy Council have repeatedly pointed out in cases decided under Art. 142, in all actions of ejectment, it lies upon the plaintiff to prove his own title. It lies upon the plaintiff to prove not only a title as against the defendants to the possession, but to prove that the plaintiff had been dispossessed or had discontinued to be in possession of the lands within the 12 years immediately preceding the commencement of the suit (see *Mohimachunder* v. *Mohesh Chunder*, 16 Cal. 473 : (16 I. A. 23 P. C.)."

[6] In *Premeswar Das* v. *Madhub Chandra*, S. A. No. 2080 of 1945 : (A. I. R. (37) 1950 Assam 55) this Court had occasion to deal with this aspect of the case. In our judgment, we relied upon the decision of their Lordships of the Privy Council, to which we have referred, and to a decision of the Full Bench of the Lahore High Court, *Bihari Lal* v. *Narain Das*, A. I. R. (22) 1935 Lah. 475 : (16 Lah. 442 F. B.). So far as the facts of the present case are concerned, there is the definite allegation made by the plaintiff in the plaint that he was dispossessed on a certain date. The lower appellate Court came to the conclusion that the appellant was dispossessed, not on the date alleged by him but some 15 or

16 years before the institution of the suit. As we understand the judgment of the lower appellate Court, it has come to the conclusion that the appellants were dispossessed not only of their physical possession but also constructive possession.

[7] In *Bhindhyachal* v. *Ramgharib*, 57 ALL. 278 : A.I.R. (21) 1934 ALL. 993 F.B.), the question referred to the Full Bench was :

"Where a plaintiff, who was a cosharer with some of the defendants who transferred a part of the property to third parties, admits in the plaint that he was dispossessed by the transferees some time prior to the institution of the suit, Art. 142 and not Art. 144, Limitation Act applies to the suit."

Sulaiman C. J. delivering the judgment of the Full Bench, observed :

"There are no words in this article which would confine its applicability to suits based on possessory title only, or confine it to plaintiffs who claim the property wholly and are not cosharers or co owners with the defendants." "The burden of proving the date of the dispossession or discontinuance of possession under Art. 142 must be on the plaintiff who, in order to succeed, must show that the dispossession or discontinuance of possession was not prior to twelve years before the suit was filed."

The learned Chief Justice, referring to a decision of the Allahabad High Court in *Kanhaiya Lal* v. *Girwar*, 51 ALL. 1042 : (A.I.R. (16) 1929 ALL. 753) stated :

"In that case, no doubt the learned Judges expressed the opinion that this article is restricted to suits in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title. In my opinion, there is no justification for limiting the scope of this article to such suits only."

[8] Sulaiman C. J. then referred to the earlier decisions of the Privy Council in *Mohima Chunder* v. *Mohesh Chunder*, 16 Cal. 473 : (16 I. A. 23 P. C.) and *Md. Amanulla Khan* v. *Badan Singh*, 17 Cal. 137 : (16 I. A. 148 P. C.) and remarked that the decision of their Lordships of the Privy Council reported in these cases were not brought to the notice of the learned Judges who decided the case of *Kanhaiya Lal* v. *Girwar*, 51 ALL. 1042 : (A. I. R. (16) 1929 ALL. 753), and referred to another case of the Allahabad High Court in *Kallan* v. *Mahomed Nadi Khan*, 55 ALL. 209:(A.I.R. (20) 1933 ALL. 775), observing that

"the learned Judges themselves emphasised the fact on p. 215 that in the plaint the plaintiff did not allege that the plaintiff, while in possession, was dispossessed."

[9] We ourselves think that where a plaintiff has been found to have been dispossessed or has discontinued possession on a certain date, the burden lies on him to prove that the suit was brought by him within 12 years of that date, and upon his failure to discharge the burden, his suit is liable to be dismissed by reason of Art. 142, Limitation Act.

[10] The lower appellate Court has held in this case that the appellants were dispossessed more than 12 years before the institution of the suit. In this view, we think the appellants' suit was rightly dismissed as being time barred under Art. 142, Limitation Act. We accordingly confirm the judgment and decree of the lower appellate Court, dated 17th September 1946, and dismiss the appeal with costs.

V.B.B. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 59 *[C. N. 21.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Gopi Kanta Bhuiya — *Appellant* v. *Kalikanta Bhattacharjya and others* — *Respondents.*

Second Appeal No. 803 of 1947, Decided on 22nd July 1949.

(a) Civil P. C. (1908), O. 34, R. 7 (1) (c) (1) — Preliminary decree in redemption suit made final — *R*, mortgagee, purchasing mortgaged property in execution — *B*, subsequent mortgagee of part of property, suing for redemption of *R*'s mortgage — Preliminary decree passed — *B* depositing amount due to *R* as directed — Representatives of *R*, who died in meantime, executing release deed in favour of mortgagor — Deed stating that representatives had no rights left in property and that possession had been delivered to mortgagor — Deed produced in Court — Money deposited by *B* paid to representatives — Deed held reconveyed property to mortgagor and representatives of *R* could not claim full ownership of property or equity of redemption. [Para 31]

(b) Civil P. C. (1908), O. 34, R. 1 — Redemption suit against prior mortgagee — Puisne mortgagee impleaded but held to be not necessary party — Sale of property in favour of prior mortgagee — Rights of puisne mortgagee are not affected.

Where *B* the puisne mortgagee, was impleaded in the redemption suit against the prior mortgagee, but it was held that he was not a necessary party to the suit and he was again impleaded in execution proceedings and on his objection his name was struck off :

Held that the litigation culminating in the sale of the property in favour of the prior mortgagee did not affect the rights of *B* as a subsequent mortgagee. [Para 17]

Annotation : ('44-Com.) Civil P. C., O. 34, R. 1, N. 19.

(c) Transfer of Property Act (1882), S. 91 — Suit for sale by prior mortgagee — Puisne mortgagee not impleaded — Prior mortgagor purchasing property in execution — Puisne mortgagee has right to redeem mortgage — On redemption equity reverts to mortgagor *(Obiter)*.

Obiter : If a puisne mortgagee is not impleaded by a prior mortgagee in his suit for sale, he has the right to redeem the mortgage notwithstanding that the first mortgagee purchased the property in the execution of his decree for sale and on redemption by him the decree and the sale are vacated and the equity reverts to the mortgagor : A. I. R. (17) 1930 Pat. 570 and 25 All. 388 (F. B.), *Rel. on* ; 24 All. 185, *Expln.* [Para 25]

Annotation : ('45-Com.) T. P. Act, S. 91, N. 2, Pt. 5.

(d) Civil P. C. (1908), O. 34, R. 8 — Redemption by act of parties — Absence of final decree does not affect its validity.

The absence of a formal final decree does not affect the validity of redemption by act of parties on which the Court has set its seal of approval. [Para 32]

Annotation : ('44-Com.) Civil P. C., O. 34, R. 8, N. 3.

(e) Transfer of Property Act (1882), S. 43 – Prior mortgagee purchasing mortgaged property in execution of final decree in redemption suit — Puisne mortgagor suing for redemption of prior mortgage — Prior mortgagee ordered to reconvey property to mortgagor on deposit of redemption money by puisne mortgagee—Mortgagor executing sale deed of property before property was reconveyed to him —Subsequent acquisition of title by mortgagor — —Purchaser held could enforce sale deed.

The prior mortgagee got the preliminary decree in a redemption suit against him made final and in execution himself purchased the mortgaged property. Thereafter the puisne mortgagee sued the mortgagor and the prior mortgagee for redemption of the prior mortgage. The Court directed him to deposit the redemption money in Court and ordered the prior mortgagee to reconvey the mortgaged property to the mortgagor if the redemption money was deposited. The redemption money was accordingly deposited. Before the property was reconveyed to the mortgagor he executed a sale deed of the property:

Held that the purchaser could enforce the sale deed against the mortgagor by reason of his subsequent acquisition of title on equitable grounds. [Para 35]

Annotation : ('45-Com.) T. P. Act, S. 43, N. 2.

S. K. Ghose, Bipin Behari Das and Chandi Ram Lahkar — for Appellant.

K. R. Barooah, R. K. Chaudhury and D. N. Medhi — for Respondents.

Ram Labhaya J.—The facts giving rise to this appeal are as follows :

[2] The land in suit measuring 16 B. 2 K. 15 Ls. of Nisf Kheraj Patta No. 5 was originally part of N. K. Patta No. 1 of Upparabarbhag mouza, Sonkani village of the 30 years settlement. The patta stood in the name of several co-sharers, One of these co-sharers was Bolodev, father of Kalikanta, defendant 6 in the present case. The share of Kalikant's father in Patta No. 1 came to about 26 B. 2 K. 18 Ls. Patta No. 1 was partitioned in partition Case No. 40 of 1928-29 and divided into three separate pattas. Kalikanta, whose father had died by that time, got a separate Patta No. 5 covering his share of the land, viz, 26 B. 2 K. 18 Ls.

[3] Kalikanta and his father had mortgaged 16 B. 2 K. 15 Ls. of land to Rahiram on 26th April 1922. Rahiram is the father of defendants 1, 2, husband of defendant 3 and brother of defendants 4, 5. The mortgage consideration was Rs. 600 and the mortgage was with possession. Some five years later, Kalikanta, defendant 6, mortgaged 6 B. 2 K. 4 Ls. to Bantiram on 4th Falgoon 1334 B. S. (1927) out of the land mortgaged to Rahiram. The consideration was Rs. 300. In 1929, Kalikanta instituted a redemption Suit No. 1569 of 1928 against Rahiram. Bantiram was also impleaded along with two other mortgagees with whom we are not concerned in this litigation. It was held that Bantiram and the two other mortgagees were not necessary parties. The suit was dismissed against them. It was decreed against Rahiram. Plaintiff was directed to deposit money due to Rahiram on his mortgage. He failed to deposit the money. Rahiram got the decree made final and in pursuance of the direction in the decree for sale of the mortgaged property got the property auctioned in execution and purchased it. Bantiram, who was not treated as a necessary party in this litigation, sued both Kalikanta, the original mortgagor and Rahiram, the auction purchaser, for the redemption of the property mortgaged to defendant Rahiram and also prayed in the alternative for a decree for the principal amount due to him in addition to some compensation which he claimed for being kept out of possession to which, he alleged, he was entitled under his mortgage. This suit was resisted by Kalikanta, the mortgagor and Rahiram, predecessor in interest of defendants 1-5. Kalikanta pleaded that plaintiff had no right to redeem as he had not paid the consideration for the mortgage in his favour. He also resisted the suit on other grounds with which we are not concerned.

[4] Rahiram's defence was that he was the first mortgagee and had purchased the property in execution of the final decree in the redemption suit. He thus became the full owner of the property and there was no mortgage in existence which Bantiram, as a puisne mortgagee, could redeem. It was pleaded *inter alia* that the suit was barred by limitation.

[5] Mr. S. K. Das, the learned Sadar Munsiff, Gauhati, who heard the case, found that the claim for the principal money and compensation were both barred. The claim for principal was held barred by the provisions contained in Order 2, R. 2, Civil P. C. He further found that the claim for the recovery of money was barred by time. On the main question in the case as to whether Bantiram was bound by the decree and sale in favour of Rahiram, he found in favour of Bantiram. He pointed out that the suit against Bantiram was dismissed on the ground that he was not a necessary party. Rahiram impleaded him in his execution application. On his objection his name was struck off. In these circumstances, he could not be regarded as a party to the proceedings which culminated in the sale of the property. He was not given any chance to assert or enforce his rights. He, therefore, was not bound by the decree or the sale. He referred to S. 101, T. P. Act in support of the view that the mortgage in favour of Rahiram could not merge in the equity of redemption and Banti-

ram, as subsequent mortgagee, could redeem the mortgage in favour of Rahiram. The plea that Bantiram as a usufructuary mortgagee could not redeem did not find favour with the learned Munsif. He thought that the mortgage in favour of Bantiram was an anomalous mortgage and held in view of the circumstances of the particular case that his right to redeem the prior mortgage was subsisting. As a result of his findings, he dismissed Bantiram's suit against Kalikanta but decreed it on contest as against Rahiram and directed him to pay into the Court a sum of Rs. 600 within six months from the date of the order and ordered further that on his paying into the Court the said amount, defendant 2 (Rahiram) shall retransfer at his cost and free from all encumbrances the entire mortgaged land to the original owner '(thereby affecting redemption of the mortgage property to him)'. The order dated 28th August 1941 was followed by a preliminary decree. The preliminary decree was in the usual form. It directed that on payment of the amount found due by the plaintiff defendant 2 (Rahiram) shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff or to such person as he appoints, and the defendant shall, if so required, reconvey or retransfer the said property free from the said mortgage and clear of and from all encumbrances created by the defendant or any person claiming under him or any person under whom he claims, from all liability whatsoever arising from the mortgage or this suit. It was further ordered that in default of payment, defendant could apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property. No final decree was passed in the case.

[6] On 26th June 1942, heirs of Rahiram, defendant 2 in Bantiram's case, including two minors who were represented by their mother (the other representatives of Rahiram being his widow and two brothers) executed a *Muktinama* or "Release" in favour of Kalikanta. It referred to the suit instituted by Bantiram against Kalikanta and Rahiram and also to the fact that Bantiram got a redemption decree as a result of the said suit under which he had to pay Rs. 600 to Rahiram for redeeming the mortgage land, and Rahiram was, on this payment, to retransfer the mortgage property free from all encumbrances to Kalikanta. The executants admitted that Bantiram had deposited the amount of Rs. 600 in Court and they, as legal representatives and co-sharers of Rahiram, in consideration of the sum of Rs. 600 lying in deposit were executing the deed of release. They also stated that from that day they will cease to have any claim over the land mortgaged in favour of Rahiram. The deed contains a recital to the effect that the possession of the land has been delivered to Kalikanta.

[7] On 13th July, the deed of release was filed in Court. The learned Munsiff treating it as a deed of reconveyance by the heirs of Rahiram in favour of Kalikanta, defendant 1, ordered that the proceedings be closed and directed that the amount deposited be paid to the heirs of Rahiram. On 14th July 1942, the sum of Rs. 600 was withdrawn by the heirs of Rahiram through their pleader. On 23rd February 1942, before the release deed was executed, Kalikanta had sold the land now in dispute to Gopikanta, the plaintiff in the present case, for Rs. 1000.

[8] Plaintiff's case is that when the Court passed the redemption decree in favour of Bantiram, Kalikanta approached him and proposed to sell the land to him for Rs. 1000. He agreed to purchase it and according to the arrangement between them, out of the sale consideration, he deposited Rs. 600 for payment to the heirs of Rahiram. He also paid a sum of Rs. 300 to Bantiram. The two mortgagees on the property were thus redeemed. He paid the balance of Rs. 100 to Kalikanta and in consideration of these payments, the sale deed in his favour was executed. On the basis of the sale deed he tried to obtain a mutation. It was found in the course of the mutation proceedings that certain *dag* numbers mentioned in the sale deed in his favour did not appertain to patta 5 lands. The mutation attested in his favour was, therefore, only as an owner of unspecified land in patta 5. For the rest, he was directed to establish his title in the civil Court. In pursuance of this direction, plaintiff has sued for a declaration of his title to the land now in suit and also for the confirmation of his possession, which, he alleges, he got from the heirs of Rahiram when the mortgage in their favour was extinguished in terms of the order passed in Bantiram's case. Kalikanta, heirs of Rahiram and his co-sharers are the principal defendants in the case.

[9] The defence set up by the representatives of Rahiram was that plaintiff had no cause of action against them and that the sale deed in his favour had been obtained by fraud. They did not take any interest in the litigation after putting the written statement. They did not produce any evidence and the learned Judge observed that these defendants had no interest in the land and that must be the reason for their not taking part in the proceedings at the time of hearing. Kalikanta, defendant 6, was the really contesting defendant in the trial Court.

He resisted the suit by pleading that he had not sold 16 bighas of land to the plaintiff. He admitted having sold 5 B. 4 K. 10 Ls. out of the land in dispute to the plaintiff for a sum of Rs. 1000. He denied plaintiff's possession of the suit property, and claimed that he was in possession of the property.

[10] Six issues were framed in the case. We are not concerned with the first two issues at this stage. They relate to the form of the suit and its constitution. The rest of the issues are as follows:

(3) Whether the plaintiff has any cause of action against defendants 1 to 5?

(4) Whether the plaintiff had purchased 16 B. 2 K. 15 Ls. of lands from defendant 6 on 23rd February 1942 for Rs. 1000? If so, whether wrong *dags* of different pattas were recited in the deed and whether the plaintiff is in possession of the suit land?

(5) Whether the plaintiff is entitled to a decree to the extent of 16 B. 2 K. 15 Ls. of N. K. Patta No. 5?

(6) What relief, if any, is the plaintiff entitled to?

The finding on issue No. 3 was that defendants 1-5 had absolutely no interest in the suit land. They had taken no active part in defending the suit and in the opinion of the Court they should have been added as merely pro forma defendants. The Judge however recognised that the objection from defendant 1 to the mutation in plaintiff's favour was the real reason why they had to be impleaded as contesting defendants. The learned Judge was emphatic in his finding that Kalikanta had sold the land in suit to the plaintiff for Rs. 1000 and certain wrong numbers were entered by some mistake. He was also clear in his finding that the entire land was in possession of Rahiram originally and after his death his heirs when executing the release deed delivered up possession and that plaintiff was in possession as alleged by him. It is worthy of note that no evidence was led on behalf of the defendants 1-5 on the point that they were still in possession. Kalikanta claimed that he was in possession. He produced three witnesses. The testimony of these witnesses was not believed. As a result of these findings, the suit was decreed.

[11] Two separate appeals were preferred. One by defendants 1-2, representatives of Rahiram and the other by Kalikanta, the original mortgagor. These appeals were heard together. Three points were raised. It was urged first, that the trial Court had no pecuniary jurisdiction to hear the suit. The second contention raised was that Kalikanta had no saleable interest in the suit land on 23rd February, the date of the alleged sale to the plaintiff. Lastly, it was argued that Kalikanta had sold only 5 B. 4 K. 10 Ls. Out of the land in suit. The learned Second Additional Judge, who had also heard suit No. 128 of 1940 and had passed the preliminary decree in that suit, overruled the objection as to the absence of jurisdiction in the trial Court. He agreed with the trial Court in the finding that the whole of the land in dispute was sold by Kalikanta to the plaintiff and not 5 bighas and odd as alleged by him. On the main point in controversy as to whether Kalikanta could sell the property on 23rd February 1942, he found that there was no deed of reconveyance in favour of Kalikanta as required by the terms of the preliminary decree on 23rd February 1942. Rahiram's title in the suit land was, therefore, intact and had not passed to defendant Kalikanta. He could not, therefore, convey any valid title to the plaintiff on the day he executed the sale deed in his favour. On the question of possession, he remarked that plaintiff's evidence appeared to him unsatisfactory and he was reluctant to believe that plaintiff had really taken possession of the land from the heirs of Rahiram.

[12] He also observed that the Sadar Munsiff was not quite correct in remarking that defendants 1-5, heirs of Rahiram, had not evinced any interest in the suit and were not having subsisting interest in the suit land. He, however, expressed the view that the defendants were not sufficiently diligent in defending the suit and practically allowed their case to go by default and created an unfavourable impression in the mind of the learned Munsiff about their earnestness. It is necessary to note that one other contention was raised before the learned Additional Judge. This was to the effect that the decree in the Title Suit No. 128 of 1940, was ineffective and had no effect on the rights of defendants 1-5 in the equity of redemption and that in any case the decree could not adversely affect the rights which they had in that part of the property which had not been mortgaged to Bantiram. This contention was given up at the hearing though it was pressed that as no final decree capable of execution was passed in Bantiram's Suit (No. 128 of 1940), Kalikanta could acquire no rights in the property under that decree. This view also seemed to find favour with the learned Judge. He allowed the appeal and dismissed the plaintiff's suit with costs in both the Courts. Plaintiff has appealed to this Court.

[13] His learned counsel Mr. Ghose has contended that the sale in execution of the decree in favour of Rahiram conferred no indefeasible title on him. His title was subject to the second mortgagee's right of redemption. On the exercise of this right the sale ceased to exist and the purchaser was driven back to his position as a mortgagee and could be redeemed as such. The second mortgagee could disregard

the sale: He was not impleaded in the previous suit for sale and was not affected by the decree or the sale. If he redeemed the prior mortgage—as he had the undoubted right to do—the equity of redemption would revert to the original owner. The first mortgagee, who became purchaser in execution of his decree by sale would be reduced to the position of a mortgagee. It is only then that he could be redeemed. If redemption of his mortgage was possible, the equity must go back to the original mortgagor. He argues, therefore, that the legal effect of the redemption decree in Bantiram's Suit No. 128 of 1940 was to revive the equity in Kalikanta. He further urges that as both the mortgages on the property had been redeemed, Kalikanta could validly transfer the property to the plaintiff. It was contended in the alternative that even if the equity of redemption could have been retained by Rahiram, it was not so retained. He did not offer to redeem Bantiram. He did not want to exercise the right of redeeming him which he had acquired by purchasing the property. He did not even oppose redemption of the entire property though Bantiram was a mortgagee of only a portion of the property mortgaged to to Rahiram. Rahiram might have claimed full ownership of the part of the property which was not mortgaged to Bantiram. Even this right was not availed of. The order directed that Bantiram should deposit Rs. 600 for redemption of Rahiram's mortgage and then the property be reconveyed to Kalikanta. In these circumstances, the order could only be for redemption in favour of Bantiram on payment of Rs. 600. The sum of Rs. 600 was deposited by Gopikanta, plaintiff, on behalf of Bantiram under an arrangement. Bantiram's mortgage money was also paid by the plaintiff. On deposit of Rs. 600, a deed described as a deed of release was executed by the representatives of Rahiram, who had died in the meanwhile, acknowledging the extinction of the mortgage and reconveying the property to Kalikanta by actual delivery of possession. It is claimed that the document executed by the representatives of Rahiram, (defendants 1 - 5) amounted to a deed of transfer. It was accepted by the Court as such. The property stood reconveyed and Kalikanta also could, therefore, transfer it to the plaintiff. There was no impediment in the way of Kalikanta transferring the property to him. It is argued that it is not open to defendants 1- 5 to claim or assert rights which Rahiram might have claimed before the redemption decree in Bantiram's suit, particularly in view of their compliance with the preliminary decree after it was passed.

[14] Respondent's case put before us is that as a result of the sale in his favour Rahiram became the full owner of the property. He was a mortgagee before. By his sale he acquired all the rights of the mortgagor also. But these rights did not merge; they remained distinct. Bantiram's suit was for redemption of the mortgage in favour of Rahiram. The redemption in pursuance of the decree did not affect the ownership of the equity of redemption. The judgment and the decree likewise could have no effect on it. The direction in the judgment that the property be conveyed to Kalikanta was illegal and not binding. The 'release' is explained as a document by which the mortgage in favour of Rahiram was redeemed and it is contended that even this does not affect or convey to Kalikanta the equity which vested in Rahiram. Kalikanta, therefore, was not in a position to convey the ownership to the plaintiff. It is also pointed out that Bantiram was a mortgagee of a part of the property only. He could not be allowed to redeem the whole. The decree could not cover the area beyond that which was mortgaged to Banti. He could redeem only that much. The judgment is charactersied as apparently illegal in this Court also. The upshot of the argument is that Rahiram's representatives (defendants 1-5) are still full owners of about 10 bighas of land and they are also owners of the equity of redemption of the remaining area. Kalikanta, therefore, had absolutely nothing to convey to the plaintiff. No separate argument was addressed to us on behalf of Kalikanta.

[15] There can be no manner of doubt as to what passed to Rahiram at the sale in execution of the decree passed in the redemption suit instituted by Kalikanta. The sale undoubtedly was of the mortgaged property. Rahiram, therefore, stepped into the shoes of the mortgagor. He purchased the property and was, therefore, its owner. The sale, however, was subject to the charge of Bantiram. He was a subsequent mortgagee of a part only. He could recover his money from the security that he had under his own mortgage. He could also redeem that part as by reason of the sale of the property to Rahiram, the first mortgagee, the security had become divisible. The last proviso to S. 60, T. P. Act permits redemption of a share of the property where a mortgagee has acquired in whole or in part the share of a mortgagor. Bantiram could redeem the whole only if the mortgagee did not resist such a move.

[16] Rahiram, the first mortgagee, resisted the redemption of the entire property on the basis that his own mortgage did not exist. He did not take up the more advantageous position that his mortgagee rights had not merged in the equity of redemption by reason of the sale in his favour. The position he took up was obviously untenable. The sale in his favour was

subject to the right of Bantiram to redeem him or to recover the amount due to him from the sale of the property. His rights under his mortgage could not be adversely affected by the sale of the property in execution of the decree on the basis of a prior mortgage if he was not a party to the suit. As held in *Udho Dass* v. *Girdhari Lal*, A. I. R. (28) 1941 Lah. 96 : 193 I. C. 656, a puisne mortgagee, who is not impleaded in a previous suit by the prior mortgagee, is entitled to disregard the decree and sale in the previous suit and to fall back on the original mortgage. This position is also recognised in *Madhuram Hazarika* v. *Bhotong Chutiya*, A. I. R. (12) 1925 Cal. 59 : (86 I. C. 193). It has also been clearly brought out in *Sailendra Nath* v. *Amarendra Nath*, A. I. R. (28) 1941 Cal. 484 : (I. L. R. (1941) 1 Cal. 514), where it laid down that :

"if a mortgagee leaves out a puisne mortgagee or a person interested in the equity of redemption and obtains a decree, the security is not merged in the decree and extinguished. If a sale takes place in execution of a decree in such a defectively constituted suit, the purchaser at a Court sale acquires the right of the mortgagee plaintiff and of the defendant purchaser provided that equity of redemption was not entirely unrepresented in that suit."

The rule so laid down is subject to the obvious condition that the decree and the sale do not affect the right of the puisne mortgagee to redeem the prior mortgage if he wished or to bring the property to sale by the enforcement of his own mortgage. When Rahiram purchased the property in execution of his decree on the mortgage, he purchased it subject to the rights of Bantiram that he had on the date of his decree on the basis of the mortgage in his own favour.

[17] Bantiram, the puisne mortgagee, was impleaded in the redemption suit by Kalikanta, but it was held that he was not a necessary party to the suit. He was again impleaded in execution proceedings and on his objection his name was struck off. In these circumstances it is agreed by counsel on both the sides that the litigation culminating in the sale of the property in favour of Rahiram did not affect the rights of Bantiram as a subsequent mortgagee.

[18] Bantiram's suit (No. 128 of 1940) was for redemption of the entire property as a puisne mortgagee. The Court came to the conclusion that plaintiff was entitled to redeem the property on payment of Rs. 600 He was directed to deposit Rs. 600 in Court. It was further ordered that Rahiram, the auction-purchaser in the previous suit, shall, on deposit of the amount by the plaintiff, transfer the property to Kalikanta the original mortgagor. Mr. Ghose states that the direction embodied in the order of the Court was in accordance with law. He argues that Bantiram had the undoubted right to redeem the prior mortgage. For him the decree and the sale had no existence. If he could redeem the mortgage, it must be in existence. For his purposes it had to be revived inspite of the previous sale of the property. When the mortgage was revived, the equity reverted to the original mortgagor notwithstanding the fact that Rahiram at the auction sale had purchased the property including the interest of the mortgagor. He relies in support of this contention on *Dhana Koeri* v. *Ram Kewal Ahir*, A. I. R. (17) 1930 Pat. 570 : (10 Pat. 197). In that case property was first mortgaged to Barhamdeo Rai under a simple mortgage by the father of the plaintiffs. He then gave a usufructuary mortgage of the property to the father of the defendants in 1900. Barhamdeo sued upon his mortgage and obtained a decree in execution of which he purchased the land. In this suit, the subsequent mortgagee was not impleaded. Barhamdeo failed to get possession in execution. In 1911, he sued the original mortgagor and the subsequent mortgagee. In that suit a decree was passed directing that defendant-mortgagee should redeem the plaintiff, the prior mortgagee and if they fail to do so, the plaintiff (auction purchaser of the property) should redeem them. The defendant mortgagees redeemed Barhamdeo who had become the owner under the sale. The original mortgagor then instituted a suit against the usufructuary mortgagee for redeeming his mortgage on payment of the amount due on both the mortgages. The prior mortgagee Barhamdeo, it appears, was no party to the suit. The second mortgagee resisted the suit. The view taken by the Division Bench of the Patna High Court was that Barhamdeo in his suit had taken a stand on his mortgage and in the alternative on his equity of redemption. He was entitled to adopt this course by virtue of the sale in his favour. But when he was redeemed by the pusine mortgagee, the equity revived in favour of the original mortgagor for after accepting his dues under his mortgage he could not retain the equity of redemption. The second mortgagee, who redeemed him, could only be subrogated in his position as a mortgagee. The equity must go back to the mortgagor. It was held, therefore, that

"the consequence of redemption by the usufructuary mortgage was that the mortgage was satisfied and therefore *ipso facto* the decree and the sale were vacated, and that equity came again into the hands of the original mortgagor because the second mortgagees paid only for the first mortgage."

[19] Mr. Ghose has also referred us to the Full Bench decision of the Allahabad High Court reported in *Wahiunnissa* v. *Gobardhan Dass*, 25 ALL. 388 : (1903 A. W. N. 86 F. B.). The owners in that case were Habiban and Bina.

They mortgaged the property first to Kaim Ali Khan and others for Rs. 1500. Later on, one of the two mortgagors mortgaged 1/4th share of the same property to one Gobind Ram. The mortgages were simple. The first mortgagee brought a suit for sale and obtained a decree. A judgment creditor of the decree-holders (Bangshi Dhar) got the decree attached and having put up the mortgaged property for sale, purchased it himself for Rs. 1050. He then sold it to Wahid-un-nissa and Jan Muhammad. They, in their turn, mortgaged it to Dungar Singh.

[20] Gobind Ram, the second mortgagee, brought a suit for sale on his mortgage and obtained a decree, in execution of which he sought to bring it to sale but was not permitted to do so by reason of the prior sale of the property. He thereupon assigned his decree to Gobardhan Das. This Gobardhan Das stepped into the shoes of second mortgagee. He then instituted a suit for redemption of the first mortgage on the ground that the puisne mortgagee whom he represented had not been made a party to the first suit. He prayed for redemption and possession of the property.

[21] After the institution of the suit, the first mortgagee who had realised only Rs. 1050 out of the mortgage through Banshidhar sold the residue of the mortgagee rights to Prasadi Lal. He was made a defendant in this case.

[22] Wahid-un-nissa and Jan Mahammad, the representatives of Banshidhar, the auction-purchaser, were also defendants. It was held that the second mortgagee was entitled to redeem the whole of the property on payment of the amount due to the first mortgagee. The dispute was as to how the money was to be distributed amongst the rival defendants. Wahid-un-nissa and Jan Mahammad, as representatives of the purchaser of the property in court sale, claimed the whole amount. This they could do only on the basis that the property vested in them. The transferee from the first mortgagee's (Parsadi Lal) claimed that he was entitled to the whole amount less than Rs. 1050 to which Wahid-un-nissa and Jan Muhammad were entitled as representatatives of Banshidhar (auction-purchaser). It was contended on behalf of Parsadi Lal that

"the auction-purchaser was under the circumstances only entitled to hold up the first mortgage, to satisfy which the sale took place, as a shield; that the measure of the shield was the amount due on the first mortgage; but that in no event could the amount recoverable by him or his assignees exceed the sum which he had actually paid for the property."

This contention prevailed and it was held that Parsadi Lal, the representative of the first mortgagee, was entitled to the whole amount which was payable on redemption with the exception of the sum of Rs. 1050 paid by Banshidhar at the auction sale. Banshidhar's representatives were found entitled only to this sum.

[23] Dealing with the rights of the auction-purchaser, Blair, J. observed

"that Banshidhar had notice, actual or constructive, that he was purchasing a defeasible title must be taken for granted. He must be taken to have known that the sale at which he bought was voidable at the will of the second mortgagee, who had only to redeem the first mortgage to enable him to put up the property for sale in satisfaction of both incumbrances. As against the second mortgagee he had acquired absolutely no title. However, the second mortgagee has redeemed the first mortgage, and has totally nullified the purchase by Banshidhar and all devolutions which derive from him."

On these observations Mr. Ghose relies for showing that on redemption of the first mortgage by the second mortgagee, who was not a party to the suit for sale on the mortgage, the sale in execution of the decree on the first mortgage is totally nullified and the purchaser, if he is the first mortgagee, is reduced to the position of the mortgagee which he occupied before the sale. He cannot retain his rights under the sale.

[24] A reference was, however, made in this case to the right of the auction-purchaser to pay off the puisne mortgagee who was seeking to redeem the first mortgage. But it was held that the representatives of the auction-purchaser (Wahid-un-nissa and another) had not chosen to exercise the right and had insisted on the puisne mortgagee redeeming the previous mortgage. They were, therefore, held entitled to a sum of Rs. 1050, the price on which the property was sold, and not the entire mortgage money as owners of the right or the equity of redemption.

[25] The *Patna case*, (A. I. R. (17) 1930 Pat. 570) discussed above is no doubt a direct authority for the proposition that if a puisne mortgagee is not impleaded by a prior mortgagee in his suit for sale, he has the right to redeem the mortgage notwithstanding that the first mortgagee purchased the property in the execution of his decree for sale and that on redemption by him the decree and the sale are vacated and the equity reverts to the mortgagor. The observations in the *Full Bench case*, (25 ALL. 388) from the Allahabad High Court to the effect that the sale is completely nullified on redemption taking place lend great weight to this view.

[26] The learned counsel for the respondent has questioned the correctness of this view. He contends that on redemption by a puisne mortgagee the sale would not be nullified. The mortgagee who purchased the property in a court sale without impleading the puisne mortgagee

acquired the property subject to the rights of the puisne mortgagee. On purchasing the property he retains his right as a mortgagee and acquires the mortgagor's interest also. The two rights do not merge. They remain distinct in this interest. If the puisne mortgagee redeems, the purchaser can still retain his rights as a mortgagor and the equity does not revert to the original mortgagor. It remains vested in the purchaser of the property. He relies on *Delhi and London Bank, Ltd.* v. *Bhikari Das*, 24 ALL. 185: (1902 A. W. N. 7).

[27] In this case one Suraj Mal was the mortgagor. He borrowed Rs. 12,000 from the appellant Bank and executed a deed of mortgage of his property in favour of the Bank. The Bank obtained a decree for sale on the foot of the mortgage. In execution the Bank purchased the property.

[28] The property mortgaged to the Bank with some other property had been mortgaged to one Narain Das before the mortgage in favour of the Bank came into existence. The prior mortgagee was no party to the suit instituted by the Bank. The representatives of Narain Das, the first mortgagee, also instituted a suit on their mortgage and obtained a decree in execution of which they purchased the property and got possession. The Bank was no party to this suit.

[29] The bank, as a puisne mortgagee, instituted a second suit for a declaration that defendants acquired no right to the property under their purchase and in the alternative for redemption. The Subordinate Judge passed a decree in favour of the Bank and directed that on payment of the sums specified the Bank should have proprietary possession of the property included in their mortgage (by reason of their purchase) and possession as mortgagee of the property which was not included in that mortgage. The Bank felt dissatisfied with this decree and appealed on the ground that it was redeeming a mortgagee who had become by purchase and on redemption was entitled to step into his shoes in regard to the whole of the property. The contention did not prevail. The Bank's appeal was dismissed. In disposing of the appeal, the learned Judge observed:

"The sale in favour of the first mortgagees was undoubtedly not binding upon the puisne mortgagee, inasmuch as the Bank was not impleaded as required by the provisions of S. 85, T. P. Act. This being so, the Bank retained its ordinary right as a puisne mortgagee to redeem the property. Having elected to redeem the property and having paid off the prior mortgagee's claim, the Bank undoubtedly acquired under S. 74 of the Act to which we have referred, all the rights and powers of the first mortgagees; but in the words of the section, 'as such', i. e, "mortgagees". But the section does not give the Bank any right or interest which the first mortgagees may have acquired otherwise than as such mortgagees. This, it appears to us, left outstanding the equity of redemption in the property which was not included in the Bank's mortgage. The mortgagor's equity of redemption either passed to the first mortgagees under the sale made to them or it did not. If it did pass to them, they acquired it at the auction sale held in execution of their decree, as purchasers and not as mortgagees. If it did not pass to them, the equity of redemption remains outstanding in the mortgagor who has not been made a party to this suit... We, therefore, hold that the contention of the Bank in this respect is not well founded."

[30] The question whether the equity of redemption for the part of the property which was not covered by the Bank's mortgage vested in the mortgagor or in the purchaser at the court sale was not decided. As the Bank could not claim the equity of redemption, the appeal failed. As between the mortgagor and the purchaser, the matter was left undecided. The effect of the decision was that Bank's purchase of the property covered by its mortgage which was subject to the right of redemption of a puisne mortgagee was perfected by redemption of the prior mortgage. For the rest of the property redeemed, the Bank was held to be a mortgagee only. The question dealt with and disposed of in the *Patna case*, (A. I. R. (17) 1930 Pat. 570) was left open in this case as it was not necessary for the disposal of the appeal by the Bank. The case, therefore, decides nothing which is in conflict with the *Patna case*, (A. I. R. (17) 1930 Pat. 570) which has both reason and equity on its side. The learned counsel has not been able to cite any other apt authority on this point. In these circumstances, if it had been necessary for us to decide this question, we would unhesitatingly follow the view of the law as expressed in the *Patna case*, (A. I. R. (17) 1930 Pat. 570). From the facts of this case it is however clear to us that Rahiram's representatives have no subsisting interest in the property. It was duly reconveyed to Kalikanta who has in turn transferred to the plaintiff.

[31] It may be recalled that in Bantiram's suit for redemption (No. 128 of 1940) the Court ordered redemption on payment of Rs. 600. In this suit Kalikanta, the mortgagor and Rahiram, the purchaser of the property in execution of his decree for sale were both parties. All the equities in the case, therefore, could be adjusted. They were the only persons who had interest in the property. Rahiram resisted the suit on the ground that he was the full owner by reason of his purchase. His mortgage had merged in the ownership rights. This position had no support in law. This puisne mortgagee was not a party to his suit and could surely redeem his mortgage. But the learned counsel for the respondent contends that Bantiram could redeem only that

part of the property which was covered by his mortgage, and even with regard to that Rahiram's right to redeem him could have remained. As the entire property was allowed to be redeemed he claims that this redemption did not destroy his rights in the equity of redemption. He relies on *Madhuram* v. *Bhotony*, A. I. R. (12) 1925 Cal. 59 : (86 I. C. 193) in support of this proposition. In this case it was held that a puisne mortgagee, not being a party to a suit for sale in which the property was purchased at a court sale by the prior mortgagee, should be allowed to redeem that part of the property which is covered by his mortgage as, if he is allowed to redeem the whole, he would be in turn redeemable as regards the part not mortgaged to him by the auction-purchaser. Bahiram may have taken this stand which defendants in this Calcutta case did. He may have resisted the redemption of the entire property. By doing so he would have asserted his rights and title to the equity of redemption. He was, however, ill advised and did not avail of the opportunity that the suit offered him. Instead of contending that the mortgagee rights and the equity of redemption had not merged as the learned counsel for his representatives is now contending, he asserted that there was a complete merger of the two rights which had resulted in the extinction of his own mortgage. The result was that Bantiram was allowed to redeem the prior mortgagee. He allowed by his act or omission a redemption decree to be passed against him. The order in the case required Bantiram to deposit Rs. 600 for Rahiram. On this deposit being made, Rahiram was to convey the property to Kalikanta, the original mortgagor. The sum of Rs. 600 was deposited in the Court by Gopikanta, the plaintiff in the present suit, under an arrangement with Kalikanta. Rahiram became liable to reconvey the property. This order was acquiesced in and complied with by the representatives of Rahiram. They appear to have taken for granted that the decree was in accordance with the order. These representatives, his two minor sons, a widow and two brothers executed what the party described as a deed of release. The minors were represented by their mother. In this the preliminary decree was referred to and the substance of the order of the Court which preceded the preliminary decree was reproduced and in consideration of the deposit of Rs. 600 in Court on behalf of Bantiram, the defendants (the representatives of Rahiram) acknowledge that the mortgage in their favour was discharged and that they had no rights left in the property. It was further expressly stated that the possession of the property had been delivered to Kalikanta to whom the property was to be conveyed according to the order of the Court. This deed was executed on 27th June 1942. It was produced in the Court on 13th July 1942, and it was ordered that as the deed of reconveyance had been executed and registered as required by law the proceeding be closed and the amount (Rs. 600) be refunded to the heirs of Rahiram. The amount was actually withdrawn on 14th July 1942, on their behalf by their counsel. It is clear that what the parties describe as a deed of release was accepted by the Court as a deed of reconveyance by its order dated 13th July 1942. It is immaterial what name the parties gave to the document. All that the Court had to see was whether the extinction of the mortgage and retransfer of the property to the mortgagor were evidenced by a document which could command acceptance in law. The Court passing the preliminary decree was satisfied that the document fulfilled the requirements of the law and we find ourselves unable to hold that this document is lacking in any essential attributes which derogate from its quality as a deed of retransfer. It clearly states that the executants of the deed had no right left in the property and that they had delivered possession to Kalikanta. The property was thus transferred by delivery of possession to Kalikanta without reservation of any rights. The learned counsel for the respondent has urged that the document merely evidenced extinction of the mortgage and there is nothing in it to indicate that the equity of redemption was transferred back to Kalikanta. We do not think there is any force in this contention. If the transfer had been to Bantiram, it could have contended with some show of reason that the equity remained with the executant of the document. The deed was in favour of Kalikanta who, according to the learned counsel, had no right in the property. The transfer of the property to him could be made only on the basis that his equity had revived. After transferring the property to him with a clear statement that they had no right left in it, they cannot now claim that they are its owners still as against him. The document executed by them was an effort on the part of the parties concerned to comply with the terms of the order of the Court in suit No. 128 of 1940. This order by allowing the redemption to the plaintiff nullified the sale in favour of Rahiram, which could have been saved by redemption of Bantiram's mortgage. The compliance with the decree received the approval of the Court which was embodied in its order dated 13th July 1942. The result was that no necessity was left for a final decree in the case. The mortgage stood redeemed and the property was transferred to Kalikanta. Bantiram was himself redeemed under

the same arrangement under which plaintiff deposited the money for Rahiram. Both the mortgagees having been redeemed Kalikanta got back the property free from all incumbrances and became its full owner. The binding effect of this document is not challenged. According to this document, defendants 1-5 had no rights left in the property. The document does not bear the construction which the learned counsel for the defendants seeks to put on it. In the face of the document it is not open to the defendants to urge that they are still full owners of a part of the property or they still have the equity of redemption of the whole nor can they contend that the order of the Court was illegal. The terms of the document offer a complete answer to the defendants' contention.

[32] The absence of a formal final decree does not affect the validity of redemption by act of parties on which the Court has set its seal of approval. It has already been held that the requirements of the law so far as redemption of Rahiram's mortgage is concerned have been fully satisfied by the document described, as a deed of release by the parties and a reconveyance by the Court.

[33] In this suit defendants 1-5 apparently were not contesting the suit in the trial Court. Their attitude was one of indifference. Their main plea was that there was no cause of action against them. They did not explain as to what they meant by it. Their subsequent conduct indicates that all that they meant was that they had no interest in the property and, therefore, should not have been dragged into this litigation. They produced no evidence at all. They did not claim that they were in possession or had reserved their rights in the equity of redemption. They allowed the suit to be decreed practically in default. The observations made about them by the learned trial Judge, therefore, are fully justified. It is obvious that they did not contest the suit on the ground that they were the full owners of the property as against the plaintiff. The suit was resisted by Kalikanta on the ground that he had not sold the whole of the property to the plaintiff and that he was in possession and not the plaintiff. This was the only important point which the trial Court had to decide. Two appeals were preferred, one by Kalikanta and the other on behalf of defendants 1 and 2. The three adult rapresentatives of Rahiram did not join this appeal. It appears that the minors were selected on purpose. But no objection had been raised on behalf of these minors in the trial Court that they were not bound by the deed of release executed in favour of Kalikanta on 27th June 1942. No such plea was raised. It was nobody's case that the minors were not properly represented in this litigation. Even in appeal the deed of release was not being challenged on the ground that the guardian had no authority to execute it on their behalf or that it was not in their interest. The plea urged, as is shown above, was that in spite of the 'release' they still are the owners of the equity of redemption. Emphasis was laid on the fact that the release did not amount to a conveyance of the property to the mortgagor and thus Rahiram's representatives were still the owners of the property. This contention has been examined and we have come to the conclusion that the document fulfilled the requirement of a deed of reconveyance. The claim that the redemption of the mortgage did not affect the equity of redemption which could remain distinct from the mortgagee rights raised before the lower appellate Court was definitely abandoned. Before us this contention is taken up again. It will be observed that this plea is opposed to the position that Rahiram adopted in the previous litigation. He himself was then pleading merger. It was not raised in trial Court, mentioned but abandoned in appeal. The defendants are thus playing fast and loose, approbating and reprobating.

[33] The plea in these circumstances may not have been allowed but since a very elaborate and prolonged argument centering round this point was heard, it has been fully dealt with above. The conduct of these defendants in this litigation fully supports the conclusion arrived at above that after allowing redemption of the property they agreed to the situation that they had no more rights in the property. Whatever legal rights they had, were lost by their own act when they reconveyed the property free from all incumbrances to Kalikanta.

[34] The learned Additional Judge observed when discussing the question of possession that plaintiff's evidence on the point seemed very unsatisfactory. He, therefore, felt reluctant to believe that plaintiff had taken possession of the suit land from the heirs of Rahiram. This finding is absolutely unsustainable. Rahiram's representatives had not claimed that they were in possession. They had given no evidence at the trial that they were in possession. According to the deed of release it had been handed over to Kalikanta. It could have been in possession either of Kalikanta or of the plaintiff. The learned Judge could not find that Kalikanta was in possession. He has not referred to Kalikanta's evidence at all. This was not relied on by the trial Court. Plaintiff alone could have been in possession in these circumstances. The conclusion arrived at by the learned Judge on this point is opposed to the evidence on the record and is wholly unsustainable.

[35] It is true that Kalikanta executed the deed of sale in favour of the plaintiff before the deed of release was executed. On the date that he actually executed the sale deed the property had not been transferred to him by the representatives of the mortgagee though redemption money had been deposited. But plaintiff's title has not been questioned on this technical ground before us. Even if it is assumed that Kalikanta had not acquired title till then, plaintiff can enforce the sale deed as against Kalikanta by the reason of his subsequent acquisition of title on equitable grounds.

[36] In these circumstances this appeal must be allowed. The order of the learned Additional Judge is reversed and that of the trial Court restored. The plaintiff's suit is decreed with costs throughout.

Thadani Ag. C. J. — I agree.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Assam 69 *[C. N. 22.]*

RAM LABHAYA J.

Badrinarain Kanu and others—Appellants v. *Maisan Manipurini—Respondent.*

Second Appeals Nos. 1615 and 1654 of 1945, Decided on 27th April 1949.

Assam Land and Revenue Regulation (1886), S. 59 (1) — Plaintiff suing for rent before getting himself registered—Case should be suspended and plaintiff ordered to get himself registered—On registration taking place decree can be passed.

A strict construction of the language of S. 59 may be avoided on the ground that it leads to hardship and inconvenience, which the Legislature could not have intended. But where the plaintiff institutes a suit for rent before getting himself registered, it is certainly not necessary to pass a decree before the requisite qualification enabling the plaintiff to demand and recover rent has actually been acquired. The proceedings in the case can be suspended and plaintiff ordered to satisfy the Court that he has got himself registered. For this purpose a reasonable period of time can be allowed. On his satisfying the Court that necessary registration has taken place, the bar to his claim would disappear and decree can be granted to him. This is a better course than a conditional decree directing the plaintiff not to execute the decree till he gets himself registered: 23 Cal. 87 (F. B.), *Rel. on.* [Para 8]

K. P. Bhattacharjee — for Appellants.

N. M. Dam — for Respondent.

Judgment. — This judgment will cover the two appeals Nos. 1615 and 1654 of 1945.

[2] This appeal arises out of two rent suits instituted by Maisan Manipurini, plaintiff, against two separate sets of defendants. The holdings in the two suits belonged to her deceased husband. He got them under a gift from his maternal grandfather. The defendants in the two cases were settled by him in the year 1936. The annual rent fixed in each case was Rs. 20. The rent for year 1347-1349 B. S. was paid by the tenants. Plaintiff, as heir of her deceased husband, instituted the suits for recovery of rent. She also claimed compensation at the rate of 25 per cent. The amount claimed in each case is Rs. 75.

[3] The defendants resisted the suit on several grounds but it is not necessary to state them. The trial Judge found that the amount claimed was due to the plaintiff. The holdings in the suit were let out for residential purposes and were in fact being used as shops. They are situate in the heart of the Kalacherra bazar, and are not agricultural holdings. The contention of the defendants that plaintiff is not entitled to recover more than five times the land revenue for the holdings was negatived on this finding. The plea of the defendants that S. 59 (1), Assam Land and Revenue Regulation, 1886, was a bar to the passing of any decree in favour of the plaintiffs succeeded only partially. The learned Munsiff held that a conditional decree could be passed, which plaintiff will not be entitled to execute unless she got her name registered as a landholder under Ch. IV of the Regulation.

[4] The orders were affirmed on appeal. Defendants have appealed to this Court.

[5] The learned counsel for the appellants has contended that the holdings are really agricultural and therefore plaintiff cannot recover more than five times the land revenue. In support of this contention, he has referred me to Ex. C, a certified copy of the record of rights of 1916-17 showing that dag 631 was then described as arable land. Dag 632 had residential houses. Dag 633 was shown as waste land. His contention is that the holdings now in suit are contiguous to agricultural land and therefore are a part of it.

[6] The contention is not borne out by the document on which he relies. The record of right was prepared in 1916-1917. The defendants were settled on the holdings in 1935. The holdings are admittedly used for residential or shop purposes. There is nothing to show that defendants are tenants of any agricultural land contiguous to these holdings. Settlements on defendants were made for purposes other than agricultural. The Courts below have found concurrently in favour of the plaintiff on this point and I see no reason for differing from the conclusion arrived at by them. The learned counsel concedes that if the holdings are not held to be agricultural, the stipulated rent would be payable as found by the Courts below.

[7] The second contention rests on the language of S. 59 (1), Assam Land and Revenue Regulation. It provides that no tenant shall be bound to pay rent to any person who has no

been registered as a landholder, proprietor, manager or mortgagee under Chap. IV of the said Regulation. The plaintiff, in this case, instituted the suit before getting herself registered as required by the Regulation. The question that arises is whether any decree can be passed in her favour in the suit. The learned counsel for the appellant urges that the suits are liable to dismissal as defendants were under no legal obligation to pay to the plaintiff on the date the suits were instituted. This question came before a Full Bench of the Calcutta High Court reported in *Alimuddin Khan* v. *Hira Lal Sen*, 23 Cal. 87 (F. B.). A provision (S. 78) almost in the same terms exists in the Land Registration Act, Calcutta (Bengal Act VII [7] of 1876). The plaintiff in the Full Bench case, without getting himself registered as required by the Act 1 (sic.), instituted the suit for recovery of rent. He, however, produced the certificate of registration after the institution of the suit. The learned Judges composing the Full Bench were divided in their opinion. Two of the learned Judges including the learned Chief Justice were of the view that plaintiff could not demand or receive rent on the date of the suit as there was no obligation on the tenant to pay to him. There was thus no cause of action on the date of the suit. This defect was fatal to the suit and it could not be cured by the subsequent production of a certificate or other evidence showing that plaintiff had got himself registered as required by the Act. The majority of the learned Judges, however, were of the view that there was ample justification for preferring an alternative construction by which the object of the Legislature in insisting on registration before a person entitled to recover rent could demand and receive it could be achieved and the complications arising from a very strict interpretation of the section also avoided. They pointed out that if it insisted that a landlord suing to recover rent must get himself registered before instituting the suit, he may lose his right to recover rent in certain cases. If, on the other hand, the omission to get himself registered is not regarded as fatal to the suit and he is allowed to show to the Court before the decree is passed that he has acquired the requisite qualification by getting himself registered, that difficulty can be avoided. The real purpose of the provision insisting on registration can also be achieved. Such a construction they held had the merit of avoiding anomalous and inconvenient results. Holding it to be a permissible construction, the majority of the learned Judges held that the suit was not liable to dismissal. I find myself in respectful agreement with this view.

[8] In the present case, the qualification necessary for recovery of rent had not been acquired till the decree stage. The trial Judge held that the difficulty could be obviated by the direction that plaintiff shall not execute the decrees in the two cases till she got the requisite qualification by getting herself registered under Chap. IV of the Regulation. In this view of the matter, he has gone beyond the view of the Full Bench of the Calcutta High Court, considering the process of reasoning by which the learned Judges of the Calcutta High Court came to the conclusion that the omission of a plaintiff landlord to get himself registered before instituting the suit was not fatal to the suit and that the language of S. 78 of the Land Registration Act did not preclude the Court from passing a decree if it was satisfied that after the institution of the suit registration had taken place. There would not be any justification for extending the previlege conceded to the plaintiff in that case any further. A strict construction of the language of S. 59 may be avoided on the ground that it leads to hardship and inconvenience, which the Legislature could not have intended. But, it is certainly not necessary to pass a decree before the requisite qualification enabling the plaintiff to demand and recover rent has actually been acquired. The proceedings in the case could have been suspended and plaintiff ordered to satisfy the Court that she has got herself registered. For this purpose a reasonable period of time could be allowed. On her satisfying the Court that necessary registration had taken place, the bar to her claim would have disappeared and decree could be granted to her. This would have been a better course than a conditional decree. It would have led to the same result as was achieved by the Calcutta High Court by taking into consideration the certificate obtained by the plaintiff in that case after the institution of the suit.

[9] In the view that I have taken of the matter, a remand of the case to the trial Court would have been necessary. But I have been informed that the plaintiff has got herself registered as required by the Land and Revenue Regulation. Her learned counsel has also produced a certified copy of the Jamabandi showing that plaintiff got her name registered on 3rd January 1945 before the disposal of the appeal by the lower appellate Court. It was presumably for this reason that the objection as to non-registration was not pressed at that stage. In these circumstances, the objection raised by the appellants loses whatever force it had. Plaintiff could now be given an unconditional decree. But as she did not appeal from the decree of the trial Court, it is not open to me to amend it in her favour, nor need the case be remanded for an unconditional decree to be passed. The decree, therefore, shall stand in the exceptional

circumstances of the case. The appeals are dismissed. Parties shall bear their own costs throughout.

V.R.B. *Appeals dismissed.*

A. I. R. (37) 1950 Assam 71 *[C. N. 23.]*

RAM LABHAYA J.

Krishna Kanta Sarma and others — Appellants v. Mt. Bhuban Priya Debi and others — Respondents.

Second Appeal No. 2110 of 1947, Decided on 27th April 1949, from decree and judgment of 2nd Addl. Judge, Assam Valley Division, D/- 14th May 1947.

(a) Tenancy laws — Assam (Temporarily Settled Districts) Tenancy Act (III [3] of 1935), Sch. I, Part I, cl. 4—Applicability—Clause does not apply if dispossession is not by landlord — Dispute between tenant and her relation — Relations fraudulently obtaining mutation in his name and asserting adverse title—Suit for possession governed by Art. 142, Limitation Act—Limitation Act (1908), Art. 142.

Clause 4 applies where a raiyat or under-raiyat is dispossessed by the landlord personally or by his agent.

Where the dispute is between a tenant, a widow and the relation of her late husband, who, while managing the land on her behalf, got the land mutated in his name fraudulently and then repudiated her title, there is, in fact, no dispossession by landlord and the tenant's suit for recovery of possession against her relation to which the landlord is a pro forma defendant is not governed by cl. 4 but by Art. 142, Limitation Act, 1908 : A. I. R. (8) 1921 Cal. 249, *Disting.*

[Paras 5, 6]

(b) Tenancy laws—Assam (Temporarily Settled Districts) Tenancy Act (III [3] of 1935), Sch. I, Part I, cl. 4—Dispossession by landlord—Adverse mutation effected by landlord's officer by fraud—Tenant dispossessed on strength of mutation — Dispossession is not by landlord.

Where a relation of the tenant, a widow, who managed the land on her behalf got the land mutated in his name through the landlord's officer and then, on the strength of the mutation, dispossessed her asserting an adverse title to the tenant :

Held, that the officer of the landlord, who was responsible for the mutation, may or may not have been a party to the fraud. If he was a party to it, he exceeded his powers. He was not acting within the scope of the authority and on behalf of the landlord. If he was not a party to the fraud, and was himself deceived into attesting a mutation it could not be said that he dispossessed the tenant on behalf of the landlord. The tenant, therefore, could not be said to have been dispossessed by the landlord. [Para 4]

J. N. Borah — for Appellants.
J. C. Sen — for Respondents.

Judgment.—This is an appeal from a decree and judgment of the Second Additional Judge, Assam Valley Division, dated 14th May 1947 by which the order of the Munsif, Barpeta, dated 26th April 1946 granting plaintiff a decree for declaration of her title to the suit land and its khas possession was affirmed. Defendants have appealed.

[2] The learned counsel for the defendants has raised only one point. He contends that the suit was barred as it had been instituted more than two years after plaintiff's dispossession by the landlord. The case, he argued, was governed by cl. 4, Part I of Sch. I, Assam (Temporarily Settled Districts) Tenancy Act, 1935. According to this clause, a suit for recovery of possession claimed by a plaintiff as a raiyat or an under-raiyat otherwise than under Ss. 35 and 41 respectively must be instituted within two years from the date of dispossession. The learned Second Additional Judge held that this clause had no application and the case was governed by Art. 142, Limitation Act.

[3] The case of the plaintiff was that her husband was a tenant of the land. He died some 18 years before suit. On his death, the land devolved on her. She had no other male member in the family. She, therefore, got these lands managed through her husband's nephews, who are the contesting defendants in the case. They constructed a house on the homestead land with her consent. Later on, the defendants in collusion with the officers of the pro forma defendants (landlords) got the name of Krishna Kanta, defendant, mutated in the records of the superior landlords without her knowledge or consent. In 1348 B. S. defendants erected two more houses without her consent and asserted hostile title to the land.

[4] The suit was resisted by the nephews of the plaintiff's husband. The landlords, though defendants in the case, did not contest it. A Tahsildar of the landlords appeared as a witness for the plaintiff. He deposed that the suit land stood in the name of the plaintiff, then it was entered in the name of Krishna Kanta, a contesting defendant and at the time he made his statement in Court it stood again in the name of the plaintiff. He explained that one Mt. Durga Priya consented to the mutation in the name of Krishna Kanta, but later, on the representation of the plaintiff her name had been re-mutated in place of Krishna Kanta. Durga Priya was the step mother of the plaintiff's husband. She had no right to consent to the mutation respecting property in which she had no title. It is obvious that this mutation was collusive and fraudulent. It was without the knowledge or consent of the plaintiff. It is on the basis of this mutation that the defendants constructed two more houses and repudiated the title of the plaintiff. It is obvious that the landlord never meant to dispossess the plaintiff of the land. The officer of the landlord, who was responsible for the mutation, may or may not have been a party to the fraud. If he was a party to it, he exceeded his powers. He was not acting within the scope of the authority and on behalf of the landlord. If he was not a party to the

fraud, and was himself deceived into attesting a mutation it could not be said that he dispossessed the plaintiff on behalf of the landlords. The plaintiff in this case, therefore, cannot be said to have been dispossessed by the landlords. This was in fact not the case put forward by any of the parties including the contesting defendants. The defendants relied on the mutation in favour of Krishna Kanta, according to which plaintiff relinquished her right in favour of the defendants. That would not be an ouster by the landlords. The mutation embodying the alleged relinquishment has been found to be fraudulent and was cancelled. The defendants, therefore, have got no title in the lands. The landlords do not claim that they are in possession on their behalf or under them. In these circumstances the case is not governed by cl. 4, part I of the Sch. I, Assam Tenancy Act, 1935.

[5] The learned counsel for the appellant has relied on *Hari Chandra* v. *Madan Barai*, 25 C. W. N. 102 : (A. I. R. (8) 1921 Cal. 249) in support of his contention. But this authority is easily distinguishable. This is a case under the Bengal Tenancy Act (Art. 3 of Sch. III). It was held that Art. 3 of Sch. III, Bengal Tenancy Act which corresponds to cl. 4, part I of Sch. I, Assam Tenancy Act, 1935, can be made applicable only where the dispossession has been effected by the landlord. It was held further that from this it followed that the Article applied where the dispossession had been effected not by the landlord personally but by an agent acting within the scope of his authority. This is a perfectly correct statement of the law but it does not help the defendants. In this case, it is obvious that there has been no dispossession of the plaintiff either by the landlords personally or by their agent. In fact, there has been no dispossession by the landlord at all. The dispute is between the plaintiff and the nephews of her late husband. These nephews were managing the land on behalf of the plaintiff and later on, after getting a mutation in favour of Krishna Kanta, fraudulently, they repudiated plaintiff's title.

[6] The suit has been instituted within 12 years of plaintiff's dispossession and is, therefore, clearly within time.

[7] The appeal fails and is dismissed with costs.

D.R.R. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 72 *[C. N. 24.]*

RAM LABHAYA J.

Rikhobram Kalita—Appellant v. *Nalini Kanta Dawka and others—Respondents.*

S. A. No. 78 of 1948, Decided on 2nd December 1949, from decree and judgment of Second Addl. Judge, D/- 21st May 1947.

Specific Relief Act (1877), S. 39—Relief under, is in discretion of Court.

Where the plaintiff who was not in possession sued for cancellation of sale-deed and for possession, but the decree granting the reliefs was modified in appeal by the omission of relief for possession, the plaintiff, who was induced or ill-advised, having withdrawn his prayer for it, it was held that the granting of relief under S. 39 was in the discretion of the Court and in the circumstances of the case the Court in second appeal would not interfere with the lower Court's exercise of the discretion in having granted a decree for cancellation alone without possession: 34 ALL. 140, *Ref.* [Para 16]

Annotation: ('46-Man.) Specific Relief Act, S. 39 N. 5 and 6.

S. K. Ghose and C. C. Lahkar—for Appellant.

K. R. Barooah and K. Buzar Barua—for Respondents.

Judgment.—This is a second appeal from the decree and judgment of the Second Additional Judge, A. V. D., dated 21st May 1947 by which the order of the learned Sadar Munsiff, Gauhati, dated 22nd November 1946 declaring that the sale-deed executed on 11th March 1944 by the late Mt. Dhukupriya in favour of defendant 1 Rikhobram was inoperative as being bad in law and as such had conferred no right and title on defendant 1 in respect of lands covered by kheraj patta No. 15 Purnakamdev village in mouza Pachim Barigog and directing that plaintiff be put in possession of the land according to law and that the deed in defendant's favour shall stand cancelled and that a copy of the decree be sent to the Registrar, Kamrup, for taking necessary action under S. 39, Specific Relief Act was modified, and the relief for possession of the lands disallowed on the basis of withdrawal with liberty to the plaintiff to bring a fresh suit for this relief.

[2] Defendant has appealed to this Court. Plaintiff's case was that Mt. Dukhupriya was his maternal grandmother. He purchased the suit land from her for a sum of Rs. 300 and a sale-deed was executed in his favour on 7th February 1944. Mt. Dukhupriya died on the night of 11th March 1944 after a protracted illness. She was unconscious on the date and was unable to execute any deed or document. A sale deed purporting to have been executed by her on 11th March 1944 in favour of defendant was vitiated by fraud. There was no consideration for the sale in favour of defendant 1 and Mt. Dukhupriya was wholly unable to be a party to the document being not in possession of her senses.

[3] Defendant 1 denied these allegations. He admitted that a sale-deed had been executed in plaintiff's favour on 7th February 1944, but pleaded that the sale could take effect only on the fulfilment of certain conditions by the plaintiff.

As these conditions were not fulfilled, the deed was allowed to remain unregistered. Later on Mt. Dukhupriya in order to pay off her debts resold the land to him for a consideration of Rs. 680 and executed the sale-deed on 11th March 1944 in his favour with the full consent of her two daughters, one of whom is the mother of the plaintiff.

[4] Three issues arose out of the pleadings. They were framed in the following terms:

"(1) Whether the suit is bad for being improperly stamped with Court fees?

(2) Whether the transfer in favour of defendant 1 is bad for (1) want of legal necessity, (2) want of consideration, (3) incapacity of the executant at the time of execution of deed, and (4) being tainted with fraud?

(3) Whether the plaintiff is entitled to possession?"

[5] Defendant 1 urged in the trial Court that the plaint was deficiently stamped. His contention was that the suit was really one for the cancellation of a document in his favour and that the court-fee ought to have been paid by the plaintiff ad valorem on the amount of the consideration of the sale-deed in question.

[6] The learned Munsiff observed that the Court-fees Act does not contain a specfic provision for cancellation of documents and there was divergence of judicial opinion whether suits for cancellation of instruments are merely declaratory suits or they involve consequential relief as well. He, however, found by a process of reasoning, which is not very clear, that the plaint was adequately stamped.

[7] On the second issue, he came to an emphatic finding that the document in defendant's favour was inoperative, bad in law and it conferred no right or title on defendant 1 in respect of the lands covered by it. He further found that the plaintiff was entitled to possession. The order passed by him embodied a declaration that the sale-deed executed on 11th March 1944, in defendant's favour was void and inoperative. It further directed that the deed in question stood cancelled and as it was a registered document, a copy was ordered to be sent to the Registrar for necessary action under S. 39, Specific Relief Act.

[8] It is clear that the trial Court granted a decree for cancellation of the document and also for possession after declaring the deed void and inoperative.

[9] Defendant 1 appealed to the Court of the 2nd Additional Judge. The learned Additional Judge agreed with the trial Judge in holding that the sale-deed in defendant's favour was tainted with fraud; it was without consideration and Mt. Dukhopriya was "physically and mentally" incapable of executing the document when it was alleged to have been executed by her.

[10] The second contention that was raised before the learned Additional Judge was that in any case the relief for recovery of possession could not be allowed to the plaintiff as there was no prayer for a declaration of the plaintiff's title to the suit land. It may be observed that the plaintiff did rely on the sale-deed in his favour. Its execution was even admitted by the defendant. In spite of this, the contention was raised that there was no express prayer for a declaration of title. The possessory relief was obviously claimed on the basis of title as evidenced by the sale-deed in plaintiff's favour. The omission of an express prayer for a declaration of title was made the basis of the plea that a decree for possession could only follow a decree for declaration of title, and as the declaration of title had not been prayed for, this relief should not have been allowed. It appears that plaintiff-respondent did not get the right advice and put in a petition for withdrawal of the prayer for possession in order that at least the second relief given to him may stand.

[11] In his petition, he stated that the objection that the suit (for possession) was not maintainable was raised for the first time in appeal and that the omission to include a prayer for declaration of title may be considered as a formal defect and that as the suit may fail for this, he may be permitted to withdraw his claim with respect to recovery of possession with permission to bring a fresh suit on the same cause of action. In his petition for withdrawal he also stated that an error had crept in the description of the land from which he had been dispossessed by the defendant as given in the schedule. This was an additional reason for securing permission to bring a fresh suit. Defendant resisted the request for leave to bring a fresh suit on the same cause of action. The learned Judge, however, allowed plaintiff-respondent to withdraw his claim with respect to recovery of possession and dismissed the suit for possession reserving plaintiff liberty to bring a fresh suit for that relief on the same cause of action later. The decree of the trial Court so far as the second relief is concerned was allowed to stand.

[12] The learned counsel for the appellant has urged that the relief granted in the case by the appellate decree is declaratory in nature and even if it is treated as one for cancellation of the document in favour of defendant 1, it could not have been granted after the withdrawal of the relief for possession which was really the consequential relief which on the showing of the plaintiff himself was available to him at the time of the institution of the suit. He has relied on S. 42, Specific

Relief Act and on *Shankar Lal* v. *Sarup Lal*, 34 ALL. 140: (13 I. C. 19) in support of his contention. The decree in this case is not for a mere declaration under S. 42. It is a decree for the cancellation of the document in defendant's favour. The order passed by the learned Munsiff stated in express terms that the deed in question, viz., the sale deed, in favour of defendants 1, stood cancelled and that a copy of the decree be sent to the Registrar for necessary action under S. 39. There cannot be any manner of doubt that the decree that followed the order was not a simple declaratory decree. The terms of the judgment make it clear that the decree was passed under S. 39. No objection was taken to this part of the decree in appeal. All that was urged was that a decree for possession could not be granted as the plaintiff had omitted to ask for a declaration of title in his favour on the basis of the sale-deed he was relying on. This objection prevailed and the plaintiff was permitted on his application to withdraw his claim with respect to the recovery of possession. His request for leave to bring a fresh suit was resisted by the defendant but he was not successful in his attempt. The appellate Court, in consequence, modified the decree only to this extent that the relief for possession was disallowed.

[13] The learned counsel for the appellant has drawn my attention to the last part of the judgment which is as follows:

"The appeal is, therefore, dismissed with half costs to the plaintiff-respondent both in this Court and in the Court below and the judgment and the decree of the learned Munsiff with respect to the declaration that the sale-deed executed on 11th March 1944, by late Mt. Dukhoptiya in favour of defendant 1, is inoperative, and bad in law, and, as such, has not conferred any right, title and interest on the said defendant with respect to the suit lands covered by kheraj patta No. 14, of Purnakamdey village in mouza Paschim Borigog, are hereby affirmed and the plaintiff's claim with respect to recovery of possession of the suit land is dismissed on withdrawal, and the learned Munsiff's decree is modified to that extent."

He relies on this part of the order for his argument that the decree in the appellate Court was modified and it was a decree pure and simple for a declaration that the document in question was void. This contention cannot prevail. The learned Judge in appeal reproduced the penultimate para from the judgment of the trial Court which had embodied the declaration in plaintiff's favour that the sale-deed in favour of the defendant was inoperative and bad in law. The direction that the deed stood cancelled and that a copy of the deed be sent to the Registrar for necessary action under S. 39, has not been reproduced in the appellate order. But this does not imply that the relief granted under S. 39, has been disallowed. There was no such prayer made by the defendant and the appellate Court merely modified the decree of the trial Court by disallowing the claim with respect to possession only. The learned Judge stated expressly that the decree of the Munsiff was modified to that extent. The decree, so far as the second relief is concerned, therefore, stands unaltered and it is a decree for the cancellation of the instrument in favour of the defendant.

[14] The next contention raised is that when the plaintiff is admittedly out of possession and he is in a position to claim a decree for possession, he should not be permitted even to obtain a decree for the mere cancellation of the instrument. This contention is sought to be supported by *Shankar Lal* v. *Sarup Lal*, 34 ALL. 140: (13 I. C. 19). In this case the plaintiff did not ask for a declaration of his title. He merely prayed that the will may be declared void and delivered up to be cancelled. This case was clearly covered by S. 39, Specific Relief Act. The learned Judges (Karamat Hussain and Chamier JJ.) observed as follows:

"Ordinarily a Court would, we think, exercise its discretion wisely if it declined to adjudge such an instrument void and would do well to leave the plaintiff to a suit for possession. The result of allowing a suit to be maintained under S. 39, and another suit for possession to be brought immediately afterwards is that the defendant is put to unnecessary expense. In this case though the Additional Judge does not say very much about it, we think we must hold that he has exercised his discretion, and, inasmuch as he has decided that the document is void and both the lower Courts agree that the will has not been proved, we do not feel called upon to set aside his decree."

[15] It is clear that the learned Judges did not lay down as a matter of law that a document could not be cancelled unless a prayer for possession was also included in the suit where plaintiff was out of possession. All that was held was that it would be a wise discretion if ordinarily the Court declines to adjudge an instrument void if relief for possession is not included in the claim by the plaintiff who is out of possession. The granting of the relief under S. 39, was in view of the learned Judges in discretion of the Court and on the facts of the particular case before them the decree for mere cancellation of the document was not interfered with. Here, there are better reasons for not interfering with the decree of the lower appellate Court. Plaintiff had actually prayed for the relief for recovery of possession and was induced or misled to withdraw that claim on an untenable objection from the defendant. In these circumstances, I do not see any justification for setting aside the decree.

[16] The learned counsel for the respondent requested that plaintiff be allowed to amend the plaint and that a decree for possession be also passed in his favour. This is an extraordinary and also an extremely extravagant request. Plain-

tiff was permitted to withdraw his relief for the recovery of possession. He has not appealed from the decree nor has put in cross-objections. He cannot now be permitted to re-introduce his claim for recovery of possession and I decline to entertain this request.

[17] For reasons given above, the appeal fails and is dismissed with costs.

[18] Mr. Ghose has asked for a certificate for a Letters Patent Appeal. He states that the Allahabad case on which he relied does not state the law correctly. This is an extraordinary statement to make. I am not satisfied, however, that there is any substantial question of law in the case or that it is otherwise a fit case for a Letters Patent Appeal. I, therefore, decline to grant the Certificate.

M.K.S. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 75 *[C. N. 25.]*

THADANI AG. C J. AND RAM LABHAYA J.

Kasim Ali and another — Accused—Appellants v. *The King.*

Criminal Appeal No. 37 of 1949, Decided on 21st November 1949, from order of Sessions Judge, Lower Assam District.

(a) Evidence Act (1872), S. 33 — Evidence of witness in committal proceedings — Same witness partly examined in Sessions Court — S. 33 is inapplicable — Evidence is admissible only under S. 288, Criminal P. C.—Criminal P. C. (1898), S. 288.

The evidence of a witness which has been recorded in committal proceedings cannot be admitted under S. 33, Evidence Act in the Sessions Court if that witness has been partly examined in the Sessions Court. Such evidence can only be admitted under S. 288, Criminal P. C. [Paras 11 & 12]

Annotation : ('46-Man.) Evidence Act, S. 33 N 1; ('49-Com.) Criminal P. C., S. 288 N. 1 and 6.

(b) Evidence Act (1872), S. 167 — Trial by jury—Misreception of evidence not influencing verdict of jury — Other direct evidence available to justify verdict — Conviction cannot be set aside.

Under the provisions of S. 167, Evidence Act, misreception of evidence is not a ground for interference. It is true that misreception of evidence in a particular case might have the effect of so influencing the minds of a jury as to render their verdict erroneous. But where such misreception of evidence cannot reasonably be said to have influenced the mind of the jury in coming to their verdict and there is other direct evidence of eye-witnesses implicating the accused, the conviction of the accused will not be interfered with. [Para 12]

Annotation : ('46-Man.) Evidence Act, S. 167 N. 7.

J. C. Sen — for Appellant.

K. R. Barman, Govt. Advocate (Sr.)— for the Crown.

Judgment. — This is an appeal by one Kashim Ali and Fatik Sheikh against their convictions and sentences passed by the learned Sessions Judge, Lower Assam Districts upon a unanimous verdict of guilty brought by the Jury, the appellant Kashim Ali having been sentenced to transportation for life under S. 302, Penal Code and 2 years' R. I. under S. 148, Penal Code the sentences to run concurrently; the appellant Fatik Sheikh having been sentenced under Ss. 302/149, Penal Code to transportation for life.

[2] One Mt. Dalimannessa was married to one Badaruddin, a son of the deceased Yad Ali. Adarjan, a daughter of Yad Ali, was married to the appellant Fatik Sheikh. For some 3 or 4 years, Mt. Dalimannessa had ceased to live with her husband, Badaruddin, and was living with her parents. While Dalimannessa was living with her parents, she was once abducted by the appellant, Fatik Sheikh, and detained in his house for some 3 months. Fatik Sheikh then divorced his wife, Mt. Adarjan. Badaruddin, the husband of Dalimannessa, thereupon filed two criminal cases against the appellant Fatik. During the investigation of these cases, Mt. Dalimannessa was recovered by the Police about a year before the present murder and was handed over to her parents.

[3] On 11th July 1948, at about 1 A. M., some 10 to 15 persons came to the house of Badaruddin, and shouting from outside the house, asked Badaruddin to hand over Dalimannessa to them. Badaruddin answered back saying that his wife was not there. The intruders then went to the house of Yad Ali, the father of Badaruddin. Yad Ali's house was next door to that of Badaruddin. The appellant Kasim is alleged to have asked Yad Ali to hand over Mt. Dalimannessa to them. Yad Ali said Dalimannessa was not in his house, whereupon the two appellants entered the house of Yad Ali and, when they did not find Mt. Dalimannessa, Kasim who was armed with a spear, pierced Yad Ali in the region of his chest. This attack upon Yad Ali was witnessed by his wife, Fulmala, and his divorced daughter, Adarjan. As a result of the injury, Yad Ali fell to the ground. On alarm being raised, the two appellants left the house of Yad Ali and disappeared along with their companions. After the appellants had disappeared, Dalimannessa, Badaruddin and his brother, Kadam Ali, came to the house of Yad Ali. Shortly afterwards, some neighbours also arrived. Yad Ali who was still alive, was then taken to the Barpeta hospital in a boat. Yad Ali's brother, one Abed Ali, reported the matter to the Police. Yad Ali died the following day. On completion of the investigation, the two appellants and two others were sent up for trial, but the appellants only were convicted and sentenced by the learned Judge for the murder of Yad Ali.

[4] The defence of the accused was that on the night in question, they had not visited the

house of Badaruddin or the deceased for any purpose; they suggested that some dacoits might have visited the house of Yad Ali and in the course of the commission of a dacoity, had murdered Yad Ali.

[5] Mr. Sen for the appellants has argued (1) that the learned Sessions Judge misdirected the jury in that he summed up the evidence in a way which caused confusion in their minds, a confusion which has resulted in an erroneous verdict; (2) that the learned Sessions Judge, in omitting to explain to the jury the provisions of S. 304, Penal Code, has misdirected the jury, (3) that the learned Sessions Judge, in omitting to direct the jury to discard the evidence of the prosecution witnesses as worthless and unreliable, has misdirected them, (4) that the learned Sessions Judge misdirected the jury in omitting to direct them to discard the prosecution evidence altogether because, according to the medical evidence, Yad Ali could not possibly have made any statement after he had received the injury, (5) that the learned Sessions Judge ought to have directed the jury that it was not likely that the appellants would come to abduct Mt. Dalimannessa after the lapse of a year, (6) that the learned Sessions Judge, in wrongly admitting the evidence of Mt. Adarjan under S. 33, Evidence Act, has caused a failure of justice, (7) that the learned Sessions Judge misdirected the jury in omitting to draw their attention to the inherent improbabilities of the prosecution case, (8) that the learned Sessions Judge should have stressed the difficulty of identifying the appellants by the light of a torch, (9) that the learned Judge misdirected the jury in omitting to direct them to consider the case of each of the appellants separately.

[6] We have heard Mr. Sen for the appellants at length in support of his contentions. We are not satisfied that the learned Sessions Judge has misdirected the jury on any material point in the prosecution evidence. The learned Judge's summing up, from the point of view of the appellants, is a summing up more in their favour than against them. The learned Sessions Judge has drawn the attention of the jury to the contradictions and discrepancies in the prosecution evidence, material and immaterial and left the appreciation of the evidence in the case to the jury. Indeed, where he has expressed any opinion, it is in favour of the appellants. We do not think it was the duty of the learned Judge to tell the jury to discard the prosecution evidence having regard to certain contradictions or discrepancies. The acceptance or rejection of the evidence in the case, notwithstanding contradictions and discrepancies, was a matter entirely within the province of the jury. In the third paragraph of his charge to the jury the learned Judge has expressly directed the jury to consider the case of each accused separately.

[7] As regards the alleged dying declaration, the learned Sessions Judge invited the attention of the jury to the evidence of the Doctor who had stated that, in his opinion, Yad Ali must have lost all consciousness immediately after he received the injury. We do not think there is any substance in the contention that it is not likely that the appellants would attempt to abduct Mt. Dalimannesa after the lapse of a year.

[8] We can see nothing wrong in the summing up of the learned Judge on the question of identification of the appellants by the prosecution witnesses. This is not a case where the weight of evidence on this particular question rests on the evidence of casual recognition of unknown persons. In this case, the appellants who are related to the prosecution witnesses, were well known to them, and we do not think there was any difficulty in identifying them at the time of the occurrence. In any case, the learned Sessions Judge pointed out to the jury the passages in the evidence of the prosecution witnesses which affected their credibility in the matter of the identification of the appellants.

[9] On the question of the learned Judge's failure to explain to the jury the terms of S. 304, Penal Code, it is sufficient to say that we do not think this was a case in which any reference to S. 304, Penal Code, was called for.

[10] The only substantial ground taken in this appeal is that the learned Sessions Judge was in error in admitting the evidence of Mt. Adarjan under the provisions of S. 33, Evidence Act. The learned Judge has observed :

"By the by, I should tell you that Mt. Adarjan could not be cross-examined in details before this Court though attempts were made for the purpose. She gave her evidence in examination-in-chief, but on account of illness, she was incapable of giving in Court answers to the questions in cross-examination put by the learned Advocate on behalf of the defence. On account of illness, she stated that she could not understand the questions of the learned Advocate and she appeared to be very restless and she could not take the seat when she was given a stool for the purpose. Therefore, her evidence before our Court will not be placed before you and you should not consider the same. Under S. 33, Evidence Act, her evidence before the Committing Court will be placed before you. She was partly cross-examined there by the defence, and she could not be cross-examined fully during the trial of the case. The value of her evidence before the Committing Court, and which will be placed before you, is very much lessened."

[11] Mr. Sen has argued that S. 33, Evidence Act has no application where a witness has been partly examined in the Court of Session : that a witness's evidence which has been recorded in committal proceedings, can be admitted only

under the provisions of S. 288, Criminal P. C., if the same witness has been examined at the trial, as in this case.

[12] We think there is considerable force in this argument, and on the facts of this case, we propose to exclude the evidence of Adarjan entirely from our consideration. Under the provisions of S. 167, Evidence Act, misreception of evidence is not a ground for interference. It is true that misreception of evidence in a particular case might have the effect of so influencing the minds of a jury as to render their verdict erroneous. In the case before us however, the learned Judge has clearly said to the jury that the value of Mt. Adarjan's evidence was "very much lessened." We do not think the reception of the evidence of Mt. Adarjan under S. 33, Evidence Act, can reasonably be said to have influenced the mind of the jury in coming to their verdict. There is a mass of direct evidence of eye-witnesses who implicate the appellants. The jury apparently accepted it, and we do not think it acted in a manner in which no reasonable man would act. (Their Lordships then quoted the evidence of eye-witnesses, Fulmala, Dalimunnissa and Kadin Ali. The judgment then proceeds as follows :)

[13] Finally, the prosecution led evidence of Yunus, Abdul Salam, and Isub Ali, which corroborated the evidence of the eye-witnesses. If the evidence of these 6 witnesses is accepted—and the jury apparently accepted it—we do not think we can set aside the convictions and sentences on the sole ground that Adarjan's evidence was wrongly admitted under the provisions of S. 33, Evidence Act. In this view, we would scarcely be justified in ordering a re-trial by reason of the misreception of the evidence of Adarjan. We accordingly decline to interfere, and dismiss the appeal.

K.S. *Appeal dismissed.*

A. I. R (37) 1950 Assam 77 *[C. N. 26.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Kanteswar Chowdhury and others — Plaintiffs — Appellants v. *Province of Assam and others—Defendants—Respondents.*

Second Appeal No. 810 of 1944, Decided on 22nd November 1949, from judgment and decree of learned Dist. Judge, A. V. D., D/-18th January 1944.

Assam Land and Revenue Regulation (1886), Ss. 154 (1) (a), 32, 62 — To avoid bar of S. 154 (1) (a) plaintiff to prove violation by Government of his existing right under Regulation — Mere occupation not sufficient under S. 32 — S. 62 does not control S. 154 — Trial of suit in civil Court is barred.

Before the bar of S. 154 (1) (a) can be said to be inoperative, the plaintiff must lay the foundation for his contention that he had an existing right under the Assam Land and Revenue Regulation which the Government of Assam had violated. Under S. 32 mere occupation is not enough for occupation may be the occupation of a trespasser. The occupants contemplated by S. 32 must have a permanent, heritable and transferrable right of use and occupation in the land, or be in possession as mortgagees of persons having such a right. Where there is not an iota of evidence adduced by the plaintiffs which shows that they are in any manner entitled to the property in question, S. 62 also has no application. Further, S. 62 does not control S 154 which deals with certain specified subjects. The cognizance and trial of the suit by a civil Court in such a case is barred by the provisions of S. 154 (1) (a): A.I.R. (5) 1918 Cal. 21 ; A. I. R. (7) 1920 Cal. 274 ; A. I. R. (23) 1936 Cal. 629 and 39 C. W. N. 857, *Disting.*

[Paras 8, 10, 13]

J. C. Sen and M. N. Mahanta—for Appellants.
K. R. Barman, Govt. Advocate and B. C. Barua—for Respondents.

Judgment. — This is a second appeal from the judgment and decree of the learned District Judge, A. V. D., dated 18th January 1944 by which he affirmed the judgment and decree of the trial Court which had dismissed the plaintiff-appellants' suit with costs.

[2] The plaintiff-appellants 9 in number brought a suit for a declaration that an order passed by the Sub-divisional Officer of Barpeta on 17th April 1939, settling the lands in suit with the defendant-respondents 2-38, was *ultra vires* and without jurisdiction; that likewise an order passed by the Revenue Tribunal on 14th November 1941, ordering eviction of the appellants was without jurisdiction; that the appellants were entitled to remain in possession of the lands in suit and to get pattas in their favour, and for a permanent injunction restraining the respondents from evicting the appellants from the disputed lands measuring some 319 bighas odd situated in village Medhikuchi, mouza Hastinapur. The Province of Assam was impleaded as defendant 1.

[3] The defence to the suit was that the Government of Assam was free to settle the lands in question with the other defendants as they were waste lands, there being no claim by any person who could be described as a land-holder or settlement-holder or a person having any other right to settlement under the Assam Land and Revenue Regulation.

[4] On the pleadings, the trial Court framed the following amongst other, issues:

"2. Whether the Munsiff's Court has pecuniary jurisdiction to try the suit?

3. Whether the civil Court has jurisdiction to entertain and try the present suit?

4. Whether the suit is maintainable?"

[5] The trial Court tried issues 2, 3 and 4, as preliminary issues and held that it had no jurisdiction by reason of the provisions of S 154 (1), Assam Land and Revenue Regulation. The lower appellate Court agreed with the decision of the trial Court on this issue.

[6] The facts, as found by the lower appellate Court, are these: The land in dispute was admittedly unfit for cultivation, and under some mistaken impression, it was treated as a grazing reserve; the plaintiffs had failed to prove that they ever cultivated this land after acquiring it from Government on annual pattas; on the other hand, the defendants were the person who had offered to give up an equal area of land of which they were in possession, to form a recognised grazing reserve on condition that they were given settlement of the 319 bighas of land now in dispute; the defendants are inhabitants of the same village and mouza as those to which the land in suit appertains; the appellants belong to a different village and different mouza; somehow or other, before the settlement proceeding which resulted in the settlement with the defendants, the appellants managed to occupy the land which resulted in the Goverment starting encroachment proceedings against them under R. 18 (2), and the S. D. O. in due course, passed orders for their eviction; the order of the S. D. O. was set aside by the Deputy Commissioner, Kamrup, but the Revenue Tribunal set aside the order of the Deputy Commissioner and restored the order of the Sub-divisional Officer, as a result of which, the plaintiff-appellants brought the present suit.

[7] Before the learned District Judge as well as before us, it was contended on behalf of the appellants that certain sections and rules framed under the Assam Land and Revenue Regulation render the bar provided by S. 154 (1) (a) inoperative in view of certain decisions of the Calcutta High Court. The learned District Judge considered the cases reported in *Askar Mian* v. *Sahedali*, 23 C. W. N. 540 : (A. I. R. (5) 1918 Cal. 21), *Jai Gobinda* v. *Hazira Bibi*, 24 C. W. N. 149: (A. I. R. (7) 1920 Cal. 274), *Secy. of State* v. *Brajendra Kishore*, A. I. R. (23) 1936 Cal. 629 : (168 I. C. 249) and *Dhanai Namasut* v. *Haji Niamatulla*, 39 C. W. N. 857 and came to the conclusion that the decisions relied upon by the appellants' advocate, had no application to the facts before him. We are in agreement with this view.

[8] The decisions of the Calcutta High Court to which reference has been made, have application to cases where a plaintiff has made out a *prima facie* case respecting an existing right, which the Revenue Authorities omitted or refused to respect when settling the land with persons other than the plaintiff. The learned District Judge rightly points out that before the bar of S. 154 (1) (a) can be said to be inoperative, the plaintiff must lay the foundation for his contention that he had an existing right under the Assam Land and Revenue Regulation which the Government of Assam had violated. Section 32 of the Regulation, upon which apparently the appellant's advocate had relied before the learned Judge, is in these terms:

"32. (1) The Settlement Officer shall offer the settlement to such persons if any as he finds to be in possession of the estate and to have a permanent, heritable and transferable right of use and occupancy in the same, or to be in possession as mortgagees of persons having such a right.

(2) If the Settlement Officer finds no person in possession, as aforesaid, it shall be in his discretion, subject to such rules as the Provincial Government may make under S. 12, to offer the settlement to any person he thinks fit."

Under S. 32, mere occupation is not enough, as alleged by the appellants, for occupation may be the occupation of a trespasser. Indeed in this case, the learned District Judge has come to the conclusion that the appellants were trespassers. The occupants contemplated by S. 32 of the Regulation must have a permanent, heritable and transferable right of use and occupation in the land, or be in possession as mortgagees of persons having such a right. It is clear from the evidence that the plaintiff failed to bring his case within the terms of S. 32 of the Regulation.

[9] Nor do we think that S. 39 of the Regulation is of any assistance to the appellants. Section 39 deals with the effect of a decision of the Settlement Officer in the matter of the settlement. It refers to Ss. 35 and 36, and S. 35 refers to S. 12 of the Regulation. For the purpose of interpreting S. 12 of the Regulation, reference must be made to Ss. 1 and 2 of Part II, Chap. I of the Regulation. Section 1, among other definitions, contains the definition of 'waste land', and it is common ground that the land in dispute was waste land when the settlement was made. Section 2 of Part II, Chap, I deals with the powers of the Deputy Commissioner, and is in these terms :

"The disposal of waste land required for ordinary or special cultivation or for building purposes will, subject to the general or special orders of the Provincial Government, vest in the Deputy Commissioner who will dispose of such land by grant, lease or otherwise in the manner and subject to the conditions set forth in the rules following, provided that the Deputy Commissioner may expressly reserve any such land from settlement."

At the trial of the suit, the plaintiffs did not produce any order of the Deputy Commissioner in their favour. Even when the matter was before the learned District Judge, the appellants failed to produce any order of the Revenue authorities settling or purporting to settle with them the land in dispute.

[10] Mr. Sen for the appellants very properly conceded before us that S. 62 of the Regulation had no application to the facts before us. Section 62 finds place in Chap. IV, Part I of the

Regulation dealing with registration, Section 62 says :

"Nothing contained in this Chapter and nothing done in accordance therewith shall be deemed to (a) preclude any person from bringing a suit in the civil Court for possession of, or for declaration of his right to, any immoveable property to which he may deem himself entitled."

The learned District Judge points out that there is not an iota of evidence adduced by the appellants which shows that they are in any manner entitled to the property in question. Apart from the fact that there is no evidence led by the plaintiffs as to their right, title and interest, S. 62 does not control S. 154 of the Regulation which deals with certain specified subjects.

[11] These sections of the Regulation to which we have referred have been considered by the learned District Judge. Rules 15 and 18 were also argued before us, as indeed they were argued before the learned District Judge. The learned District Judge came to the conclusion that there has been no breach of R. 15. He expressed the opinion that it was not necessary to be too definite on this point, but the following facts stated by the learned Judge, namely, that the appellants belong to another village and that they had failed to prove previous possession, that they did not apply for any settlement, that ever since the trouble started between the parties, it was the defendants who were paying the land revenue justified the view he has taken that the action of the appellants was not bona fide. The use of the word 'ordinarily' in R. 15 of the Settlement Rules is also not of any assistance to the appellants. As the learned Judge points out, the use of the word 'ordinary'

"gives the Revenue Authorities the power to make departure in suitable cases and the present case is obviously one where a departure was justified."

[12] It is unnecessary for us to express our view on the interpretation of R. 18 (1), as we do not think it is necessary for the purpose of disposing of this appeal.

[13] We agree with the learned District Judge that the cognizance and trial of the suit by a civil Court was barred by the provisions of S. 154 (1) (a) of the Regulation.

[14] The result is that the appeal is dismissed with costs. There will be two sets of costs—one payable to the Province of Assam, and the other to the remaining defendants.

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 79 *[C. N. 27.]*

THADANI Ag. C. J. AND RAM LABHAYA J.

Ambor Ali — Appellant v. *Nichar Ali — Respondent.*

Second Appeal No. 11A of 1948, Decided on 7th December 1949, from judgment and decree of Sub-Judge, Cachar, D/-26th February 1948.

(a) Civil P. C. (1908), O. 41, R. 31 — Judgment should be self-contained — Material evidence not reproduced—Reasons for holding fact not proved or oral evidence not satisfactory not stated—Judgment does not comply with provisions of O. 41, R. 31.

The judgment of an appellate Court must be self-contained, so self-contained that findings of fact can be sustained upon a bare perusal of it. It is not sufficient if it merely states that a particular fact had not been proved nor is it sufficient if it merely states that the oral evidence was not satisfactory on that point. It should reproduce the material evidence and also state the reasons for holding the fact as not proved and the oral evidence unsatisfactory. [Para 7]

Annotation : ('44-Com.) Civil P. C., O. 41, R. 31, N. 7.

(b) Civil P. C. (1908), O. 20, R. 4 (2)—Judgment merely stating conclusions—Material evidence on issue and reasons for acceptance or rejection not stated—Judgment is bad.

It is not sufficient for the judgment of the trial Court merely to say that on a careful consideration of the evidence, the Court has come to this or that conclusion. The material evidence on a particular issue for and against the parties to the suit must be set out in the judgment, and reasons stated for its acceptance or rejection. [Para 8]

Annotation : ('44-Com.) Civil P. C., O. 20, R. 4, N. 9.

S. K. Ghose—for Appellant.

N. M. Dam—for Respondent.

Thadani Ag. C. J. — This is a second appeal from the judgment and decree of the learned Subordinate Judge, Cachar, dated 28th February 1948, by which he affirmed the judgment and decree of the trial Court which had decreed the plaintiff's suit with costs.

[2] The plaintiff-respondent brought a suit to eject the defendant from the lands in suit which, according to him, were settled on the defendant some 12 or 13 years before the institution of the suit at an annual rent of Rs. 20. He alleged that he required the land in suit for his own use and, after serving a notice on the defendant to vacate the lands, he brought the present suit.

[3] The defence to the suit was that no valid notice had been served upon the defendant, and that the defendant had acquired occupancy rights over the property.

[4] Upon the pleadings, the trial Court framed the following issues :

1. Whether any valid notice of ejectment was served on the defendant?
2. Whether the defendant has acquired occupancy rights over the suit lands ?
3. To what relief, if any, is the plaintiff entitled ?

As a result of its findings, the trial Court decreed the plaintiff's suit.

[5] The lower appellate Court, by a very short judgment, dismissed the appeal.

[6] We are constrained to observe that the judgment of the lower appellate Court is of no assistance to us in deciding the appeal. In dis-

posing of the appeal the learned Subordinate Judge has observed :

"I have gone through the evidence and considered the argument advanced. The defendant-appellant wanted to show that he started occupation of the suit land since 1913 by taking the same on lease from one Mostan Mia. He relied on Ex. A, a certified copy of the kabuliyat. He, however, failed to prove the suit land and the land under Ex. A, to be same and identical plot. The oral evidence also not satisfactory on this point."

This is scarcely a compliance with the provisions of O. 41, R. 31, Civil P. C.

[7] The judgment of an appellate Court must be self-contained, so self-contained that findings of fact can be sustained upon a bare perusal of it. It was the manifest duty of the learned Subordinate Judge to state his reason why he thought the plaintiff had failed to prove that the land in suit and the lands described in EX. A, were identical. Nor was it sufficient for him to say that the oral evidence was not satisfactory on this point. He should have reproduced the material evidence and stated reasons for his conclusion that the oral evidence was not satisfactory.

[8] In view of the unsatisfactory judgment of the lower appellate Court, we referred to the judgment of the trial Court and, to our surprise, we found it no more satisfactory than the judgment of the lower appellate Court. The trial Court has observed :

"On a reference to the Re-settlement map, Ex. B, and Cadastral map, Ex. B, and Cadastral map, Ex. C, one cannot be definite as to whether the land of Sch. 1 of the plaint was covered by Ex. A."

The trial Court ought to have stated reasons why it could not come to a definite conclusion as to whether the land described in Sch. 1 of the plaint was covered by EX. A. The trial Court also stated :

"He (defendant) has no doubt led some oral evidence to show that he has acquired occupancy rights over the suit lands. The plaintiff has also led some counter evidence. On a careful consideration of the evidence on record and circumstances of the case, I am constrained to hold that the defendant has failed to show by any reliable and independent evidence that he has acquired occupancy rights over the suit lands."

We wish to point out to the Munsiff, just as we have pointed it out to the Subordinate Judge, that it is not sufficient merely to say that on a careful consideration of the evidence, the Court has come to this or that conclusion. The material evidence on a particular issue for and against the parties to the suit must be set out in the judgment, and reasons stated for its acceptance or rejection.

[9] As we are unable to say upon the judgments of the Courts below whether their findings of fact have been correctly arrived at, we set aside the judgment of the lower appellate Court and remand the appeal to the lower appellate Court, with direction to the learned Judge to re-write his judgment in the light of the observations we have made, after giving notice to the parties or their advocates to argue afresh the appeal before him, on the evidence already on the record, and to dispose of the appeal according to law.

[10] We understand that the learned Subordinate Judge, Mr. Barkataki, who heard the appeal, has been transferred to Jorhat. We order the appeal from which this second appeal has been preferred, to be transferred to the file of Mr. Barkataki, for disposal, as directed by us, and according to law.

[11] Costs of the remand will be costs in the cause.

Ram Labhaya J.—I agree.

M.K.S. *Case remanded.*

A. I. R. (37) 1950 Assam 80 *[C. N. 28.]*

THADANI AG. C. J.

Abdul Latif—*Appellant* v. *Abdul Samad*—*Respondent.*

First Appeal No. 23 of 1949, Decided on 28th November 1949.

Civil P. C. (1908), S. 98 (2) and (3)—Appeal heard by Bench of two Judges of Assam High Court — Difference of opinion — Decree of lower Court is to be confirmed—Provisos to sub-s. (2) and sub-s. (3) do not apply.

Clause 36, Letters Patent (Calcutta), which is made applicable by the Assam High Court Order, 1948, to proceedings before the Assam High Court is inoperative by reason of the Court having only two Judges. [Para 6]

For the same reason provisos to sub-s. (2) of S. 98 and sub-s. (3) of that section also are not applicable. [Para 3]

Therefore, where there is a difference of opinion between the two Judges of the Assam High Court who constitute the Bench which hears the appeal under S. 96, Civil P. C., the decree of lower Court must be confirmed : *Case law referred.* [Para 7]

Annotation : ('44-Com.) Civil P. C., S. 98, N. 9.

S. K. Ghose and B. C. Barua — for Appellant.

F. A. Ahmed, U. Goswami and P. N. Roy — for Respondent.

Judgment. — A difference having arisen between my learned brother and myself in the matter of the decision of this appeal, my learned brother taking the view that the appeal should be allowed and decreed in part in favour of the plaintiff-appellant in the sum of Rs. 1500, and I taking the view that the appeal should be dismissed, a question arises to the manner in as which the appeal should be disposed of.

[2] Section 98, Civil P C., is in these terms:

"98. Decision where appeal heard by two or more Judges :

(1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges ;

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed ;

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it ; and

(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court."

[3] Under sub-s. (2) of S. 98, Civil P. C., 'where there is no such majority which concurs in a judgment, varying or reversing the decree appealed from, such decree shall be confirmed.' The proviso to sub-s. (2) of S. 98, Civil P. C., has no application for the simple reason that the High Court of Assam does not consist of more than two Judges.

[4] As regards sub-s. (3) of S. 98, Civil P. C., which apparently contemplates a Letters Patent appeal, it was added to S. 98 by the repealing and amending Act XVIII [18] of 1928. In the words of the learned Commentator D. F. Mulla, it does no more than give effect to the decisions before that Act, namely, that where an appeal is heard by a Bench of two Judges of a High Court and the Judges differ then, *if the appeal is a Letters Patent appeal*, the procedure is governed by Cl. 36, Letters Patent, (vide *Bhai Das Shiv Das* v. *Bai Gulab*, 48 I. A. 181 : (A. I. R. (8) 1921 P. C. 6) ; *Roop Lal* v. *Lashmi Doss*, 29 Mad. 1 ; *Roy Nandipat Mahata* v. *Alexander Shaw*, 13 W. R. 209 : (4 Beng. L. R. 181); *Surajmal B. Mehta* v. *B. G. Horniman*, 20 Bom. L. R. 185 : (A. I. R. (4) 1917 Bom. 62 (S.B.)) ; *Lachman Singh* v. *Ram Lagan Singh*, 26 ALL. 10 : (1903 A. W. N. 162); *Justin Hull* v. *Arthur Francis Paull*, 24 C. W. N. 352 : (A. I. R. (7) 1920 Cal. 1009)), but if the appeal is one under the Code of Civil Procedure, the procedure is governed by S. 98, Civil P. C., (vide *Bhuta Jayatsingh* v. *Lakadu Dhansingh*, 43 Bom. 433: (A.I.R. (6) 1919 Bom. 1 (F.B.)); *Tin Tin Nyo* v. *Mg. Ba Saing*, 1 Rang. 584: (A.I.R. (11) 1924 Rang. 148) ; *Prafulla Kamini Roy* v. *Bhahani Nath*, 52 Cal. 1018 : (A. I. R. (13) 1926 Cal. 121) and *Punjab Akhbarat & Press Co. Ltd.* v. *C. M. G. Ogilvie*, 7 Lah. 179 : (A. I. R. (13) 1926 Lah. 65).

[5] The Assam High Court is not a chartered High Court. The appeal before us is not a Letters Patent appeal, but one under S. 96, Civil P. C. It is true that a Full Bench of the Madras High Court in the case reported in *Dhana Raju* v. *Balkishen Das Moti Lal Daga*, 52 Mad. 563: (A. I. R. (16) 1929 Mad. 641 (F.B.)), has held that in the case of an equal division of opinion between the Judges of the High Court, in an appeal preferred to it under the Code of Civil Procedure, the procedure to be adopted by the High Court is governed by Cl. 36 of the Charter, and not by S. 98, Civil P. C. Even so, the position, so far as this Court is concerned, apart from the fact that it is not a chartered High Court, would seem to be governed by S. 98, Civil P. C., as this Court consists of two Judges only. Clause 36 of Letters Patent of the Calcutta High Court, which has been made applicable, with necessary modifications, by the Assam High Court Order, 1948, presupposes that the High Court consists of more than two Judges, for, it says "the case shall then be heard upon that point by one or more of the other Judges." I do not think Cl. 36 means that where there are only two Judges and a difference of opinion arises between them, a reference will nevertheless be made to a third Judge to be appointed. Undoubtedly, if the Assam High Court consisted of more than two Judges, a reference would have to be made to a third Judge, and no difficulty would have arisen even if the decision of the Madras High Court, to which reference has been made, were followed.

[6] In this connection, it is significant to observe that S. 9, Assam High Court Order, 1948, which empowers the High Court of Assam to apply the law in force immediately before the prescribed day (5th April 1948) relating to the powers of the Chief Justice, single Judges and Division Courts of the High Court in Calcutta and with respect to all matters ancillary to the exercise of those powers, says that it will apply with the necessary modifications. In my opinion, the necessary modification in the application of Cl. 36 of Letters Patent of the Calcutta High Court would mean that so long as this Court consists of two Judges only, Cl. 36 of Letters Patent of the Calcutta High Court is, for all practical purposes, inoperative.

[7] In this view, the order which automatically follows as a result of difference of opinion between my learned brother and myself is that the decree of the trial Court from which the appeal has been preferred, is confirmed.

M.K. *Decree confirmed.*

A. I. R. (37) 1950 Assam 81 *[C. N. 29.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Onkarmal Agarwalla — Complainant v. *Tulsinath Gogoi — Accused.*

Criminal Ref. No. 11 of 1949, Decided on 15th November 1949, made by learned Sessions Judge, Upper Assam Dists. in Case No. 1512-C of 1947.

Criminal P. C. (1898), Ss. 258 (1) and 367 (1) — Case adjourned for defence evidence after framing of charge — Absence of complainant — Order of acquittal without finding accused not guilty is bad.

In a trial under S. 420, Penal Code, the Magistrate after framing a charge adjourned the case for defence evidence. As the complainant was absent on the adjourned date the Magistrate passed the following order: "Complainant absent. No steps taken. Accused acquitted."

Held, that as the Magistrate had not found the accused not guilty the order of acquittal contravened the provisions of S. 258(1) The order also contravened the provisions of S. 367 as neither the points for determination nor the reasons for the decision were given in the judgment and therefore it must be set aside. [Para 6]

Annotation: ('49-Com.) Criminal P. C., S. 258 N. 3, Pt. 2; S. 367, N. 5 and 7.

P. K. Goswami — for Accused.

Order.— This is a reference made by the learned Sessions Judge, Upper Assam Districts, reporting to this Court Case No. 1512-C of 1947. *Onkarmal Agarwalla* v. *Tulsi Nath Gogoi*— under S. 417, Penal Code, disposed of by Mr. T. Ahmed, Magistrate, 1st Class, Dibrugarh.

[2] In November 1947, the complainant, Onkarmal Agarwalla, delivered a quantity of rice to Tulsi Nath Gogoi, with instructions to deliver the same to the Manager of the Singlijan T. E. and to obtain a cheque from him for the price. The accused Tulsinath Gogoi obtained a cheque from the Manager of the Singlijan T. E., but did not give it to the complainant. The complainant, thinking that the Manager had not given the accused Tulsinath a cheque, asked the accused to go with him to the Manager of the Singlijan T. E. on the way, the accused, on the pretext of answering a call of nature, parted company with the complainant and never returned. The complainant made inquiries from the office of the Tea Estate and was informed that a cheque was given to the accused the previous evening. The cheque was for a sum of Rs. 2800-5-0.

[3] On the following day, i. e. 19th November 1947, the complainant filed a complaint before the District Magistrate of Lakhimpur who transferred it to Mr. A. Ahmed, E. A. C., for disposal. Mr. A. Ahmed examined the complainant on oath on 19th November 1947 and issued process against the accused under S. 420, Penal Code. The accused appeared in Court on 19th December 1947. Mr. A. Ahmed, however, was transferred and the case came to the file of another Magistrate of the 1st Class, one Mr. T. Ahmed, also stationed at Dibrugarh.

[4] On 20th April 1948, Mr. T. Ahmed examined 5 witnesses, including the complainant, and framed a charge against the accused under S. 420, Penal Code. For some reason or other, the case could not be heard until 28th January 1949, on which date the prosecution witnesses were further cross-examined by the defence, and the case for the prosecution came to a close. The case was adjourned to 1st March 1949, for defence. On 1st March 1949, the complainant appears to have been absent, and the case was adjourned to 7th March 1949. On 7th March 1949, the complainant was again absent, and the learned Magistrate, Mr T. Ahmed, passed the following order: "Complainant absent. No steps taken. Accused acquitted." It is against this order that the learned Sessions Judge has made this reference.

[5] The learned Sessions Judge points out that the order passed by the learned Magistrate contravenes the provisions of S. 258 (1), Criminal P. C., which says:

"If in any case under this chapter in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order of acquittal."

The learned Sessions Judge rightly points out that the learned Magistrate has not found the accused not guilty, and that he could not, therefore, pass an order of acquittal. The learned Sessions Judge also points out that Mr. T. Ahmed has contravened the provisions of S. 367 (1), Criminal P. C. No points for determination have been set out in the judgment of acquittal, no reasons have been given for the decision.

[6] We agree with the learned Sessions Judge, for reasons stated by him, that the order of acquittal passed by the learned Magistrate in this case is one which must be set aside. We accordingly set aside the order of the learned Magistrate, dated 7th March 1949, and remand the case for disposal according to law, from the stage at which he passed the erroneous order on 7th March 1949.

[7] The trying Magistrate is directed to call upon the accused to adduce evidence in his defence, if he so wishes, hear argument if any and thereafter to pass judgment in accordance with law.

K.S. *Reference accepted.*

A. I. R. (37) 1950 Assam 82 *[C. N. 30.]*

RAM LABHAYA J.

Belumani Nath and another — *Petitioners* v. *Ramesh Chandra Nath* — *Opposite Party.*

Criminal Revn. No. 46 of 1949, D/- 22-12-1949.

Penal Code (1860), Ss. 339 and 341 — Accused obstructing private right of way alleged by complainant over land of accused — Accused denying existence of right of way — Trial and conviction under S. 341 — Revision — Accused can plead that evidence adduced did not exclude existence of bona fide belief in mind of accused that he had right to obstruct — Act is not offence in view of exception to S. 339—Proper remedy of complainant lies in civil Court.

The accused was tried under S. 341, Penal Code for obstructing a private right of way which the complainant claimed over the land of the accused. The accused denied any such right in the complainant. The trial Court found in favour of the complainant and therefore convicted the accused under S. 341:

Held, that the failure on the part of the accused to plead at the trial that his act fell within the exception to S. 339 could not deprive him of the right to show that the evidence in the case did not exclude the existence of a bona fide belief in his mind that he had a right to close the pathway. The act of the accused did not amount to any offence. Moreover as the dispute could be more appropriately tried in a civil Court instead of in a summary trial on criminal side, the conviction could not be maintained. [Para 5]

Annotation: ('46-Man.) Penal Code S. 339 N. 1.

J. C. Sen—for Petitioners.

N. M. Dam—for Opposite Party.

Order. — The petitioners in this case were convicted under S. 341, Penal Code and sentenced to pay a fine of Rs. 20 each, and in default to undergo simple imprisonment for one week. The order of conviction was upheld in appeal.

[2] The prosecution case was that the *jangal* (path ail) in front of complainant's *bari* reached up to and joined the village path to the east of his bari and that this pathway had been in existence since the time of the complainant's grandfather. A part of the pathway, about 24 cubits in length, was on the land of the accused. They included the pathway in their field and grew paddy on it. Plaintiff was thus prevented from using the pathway. This act of the accused according to the complainant amounted to an offence under S. 341.

[3] The defence was that the complainant had no right of way over the land of the accused. Five witnesses were examined on behalf of the complainant. The trial was summary. The learned Magistrate states that these witnesses support the prosecution. They deposed that the pathway had been in existence for a long time. One witness was examined for the defence who stated that the complainant was using another pathway of the accused. The learned Magistrate visited the site of the alleged pathway. He felt satisfied that the complainant's pathway extended up to the village path and that about 3 *nols* of it lay on the accused's land. As a result of the local inspection or rather with its aid, he held that the prosecution witnesses had given proper description of the path and its locality. They also seemed to him disinterested. He, therefore, found the accused guilty.

[4] The learned counsel for the petitioners urges that the dispute was of a civil nature and in any case the accused bona fide believed that they had the right to include the site of the pathway in their own land they being the owners of the land admittedly.

[5] It appears that the complainant claims a private right of way. The dispute evidently can be more appropriately decided by the civil Court. The likelihood or at least the possibility of a bona fide belief in the mind of the accused that they had the right to stop the pathway as it was passing on their land cannot be entirely excluded. Section 339, Penal Code, which defines wrongful restraint provides an exception to the principle embodied in the section. The exception is to the effect that the obstruction of private way over land or water which person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section. This exception has not been considered by the Courts below, probably, for the reason that the defence that accused bona fide believed that they had right to close the pathway, was not pressed at the earliest possible opportunity. This failure on the part of the accused, however, should not deprive them of the right to show that the evidence in the case does not exclude the existence of a belief in their mind which takes away their act from the definition of the offence. Moreover, the question in controversy could not be decided properly in a summary trial on the criminal side.

[6] In this view of the matter, the convictions cannot be maintained. The petition is allowed. The convictions of the petitioners are set aside. The fines, if paid, shall be refunded.

K.S. *Conviction set aside.*

A. I. R. (37) 1950 Assam 83 *[C. N. 31.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Governor-General in Council — Defendant —Appellant v. *Jesraj Tilakchand Lathchand and others—Plaintiffs—Respondents.*

First Appeal No. 31 of 1947, D/- 24-8-1949.

(a) Limitation Act (1908), S 12 (2) — Time between date of pronouncing judgment and date of signing decree cannot be excluded.

Under S. 12 the time taken from the date of the pronouncement of the judgment to the date of the signing of the decree cannot be properly excluded as time requisite for obtaining a copy of the decree: A. I. R. (15) 1928 Cal. 103; 13 Cal 104 (F. B.); A.I.R. (14) 1927 Cal. 65; A. I. R (33) 1946 Cal. 10 and A I.R. (24) 1937 Cal. 732, *Dissent.*; 12 All. 461 (F. B.), *Rel. on.* [Para 5]

Annotation: ('42-Com.) Limitation Act, S. 12, N. 25, Pt. 1.

(b) Limitation Act (1908), S. 5, Explanation — Appeal, originally filed in Calcutta High Court, transferred to Assam High Court—Appellant being misled by practice of Calcutta High Court not filing appeal in time – Held there was sufficient cause for not filing appeal within time — Formal application held was not necessary.

Where an appeal originally filed in the High Court of Calcutta was, on the establishment of the Assam High Court, transferred to that High Court and the

appellant was misled in not preferring the appeal within the period allowed by law by the practice of the Calcutta High Court in computing the period of limitation prescribed for appeals :

Held, that the appellant must be regarded as having shown sufficient cause for not preferring the appeal within the period allowed by law and no formal application under S. 5 was, in view of the practice of the Calcutta High Court in which the appeal was originally filed, necessary. [Para 7]

Annotation : ('42-Com.) Limitation Act, S. 5, N. 22 and 43.

D. N. Medhi — for Appellant.

M. N. Roy and J. C. Sen — for Respondents.

Judgment. — In this appeal, a preliminary objection has been taken, namely, that the appeal is time-barred. The judgment in the first appeal was pronounced on 29th March 1946, and the appeal was preferred in the Calcutta High Court on 3rd August 1946. The decree was signed on 29th April 1946. The application for copies of the judgment and decree was made on 25th April 1946, and the copies were delivered to the appellant on 16th May 1946. On the establishment of the Assam High Court in April 1948 this appeal was transferred to this Court.

[2] Under Art. 156, Limitation Act, the appeal should have been preferred within 90 days of 29th March 1946, a period which expired on 28th June 1946. If the time taken from the date of the application for copies of the judgment and decree, namely, 25th April 1946, to the delivery of the copies on 16th May 1946; is added to 28th June 1946, in accordance with S. 12, Limitation Act, the appeal should have been filed on 17th July; the appeal having been filed on 3rd August 1946, it was *prima facie* time-barred.

[3] Mr. Medhi for the appellant has contended that the appellant is entitled not only to the period, at any rate 10 days of it, which elapsed between the date of the application for copies and their delivery, but also to the period from 29th March 1946 to 29th April 1946, during which time the decree was not signed by the first appellate Court; 90 days from 29th April 1946, would expire on 29th July 1946, and if the 10 days which he claims from 25th April 1946 to 16th May 1946, are added to the 90 days, the appeal would have been within time even if it had been filed on 8th August 1946; it was in fact filed on 3rd August 1946.

[4] In support of his contention, Mr. Medhi has relied upon certain decisions of the Calcutta High Court reported in *Mahoruddi Sheikh* v. *Safed Ali Khalifa*, A. I. R. (15) 1928 Cal. 103 : (105 I. C. 779) ; *Bani Madhub* v. *Matungini Dassi*, 13 Cal. 104 (F. B.) ; *Ashutosh Roy* v. *Monomohan Roy*, A. I. R. (14) 1927 Cal. 65 : (97 I. C. 539) ; *Dwarka Das Kedar Bux* v. *Gajanan Jagannath*, A. I. R. (33) 1946 Cal. 10 : (222 I. C. 475) and *Sudhansu Bhusan* v. *Majho Bibi*, 42 C. W. N. 72 : (A. I. R. (24) 1937 Cal. 732), in which the Calcutta High Court has consistently taken the view that the time which elapses between the pronouncement of the judgment and the signing of the decree can be properly excluded under the provisions of S. 12, Limitation Act as time requisite for obtaining a copy of the decree. This aspect of the case has been noticed in Chitaley's Limitation Act, Edn. 2, 1942, Vol. 3, at p. 2509, where the decisions of the various High Courts in India have been referred to. This Court had occasion to consider this question in *Katimal Brahma* v. *Mohan Nath Nahata*, A. I. R. (36) 1949 Assam 23, we took the view that the starting point for the purpose of the Limitation Act under Art. 152, is the date of the pronouncement of the judgment, and not the date of the signing of the decree. Mr. Medhi has not disputed the correctness of that view, but his contention is that the Calcutta High Court has consistently taken the view that under S. 12, Limitation Act, the time which elapses between the date of the pronouncement of a judgment and the date of the signing of the decree, is to be excluded as time requisite for obtaining a copy of the decree.

[5] With all respect to the decisions of the Calcutta High Court, to which we have referred, we are unable to persuade ourselves to agree with the view that under S. 12, Limitation Act, the time taken from the date of the pronouncement of the judgment to the date of the signing of the decree, can be properly excluded as time requisite for obtaining a copy of the decree. The earliest Full Bench decision of the Calcutta High Court reported in *Beni Madhub* v. *Matungini Dassi*, 13 Cal. 104, which apparently has been interpreted as authority for the proposition that the time which is taken from the date of the pronouncement of a judgment till the signing of the decree can be excluded as time requisite for obtaining a copy of the decree under S. 12, Limitation Act, was dissented from by a Full Bench decision of the Allahabad High Court reported in *Bechi* v. *Ahsan Ullah Khan*, 12 ALL. 461 : (1890 A.W.N. 149 (F. B.)). The Allahabad High Court did not accept the view that under S. 12, Limitation Act, the time which elapses between the date of the pronouncement of the judgment and the date of the signing of the decree, can be properly excluded as time requisite for obtaining a copy of the decree. At p. 469, Mahmood J., delivering the judgment of the Full Bench, observed :

" 'Now, in the first place, I entertain no doubt that it is necessary and indispensable for a litigant who intends to appeal from a decree which is the result of a judgment against him, and which decree must, under the law, bear date the day on which the judg-

ment was pronounced to apply for a copy of the decree and, if necessary, of the judgment also, before the lapse of the period of limitation for the appeal which he intends to file, whatever that period may be. This view is amply supported by the ruling of Garth C. J., in *Ramey* v. *Broughton*, 10 Cal. 652.' In the case before Garth C. J., the decree had remained unsigned for more than the period of limitation, and the appellant subsequently applied for and obtained a copy of the decree. It was contended before the learned Chief Justice on behalf of the appellant 'that where the decree was not drawn up and signed until after 20 days had expired from the delivery of the judgment, the 20 days ought to count from the time when the decree was made.' In dealing with this contention, Garth C. J., said 'But this is directly contrary to the express language of the law. By Art. 151 of the schedule to the Limitation Act, the 20 days are to be reckoned from the date of the decree; and by S. 205, Civil P. C., the decree is to bear date the day on which the judgment is pronounced, so that the appeal must clearly be filed within 20 days from the day on which the judgment is pronounced.' Garth C. J., has also observed 'If the appellant had applied for a copy while the 20 days were running, he would not be barred.' "

[6] In the case before us, the application for copies was made during the time when the period of limitation was running, and under S. 12, the time which the appellant was entitled to exclude was the time which elapsed between the date of the application for copies of the judgment and decree and their delivery, namely, from 25th April 1946 to 16th May 1946, and if this time is added to 28th June 1946, the appeal should have been filed on 17th July 1946.

[7] But we think, having regard to the explanation to S. 5, Limitation Act, which says:

"The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation, may be sufficient cause within the meaning of this section."

The appellant must be regarded as having shown sufficient cause for not preferring the appeal within the period allowed by law. It is true the appellant has not filed a formal application under S. 5, Limitation Act, but we do not think that a formal application is necessary, in view of the practice of the Calcutta High Court in computing the period of limitation prescribed for appeals, in the manner indicated in a long line of decisions which lay down that the time taken between the date on which the judgment is pronounced and the date on which the decree is signed is to be excluded under S. 12, Limitation Act as time requisite for obtaining a copy of the decree. As this appeal was originally filed in the Calcutta High Court, the appellant was undoubtedly misled by the judgments and practice of that Court into believing that appeals filed in such circumstances as the present are within time. No formal application under S. 5, Limitation Act, is, therefore, necessary.

[8] We accordingly decide the preliminary objection against the respondents and order that this appeal will be heard. The appeal will be set down for hearing in due course.

V.R.B. *Objection disallowed.*

A. I. R. (37) 1950 Assam 85 *[C. N. 32.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Monje Mechik and another — *Petitioners* v. *Mechok Mechik and another*—*Opposite Party.*

Civil Revn. No. 17 (H) of 1949, D/- 28-11-1949, to revise order of Deputy Commissioner, Garo Hills, D/- 25-11-1948.

Administration of Justice and Police in Garo Hills District Rules, R. 31—Provisions are mandatory.

The non-observance of R. 31 goes to the root of the jurisdiction of the Deputy Commissioner in the trial of the petition brought by an indigenous inhabitant and her husband for being appointed as Nokmas. Deputy Commissioner is bound, under the terms of R. 31, to induce the parties to submit their case to a panchayet and, if they agree to do so, to follow the procedure laid down in the Rule. (Where he made no attempt to induce the parties to submit their case to a punchayet and passed an order after himself taking evidence, his order was set aside, and he was directed to proceed in accordance with R. 31.) [Para 6]

P. K. Lahiri — for Petitioners.

J. C. Sen — for Opposite Party.

Order. — This is an application under R. 35, of the Rules framed for the Administration of Justice and Police in the Garo Hills District, seeking to revise an order passed by the learned Deputy Commissioner, Garo Hills, on 25th November 1948, by which he set aside his previous order by which he had appointed one Monje Mechik and Withson Sengma as Nokmas and in their place appointed one Mechok Mechik and her husband, Okjang Sangma, as the Nokmas.

[2] The original Nokmas were one Wallam Sangma of Kambakpara Akbing and his wife, Mongmong Mechik. After their death, their daughter, Monje Mechik and her husband, Withson Sangma, instituted proceedings before the Deputy Commissioner, Garo Hills, for their appointment as Nokmas in succession to Wallam Sangma. In her petition, Monje Mechik alleged that she was the only daughter of Wallam Sangma and his lawfully wedded wife, Mongmong Mechik. The learned Deputy Commissioner sent Monje Mechik's petition for enquiry and report to the Mauzadar who however could not personally enquire into the matter and deputed the Garo Mondol of Garo Mouzas for enquiry and report. In due course, the Mondol submitted a report recommending Monje Mechik and her husband's appointment as Nokmas.

[3] The learned Deputy Commissioner, on receipt of the report of the Mondol, held an enquiry and declared Monje Mechik and her husband, Withson Sangma, as Nokmas and ordered their names to be entered in the Genealogical Table.

[4] Some 14 days later, on 27th September 1948, Mechok Mechik and her husband, Okjang Sangma, filed a petition objecting to the appointment of Monje Mechik and her husband, Withson Sangma, as the Nokmas, and made a counter claim for their appointment as Nokmas and prayed that the previous order of the Deputy Commissioner be set aside on the ground that Mechok Mechik was the real daughter of the deceased Wallam Sangma and his wife, Mongmong Mechik, and that Monje Mechik was, in fact, a daughter of Wallam Sangma by a woman called Satme Mechik who was not a legitimate wife of Wallam Sangma. The learned Deputy Commissioner proceeded to adjudicate the claim made by Mechok Mechik and her husband, Okjang Sangma, and after hearing the evidence adduced by both parties, set aside his previous order, dated 3th September 1948, and ordered the substitution of Mechok Mechik and her husband, Okjang Sangma, as the Nokmas for Monje Mechik and her husband, Withson Sangma. It is against this order that the present petition has been filed.

[5] One of the grounds taken by the petitioners' advocate is that the learned Deputy Commissioner has not given effect to the mandatory provisions of R. 31 of the Rules framed for the Administration of Justice and Police in the Garo Hills District. Rule 31 is in these terms :

"The Deputy Commissioner and his Assistants shall in all cases in which the parties are indigenous inhabitants of the district, and in any other cases, may endeavour to induce them to submit their case to a panchayet. If they agree to this, each party shall name an equal number of arbitrators, and shall choose, or leave the arbitrators to choose, an Umpire. The name and residence of Arbitrators and Umpire and the matter in dispute must be recorded before the proceedings commence, and the Court will direct the *laskar* or other recognised authority to assemble panchayet and witnesses within eight days. When the case has been decided, the Umpire shall appear with the parties before the Court, which shall proceed to record the decision and enforce it as its own. From such decision, there shall be no appeal."

[6] We think the non-observance of R. 31 goes to the root of the jurisdiction of the Deputy Commissioner in the trial of the petition brought by Mechok Mechik and her husband, Okjang Sangma. The learned Deputy Commissioner was bound under the terms of R. 31, to induce the parties to submit their case to a panchayet and, if they agreed to do so, to follow the procedure laid down in R. 31. But it appears the learned Deputy Commissioner made no attempt to induce the parties to submit their case to a panchayet.

[7] We, therefore, set aside the order of the learned Deputy Commissioner, dated 25th November 1948, and remand the case to the learned Deputy Commissioner to dispose of the petition after complying with the provisions of R 31 of the rules framed for the Administration of Justice and Police in the Garo Hills District. In case the parties do not agree, the learned Deputy Commissioner is directed to record evidence afresh and dispose of the case according to law.

R.G.D. *Order set aside.*

A. I. R. (37) 1950 Assam 86 *[C. N. 33.]*

THADANI AG. C. J. AND
RAM LABHAYA J.

Khagendra Narayan Deb — Petitioner v. *Ranee Purnima Debi — Opposite Party.*

Criminal Revn. No. 29 of 1949, D/- 15-11-1949, from order of Sessions Judge of L. A. D., D/- 16-5-1949.

Criminal P. C. (1898), Ss. 523, 517 — Theft of property reported — Property found in possession of accused — Police instituting proceedings under S. 147, Penal Code —Case transferred by S D. O. to 2nd E.A C.— Police requesting S. D O during pendency of proceeding before 2nd E. A. C., to confirm custody of property with complainant to whom police had delivered it — S. D O. accordingly ordering confirmation—Order held one under S. 523 and not under S. 517—No appeal held lay to Sessions Judge —Sessions Judge held could only make reference under S. 438 — Order of S. D. O. passed on recommendation of police held not proper — Order should be a judicial order. [Paras 3, 4 and 5]

Annotation : ('46 Com.) Cri. P. C., S. 517 N. 5; S. 523 N. 4 and 12.

K. R Barooah — for Petitioner.
J. C. Sen — for Opposite Party.

Order.—This is an application under S. 439, Criminal P. C. seeking to set aside the order of the learned Sessions Judge, L. A. D., dated 16th May 1949, by which he set aside the order of the S. D. O., Mangaldai, dated 12th May 1948, by which the S. D. O. had ordered an elephant, a guddi (trappings) and a chain to be returned to the petitioner.

[2] It appears that the petitioner had lodged a first information report on 25th January 1948 alleging that his elephant had been stolen by the accused-respondent. Three days later, on 28th January 1948, the elephant was seized by the police from the possession of the respondent. The police, however, did not send up a case against the respondent for theft, but instituted proceedings under S. 147, Penal Code. On 26th April 1948, the S. D. O. transferred the case under S. 147, Penal Code, to the 2nd E. A. C. for disposal. While this case was pending before the 2nd E. A. C., the police requested the S. D. O. to make an order confirming the custody of the property in the possession of the petitioner to whom the police had handed over the property during the course of the investigation. The S. D. O. endorsed the report of the police by writing upon it the word "Yes." Against this order, the respondent appealed to the Sessions

Court, and the learned Sessions Judge set aside the order of the S. D. O and awarded the custody of the property to the respondent. It is against this order that the petitioner has come in revision.

[3] It was contended by Mr. Barua on behalf of the petitioner that the order passed by the S. D. O. on 12th May 1948, confirming the custody of the petitioner, was not subject to appeal, and that the learned Sessions Judge had, therefore, no jurisdiction to set it aside. It was, however, pointed out to Mr. Barua that the order of the S. D. O. dated 12th May 1948, cannot properly be regarded as an order passed under S. 517, Criminal P. C., as no enquiry or trial had been concluded by him. Mr. Barua conceded that the order of the S. D. O., dated 12th May 1948, was not an order under the provisions of S. 517, Criminal P. C., but one under S. 523, Criminal P. C. Mr. Sen for the respondent also agreed that the order of the S. D. O. falls properly within the terms of S. 523, Criminal P. C.

[4] We do not agree with the learned Sessions Judge that the S. D. O., in passing the order dated 12th May 1948, acted without jurisdiction. The S. D. O. had jurisdiction in the matter, as the police had reported the seizure of the property to him. Under S. 523 (1), it is the Magistrate to whom the seizure of the property is reported who can make order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof. We do not think the order of the S. D. O., dated 12th May 1948, can be assailed on the ground stated by the learned Sessions Judge. Moreover, an order made under the provisions of S. 523, Criminal P. C. is not an order against which an appeal can be preferred to the Court of Sessions, Indeed it was the learned Sessions Judge who had no jurisdiction to pass an order setting aside the order of the S. D. O., dated 12th May 1948. All that he was competent to do was to make a reference to this Court under the provisions of S. 438, Criminal P. C.

[5] Mr. Sen for the respondent contended that the order of the Sessions Judge might be treated as a reference, and as the order of the learned Sessions Judge does no more than maintain the status quo on the date of the seizure of the property by the police from the respondent, this Court, sitting in revision, ought not to interfere with it. The difficulty in giving effect to this contention is that the order of the S. D. O., dated 12th May 1948, being one passed under the provisions of S. 523, Criminal P. C., the question of the delivery of the property seized must be decided with reference to the person who is entitled to the possession thereof. Neither the S. D. O., by his order dated 12th May 1948, nor the learned Sessions Judge has considered the question from this point of view.

[6] We think, therefore, that the order of the S D O., dated 12th May 1948, and that of the learned Sessions Judge, dated 16th May 1949, should be set aside. We accordingly set aside both the orders and direct the S. D. O., being the Magistrate to whom the police reported the seizure of the property to pass an order respecting the delivery of the property in question after making a judicial enquiry into the question as to who is entitled to the possession thereof.

R.G.D. *Revision allowed.*

A. I. R. (37) 1950 Assam 87 *[C. N. 34.]*

RAM LABHAYA J.

Abdul Majid — Accused — Petitioner v. *Golok Chandra — Complainant — Opposite Party.*

Criminal Revn. No. 44 of 1949, D/- 6-1-1950.

Penal Code (1860), S. 411 — Conviction under — It must be shown that accused knew or had reason to believe that property had been stolen.

Where the accused purchases a mare from another then he can be convicted under S. 411 only if it can be found that he knew or had reason to believe that the mare had been stolen. When there is no such allegation against the accused nor is there any finding to that effect, conviction is wholly unsustainable.

[Paras 4, 5]

Annotation: ('46-Man.) Penal Code, S. 411 N. 1, 3.

K. P. Bhattacharjee — for Petitioner.

J. Chaudhury — for Opposite Party.

Order.—The petitioner in this case was convicted by the Magistrate, 1st Class, Nowgong, under S. 411, Penal Code. He was sentenced to pay a fine of Rs. 30 and in default to undergo rigorous imprisonment for two months. His petition of revision was dismissed by the learned Sessions Judge. He has now petitioned to this Court for interference.

[2] The facts leading to this revision petition are that the complainant who had purchased a mare from one Katiram found it missing in the month of Magh. On 22nd April 1947 he informed the police about its disappearance. On 11th August 1947 he found that the mare was in the possession of Abdul Majid, petitioner. He again lodged an ejahar with the police and later filed a complaint in the Court of the Magistrate. The complaint was against Abdul Majid and Forman Saikh from whom, it was alleged, Abdul Majid had purchased the mare. At the trial the defence put forward was that Forman Sheikh had purchased the mare from the village Goanbura and had sold it to Abdul Majid.

[3] Katiram supported the complainant. He deposed that the mare belonged to him and he

had sold it to the complainant by Ex. 1. The village Goanbura supported the accused. He claimed that the mare belonged to him and he had sold it to Forman, who in turn had sold it to Abdul Majid. The learned Magistrate observed that the main point for decision in the case was whether the mare belonged to the complainant or that it was owned by the Goanbura, who is alleged to have sold it to Forman from whom Abdul Majid got it by purchase. On this point, he relied on the evidence of the prosecution witnesses. His conclusion was that the mare belonged to Katiram and it had been sold to the complainant. In spite of absence of identification marks in the ejahar lodged by the complainant, he found no difficulty in coming to that conclusion. He disbelieved the statement of the Goanbura and rejected the version given by him about its sale to Forman. On this finding he convicted both Abdul Majid and Forman Sheikh.

[4] Abdul Majid stated that he had purchased it from Forman. Forman admits that he sold the mare to Abdul Majid. Assuming that the statement of the Goanbura that he sold the mare to Forman is not worthy of credence, the statement of Forman that he sold the mare to Abdul Majid cannot be ignored. If Abdul Majid purchased the mare from Forman then Abdul Majid can be convicted only if it can be found that he knew or had reason to believe that the mare had been stolen. There is no such allegation against Abdul Majid; nor is there any finding to that effect. This was the essential ingredient of the offence under S. 411, Penal Code. The accused should dishonestly receive or retain the stolen property, knowing or having reason to believe the same to be stolen property. There is nothing in the transaction itself from Forman to Abdul Majid to suggest that Abdul Majid had such knowledge. In fact, there is absolutely no suggestion from any quarter that Abdul Majid had knowledge that the mare was stolen.

[5] Conviction of Abdul Majid, therefore, is wholly unsustainable. The petition is allowed. The conviction of Abdul Majid is quashed. He is acquitted and fine, if paid by him, shall be refunded.

D.H. *Petition allowed.*

A. I. R. (37) 1950 Assam 88 *[C. N. 35.]*

THADANI Ag. C. J. AND RAM LABHAYA J.

Sonaram Nokma — *Petitioner* v. *Joran Nokma and another*—*Opposite Party.*

Civil Revn. No. 18 (H) of 1949, D/- 28-11-1949, from Order of Deputy Commissioner, Garo Hills, D/- 15-4-1948.

(a) Administration of Justice and Police in Garo Hills District Rules, R. 35— Order of Deputy Commissioner declining to review order of his predecessor—Revision against— Power to revise rests in High Court.

The powers of "the Governor in his personal capacity" have been transferred to and are exercisable by the High Court. The revisional jurisdiction under R. 35 of the Rules framed for the Administration of Justice and Police in Garo Hllls District now rests in the High Court. [Para 2]

(b) Administration of Justice and Police in Garo Hills District Rules, Rule 31—Applicability—Decision based on admission—Rule does not apply.

Rule 31, which requires the Deputy Commissioner to persuade the parties to agree to the arbitration of a Panchayat, will not apply where an admission of a party forms the basis of the decision of the Deputy Commissioner. If the decision is according to the admission of the party he can have no grievance. [Para 6]

(c) Administration of Justice and Police in Garo Hills District Rules, R. 35 — Revision under — Decision of Deputy Commissioner based on admission — Admission not alleged erroneous or misconstrued— Revision dismissed.

Where a petitioner challenged the order of the Deputy Commissioner declining to grant the review petition, which was based on an admission of the petitioner himself and it was nowhere stated in the petition nor even by the learned counsel of the petitioner during the course of the argument that the admission referred to in the order was not made by the petitioner, or that, if made, it was erroneous and be allowed to be recalled :

Held, that in these circumstances, there was no basis for interference on the merits. [Para 5]

P. K. Lahiri—for Petitioner.

J. C. Sen—for Opposite Party.

Ram Labhaya J.—This is a petition of revision from the order of the Deputy Commissioner, Garo Hills, by which he declined to review the order of his predecessor in office dated 15th April 1948, under R. 35 of the rules framed for the Administration of Justice and Police in the Garo Hills District.

[2] This case came up for hearing originally before the Hon'ble the Acting Chief Justice. He directed that it may be placed before a Division Bench of this Court as he wanted to hear the Advocate-General on the question as to whether the powers of "the Governor in his personal capacity" had been transferred to and were exercisable by the High Court. The learned Advocate-General appeared and conceded that the revisional jurisdiction under R. 35 now rests in the High Court. The learned counsel for the parties are also agreed in this view.

[3] The original order of the Deputy Commissioner of Garo Hills dated 15th April 1948, laid down that in effect the dispute as to the boundary was between Joran Nokma and Sonaram Nokma, and acting on the Sub-Deputy Collector's report, he found the claim of Sonaram

Nokma to be false and directed Sonaram Nokma to deliver possession to Joran Nokma. He also ordered that Sonaram Nokma shall pay Rs. 25 as compensation to Joran Nokma.

[4] Sonaram Nokma applied for a review of the order dated 15th April 1948. Mr. Bhattacharjee, who had passed that order, had been relieved by Mr. J. B. Rajkowar. He heard the parties and also the Sub-Deputy Collector. His conclusion was "that one of the boundary Dhips (one tree) was not in its correct place." The direction he gave on 8th September 1948 was that the Sub-Deputy Collector and the Mouzadar will jointly visit the locality and erect the Dhip at the correct place, viz., at the junction of the Norang stream and the Dari Baliking which is a long and a high cliff. He disposed of the review petition on 15th January 1949. His final order was to the effect that the Chori Dhip will continue to be the boundary Dhip of the two Akhins, i. e., Balikingri Akhin and Sankhingri Akhin. There was no need of correction of the boundary on the spot and only the maps were to be corrected, if necessary. The order of his predecessor directing Sonaram Nokma to pay compensation to Joran Nokma was also upheld. In effect, the review petition was rejected. The basis of the decision was the admission of both the parties to the Sub-Deputy Collector, who had visited the locality for its inspection, that the Chori Dhip as the boundary Dhip of the two Akhins had been in existence for many years. By reason of this admission, he even revised his intermediate order of 8th September 1948.

[5] The petitioner challenges the order declining to grant the review petition. It has nowhere been stated in the petition nor even by the learned counsel of the petitions during the course of the argument that the admission referred to in the order of 15th January 1949, was not made by the petitioner, or that, if made, it was erroneous and be allowed to be recalled. This admission forms the basis of the decision of the review petition. The original order of the Deputy Commissioner was based on the report of the Sub-Deputy Collector. The order on review is based on an admission of the parties. In these circumstances, there is no basis for interference on the merits.

[6] Rule 31, which requires the Deputy Commissioner to persuade the parties to agree to the arbitration of a Panchayat, will not apply in view of the admission which forms the basis of the decision. If the decision is according to the admission of the petitioner, he can have no grievance and it is not the petitioner's case that no admission was made or that the statement made was misconstrued.

[7] We can discover no valid ground for interference in this case. The petition is dismissed with costs.

Thadani Ag. C. J.—I agree.

D.R.R. *Petition dismissed.*

A. I. R. (37) 1950 Assam 89 *[C. N. 36.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Krishnadatta Bujarbarua — *Appellant* v. *Sindhuram Choudhury* — *Respondent.*

S. M. A. No. 3 of 1949, D/- 13-12-1949, from order of Sub-Judge, L. A. V., D/- 9-2-1949.

Limitation Act (1908), Art. 180 — Order confirming sale challenged—Starting point.

Where the formal order of confirmation of an execution sale is challenged within 3 years by a petition under Ss. 47 and 151, Civil P. C., the order itself comes into question, and the sale becomes absolute not on the date when the formal order of confirmation was passed but on the termination of the litigation commenced by the judgment-debtor for having the sale set aside. [Paras 6, 10]

Annotation : ('42-Com.) Lim. Act, Art. 180, N. 4.

S. K. Ghose and C. R. Lahkar — for Appellant.

K. R. Barooah, D. N. Medhi and B. B. Das — for Respondent.

Ram Labhaya J. — This is an appeal from the order of the learned Subordinate Judge, L. A. V., dated 9th February 1949 by which the order of the Sadar Munsiff, Gauhati, dated 4th September 1948, dismissing the application of the auction-purchaser for delivery of possession under O. 21, R. 95 was affirmed.

[2] The relevant facts are as follows : The property in suit was sold in execution of a decree on 25th February 1944. The decree-holder was the auction-purchaser. The sale was confirmed on 27th March 1944 evidently because no application for setting aside the sale was made within the period of 30 days under R. 89, 90 or 91, Civil P. C. About a year later, on 26th March 1945, the judgment-debtor applied under S. 47 read with S. 151, Civil P. C., to have the sale set aside alleging that the decretal amount had been paid to the decree-holder on 27th March 1944, just four days before the confirmation of the sale. This petition was dismissed on 4th October 1945. The judgment debtor preferred an appeal to the learned District Judge, who declined to interfere. The judgment debtor then sought to have the orders of the Courts below revised. The revision petition was also dismissed on 22nd July 1947, by the Hon'ble the Chief Justice of the Calcutta High Court. The learned Chief Justice held that the payment or the adjustment between the decree-holder and the judgment-debtor was an uncertified one and therefore could not be recognised or taken notice of by reason of the provisions contained in O. 21, R. 2, Civil P. C. The decree holder-auction-purchaser

applied for delivery of possession on 3rd May 1948, more than three years after the original order confirming the sale, which was passed on 27th March 1944. The petition was resisted by the judgment-debtor on the ground of limitation. The plea has prevailed in the Courts below.

[3] The decision of the appeal turns on the interpretation of Art. 180 of Sch. I, Limitation Act. The article in question provides a period of three years for applications for delivery of possession. The starting point for limitation, according to the article, is the date on which the sale becomes absolute. The learned counsel for the appellant contends that the sale in this case became absolute for purposes of Art. 180, Limitation Act on the date on which the petition of revision was dismissed by the Calcutta High Court. Till then the sale could not have been regarded as final for purposes of limitation as the very finality of the sale was in question. He has relied on *Chandramani* v. *Anarjan Bibi*, 38 C. W. N. 901 : (A. I. R (21) 1934 P C. 134), a decision of their Lordships of the Privy Council. The other cases to which we have been referred to by him are *Chhogan Lal* v. *Behari Lal*, A. I. R. (20) 1933 Cal. 311 : (147 I. C. 981), *Muthu Korakki* v. *Mahamed Madarammal*, 43 Mad. 185 : (A. I. R. (7) 1920 Mad. 1 F B) and *Baijnath* v. *Ramgut Singh*, 23 Cal. 775 : (23 I. A. 45 P. C.).

[4] In *Chandramani* v. *Anarjan Bibi*, 38 C. W. N. 901 : (A. I. R. (21) 1934 P. C. 134), the decree-holders were the auction-purchasers. The sales were held on 10th February 1923. The judgment-debtors applied under O. 21, R. 90 to have the sale set aside. The application was dismissed on 15th April 1924 and the sales were confirmed on 22nd April 1924, under O. 21, R. 92. The judgment-debtors appealed to the High Court from the order refusing to set aside the sales. The appeal was also dismissed on 17th March 1927. Sale certificates were duly issued in May and June 1928. On 10th September 1928, the auction-purchasers applied under O. 21, R. 35 for delivery of possession of the properties purchased by them at the auction sales. The application was resisted on the ground of limitation. The Calcutta High Court held that sales became absolute on 22nd April 1924 even for the purposes of Art. 180, Limitation Act and the application for delivery of possession which had been put in on 10th September 1928, was thus barred. Their Lordships of the Privy Council held that on the facts of the case before them, the sales did not become absolute within the meaning of Art. 180, Limitation Act until 17th March 1927, and that the application for possession of the properties was not barred by the Act.

[5] The learned counsel for the respondent concedes that if the application for setting aside the sale had been under O. 21, R. 90, Civil P. C. as in the case before their Lordships of the Privy Council, the sale could not have been regarded as confirmed till the final decision of the petition for setting aside the sale. He seeks to distinguish the Privy Council decision on the ground that the application for setting aside the sale in the case before us was not made under R. '89 or 90. It was under S. 47/151, Civil P. C. His contention is that the decision of their Lordships of the Privy Council cannot be extended so as to include within its scope applications for setting aside sales which are not covered by O. 21, Civil P. C. We do not think it is possible to make any such distinction.

[6] The decision of the case turns on the interpretation of the word "absolute" occurring in Art. 180, Limitation Act. This meaning could not be different in the two sets of cases. If a formal order confirming the sale under R. 92, Civil P. C., does not make the sale absolute for purposes of Art. 180 if an application to set aside the sale is made by the judgment-debtor under O. 21, R. 90, we do not see how the sale would be absolute if the application for setting aside the sale is made under some other provisions contained in the Civil Procedure Code. Such a distinction would be indefensible in principle. Where the formal order of confirmation is challenged by a petition under some provision of the Civil Procedure Code the order itself comes into question. If such a petition is made within three years, the period within which an auction-purchaser must apply for possession under R. 95, Civil P. C., the sale cannot be described as absolute during the period that the petition for setting aside the sale remains pending. The reasoning is equally applicable to applications under R. 90 and application under S. 47 or 151. On principle, therefore, it is difficult to agree to a distinction between an application of the judgment-debtor for setting aside the sale under O. 21, R. 90 on the one hand, and an application under other provisions of the Code, e. g., Ss. 47 and 151, if they are made within three years from the date of the formal confirmation of the sale. Their Lordships of the Privy Council have not left the matter in any doubt even so far as this question is concerned. The judgment of their Lordships was delivered by Sir Lancelot Sanderson and he observed in the course of the judgment as follows:

"Upon a consideration of the sections and orders of the Code, their Lordships are of opinion that in construing the meaning of the words 'when the sale becomes absolute' in Art. 180, Limitation Act, regard must be had not only to the provisions of O. 21, R. 92 (1) of the Schedule of the Civil Procedure Code, but

also to the other material sections and orders of the Code, including those which relate to appeals from orders made under O. 21, R. 92 (1)."

It is clear that in construing Art. 180, the provisions of R. 92 and those that relate to appeals from orders under that rule are not the only ones which have to be considered. Regard must be had also to other material sections and orders of the Code. Applications covered by other sections also will have the same effect, therefore, as applications under R. 92 of O 21 will have. We do not see how a different result could have been arrived at.

[7] Their Lordships overruled *Neckbar* v. *Prakash Nag* 56 Cal. 608 : (A. I. R. (17) 1930 Cal. 86) in which it was laid down that the period of three years provided in Art. 180, Limitation Act for an auction-purchaser's application for delivery of possession should be reckoned from the date of the confirmation of the sale under O. 21, R. 92 and not from the date of the final disposal of the judgment-debtor's application under O. 21, R. 90. On the other hand they approved of the decision reported in *Chhoganlal* v. *Beharilal*, 6 C. L. J. 520 : A. I. R. (20) 1933 Cal. 311. In this case also, the application for setting aside the sale was presumably under O. 21, Civil P. C. But relying on *Baijnath* v. *Ramgut Singh*, 23 Cal. 775 : (23 I. A. 45 P. C.) an earlier decision from their Lordships of the Privy Council, it was held by a Division Bench of the Calcutta High Court that it could not be said, when the parties were litigating as to whether the sale should be confirmed or not, that the sale had become final or conclusive. The confirmation of the sale, according to the learned Judges, could be regarded as having taken place from the date when the litigation following upon the application for setting aside the sale terminated, viz., the date of the final decision of the Court in that litigation. It is noteworthy that the ratio of this decision is not limited to applications under O. 21.

[8] In *Baijnath* v. *Ramgut Singh*, 23 Cal. 775 : (23 I. A. 45 P. C.), the Board of Revenue had discharged an order of the Commissioner by which a sale by the Collector had been confirmed. The Board afterwards on 21st August 1886, discharged its own order and revived that of the Commissioner. It was held that the confirmation of the sale dated only from 21st August 1886, and that a suit brought in July 1887 to set aside the sale under Art. 12, Limitation Act was not barred. Article 12, Limitation Act provides a period of one year for setting aside sale in pursuance of decree or order of a Collector or other officer of revenue. The period of limitation, according to the Article commences from the date when the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought. Their Lordships did not express any opinion on the question whether the proceedings taken by the parties to stay the confirmation of the sale was such a civil proceeding as is referred to in S. 14, Limitation Act, but laid down that there was no

'final, conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation, or until the order of the Commissioner of 25th January 1884, became definitive and operative by the final judgment of the Board of Revenue on 21st August 1886, or (in other words) that for the purpose of the law of limitation there was no final or definitive confirmation of the sale until that date.'

The rule enunciated in this case was the basis of the decision in *Chhogan Lal* v. *Behari Lal*, A. I. R. (20) 1933 Cal. 311 : (147 I. C. 981) and this decision received the approval of their Lordships of the Privy Council in *Chandramani* v. *Anarjan Bibi*, 38 C. W. N. 901 : (A. I. R. (21) 1934 P. C. 134). The principle of the decision discussed above does, in our opinion, lead to the conclusion that the sale in the circumstances of the case before us did not become absolute on the date of its formal confirmation but it acquired the attribute of finality on the termination of the litigation commenced by the judgment debtor with a view to having the sale set aside.

[9] The learned counsel for the respondent has put forward another argument. He contends that the judgment-debtor's petition, though purporting to be under S. 47/151, Civil P. C., was not really covered by those sections. It was based on an uncertified payment or adjustment which could not be enquired into or recognised in the course of the execution proceedings. He has relied on *Biroo Gorain* v. *Jainurat Koer*, 16 C. W.N. 923 : (13 I C. 63), *Nanhelal* v. *Umrao Singh*, A.I.R. (18) 1931 P. C. 33 : (27 N. L R. 95) and 38 Cal. 798 (A. I. R. (25) 1938 Cal. 798?) in support of his contention. He has further pointed out that this was the view that prevailed with the learned Chief Justice of the Calcutta High Court in the revision petition of the judgment-debtors. These decisions no doubt support the view that a payment or adjustment not certified in accordance with the provision of O. 21, R. 2, Civil P. C., cannot be recognised by a Court executing the decree but this view is no answer to the case set up on behalf of the appellant. The petition of the judgment-debtor was admittedly dismissed for the reason that the payment had not been certified but this petition was entertained. The auction-purchaser was summoned and had to resist it. The litigation was fought in three Courts. Even the revision petition was not dismissed in limine. It was

disposed of after a full hearing. During the pendency of the litigation, the auction-purchaser could not foresee its final result and could not at any stage say that the sale would become absolute or conclusive. In the language of their Lordships of the Privy Council used in *Baijnath* v. *Ramgut Singh*, 23 Cal. 775 on p. 785: (23 I. A. 45 P. C.)

"there was no final, conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation."

The final dismissal of the judgment-debtor's petition cannot in these circumstances, be allowed to affect the interpretation placed by their Lordships on Art. 180, Limitation Act. This interpretation has the merit of advancing substantial justice. It also avoids hardship.

[10] We are, therefore, of the opinion that for purposes of limitation, the sale in this case became absolute not on the date when the formal order of confirmation was passed but on the termination of the litigation commenced by the judgment debtor for having the sale set aside. The application of the auction-purchaser for delivery of possession, therefore, is not time barred being within three years from the date of the termination of the litigation.

[11] This appeal is, therefore, allowed. The orders of the Courts below are reversed and the case is remanded to the learned Munsiff for disposal of the application for delivery of possession according to law. As an interesting question of law was involved in the case, we leave the parties to bear their own costs in all the Courts.

Thadani Ag. C. J.—I agree.

V.B.B. *Appeal allowed.*

A. I. R. (37) 1950) Assam 92 *[C. N. 37.]*

LODGE C. J. AND THADANI J.

Lakshmidhar Goswami — Appellant v. *Upendra Nath Sen and others—Respondents.*

Second Appeal No. 71 of 1945, 15-3-1949, from judgment and decree of D. J., A. V. D., D/- 6-5-1944.

(a) Civil P. C. (1908), S. 11 — Land in suit belonging to temple — *T* acquiring same by exchange of his land from temple's manager—Land ultimately devolving upon *P*—*G* as manager of temple suing *P* for declaration of temple's title to land and for possession — *P* setting up adverse possession against temple—Suit dismissed—Issues of adverse possession decided against temple — Land purchased by plaintiff—Suit by plaintiff against *G's* brother to establish his absolute right to land—Decision in previous suit held was decision against temple and not merely against its manager—Decision held operated as *res judicata* against defendant.

There is no justification for making a distinction between the manager of a temple and the temple for the purposes of a suit for a declaration of title and possession—a subject which must be considered with reference to the substantive law governing the parties, the Civil Procedure Code and the law of Limitation. [Para 13]

One *T* acquired the land in suit which belonged to a temple from the then manager of the temple by exchange of his share in the paternal property. The land ultimately devolved upon *P* who settled some tenants thereon. One *G*, alleging himself to be the manager of the property having failed to recover rents from these tenants, brought a suit as manager of the temple against *P* for a declaration of the temple's title to the property in suit and for *khas* possession. *P*, denied the title of the temple and set up adverse possession tracing it to *T's* possession. The suit was dismissed, issue of adverse possession being decided against the temple, and the first and second appeals against the decision were also dismissed. The property was ultimately purchased by the plaintiffs who brought a suit against the brother of *G* for a declaration that he had acquired an absolute title to the land in suit. The defendant contended that the decision on the issue of the adverse possession in the former suit did not operate as *res judicata* as against the temple as distinct from the manager of the temple :

Held that in substance the former suit was by the temple suing by its manager even if exception could be taken to the frame of the suit. The judgment in that suit established the fact that the title of the temple to the property in suit had been extinguished by reason of the adverse possession of *P*, and his predecessors-in-title and the decision in that suit was a decision against the temple and not merely a decision against the then manager of the temple and therefore the decision operated as *res judicata* against the defendant: A. I. R. (23) 1936 P. C. 183, *Foll.* [Paras 14 and 23]

Annotation: ('44-Com.) Civil P. C. S. 11 N. 60.

(b) Limitation Act (1908), Art. 144—*G*, manager of temple, suing *P* in 1899 for declaration of temple's title to property in *P's* possession and for *khas* possession—Decision that temple's title was extinguished by adverse possession of *P* and his predecessors-in-interest—*P* thereafter selling property to *D*, who mortgaged it to *S*—*D's* widow selling property to plaintiff — All transfers containing entries "on behalf of temple"—General Register of revenue free estates and jamabandi also containing similar entries — Shortly after purchase, plaintiff getting offending words in jamabani deleted — Defendant, *G's* brother, getting them restored—Suit by plaintiff to establish his absolute title to property—No inference as to fresh dedication after 1899 held could be drawn from entries—Property held was held adversely to temple by plaintiff and his predecessors-in-interest.

In 1899 one *G* alleging himself to be the manager of a temple brought a suit against *P* for a declaration of the temple's title to certain property in his possession and for *khas* possessiion. The suit was dismissed it being decided that the title of the temple to the property had been extinguished by adverse possession of *P* and his predecessors-in-title. *P* thereafter sold the property to *D* who mortgaged it to *S* and ultimately *D's* widow sold it to the plaintiff in 1911. All these transfers contained an entry which read: "on behalf of the temple". The General Register of revenue free estates and the *jamabandi* also contained similar entry. Shortly after his purchase, the plaintiff succeeded in getting the offending words in the *jamabandi* deleted. The words stood deleted from 17th June 1912 till October 1939 when at the instance of the defendant those words were restored. The plaintiff having thereafter sued the defendant

who was *G*'s brother, to establish his absolute title to the property it was contended that a fresh dedication after 1899 could be inferred from the several entries and that when so inferred, the transactions amounted to transfers of interest valid for the duration of the office of the then manager of the temple.

Held, none of the entries was capable of being properly construed as giving rise to an inference of a fresh dedication as the plaintiff had no control over the making of the entries in the General Register and the *jamabandi* and, as to the entries in the transfers, it was reasonable to suppose that they were inserted merely because in the *jamabandi*, made long before 1899, the words, "on behalf of the temple" were to be found. However, if any inference as to fresh dedication after 1899 were permissible, it was wholly displaced by what the plaintiff did immediately after he purchased the property. The property was therefore held by the plaintiff and his predecessors-in-interest in their own right and adversely to the temple and at no time there was a fresh dedication after 1899 so as to justify the view that the plaintiff had acquired a limited interest valid for the duration of the office of the manager of the temple. [Parsa 27, 30]

Annotation: ('42-Com.) Lim. Act, Art. 144 N. 49.

Panchanan Ghose and B. B. Das—for Appellant.

S. K. Ghose and Bhabesh Ch. Barua—for Respondents.

Thadani J. — This is a second appeal from the judgment and decree of the learned District Judge, A. V. D., dated 6th May 1944, by which he affirmed the judgment and decree of the trial Court which had decreed the plaintiffs' suit with costs.

[2] The facts material to the appeal are these. There is a temple at Gauhati known as the Baneswar Temple which, according to the plaintiffs, was established as a family temple by one Gangadhar Goswami, ancestor of the defendant, Jibadhar Goswami, in the present suit. The temple stood on Plot No. 979 comprising an area of 3K-16L. To the west of this plot (No. 979) are the old dags Nos. 1774 and 1775 re-numbered as new dags Nos. 978, 1174 and 977 comprising an area of 2B-1K-3L, duly entered in the Lakhiraj Register. This property (2B-1K-3L) was for many years in possession of one Topodhar Goswami who acquired it by exchanging his share in the paternal property situated in North Gauhati with an ancestor of the defendant. Topodhar died in the year 1292 B.S. (about 1885). Topodhar made a will of this property in favour of his grandsons, Umanath and Ratnanath. On the death of Umanath and Ratnanath, the property was inherited by their heir, one Kanakeswar. On the death of Kanakeswar, it was inherited by his heir Praneswar. Praneswar settled some tenants on the land and transferred 1/4th of the area to one Joydev Goswami, retaining the balance in his exclusive possession. The 1/4th share transferred to Joydev Goswami is not comprised in the new dag No. 977, which is not the subject-matter of the present suit. The property which is the subject-matter of the present suit is comprised in the new dags Nos. 978 and 1174.

[3] Shortly before 1899, one Gopal Goswami, an elder brother of the defendant in the present suit, alleging himself to be the manager of the property in suit, made attempts to recover rents from the tenants settled by Praneswar and Joydev without success. In 1899, he brought a suit (Suit No. 792 of 1899) as manager of the temple against Praneswar and Joydev for a declaration of the temple's title to the property in suit, and *khas* possession, but failed. The defendants—Praneswar and Joydev—in that suit denied the title of the temple and set up a plea of adverse possession tracing it to Topodhar's possession. Suit No. 792 of 1899 was dismissed on 23rd December 1899. The first and second appeals against the judgment and decree in that suit were also dismissed.

[4] Eight years later in 1907, Praneswar sold the area of 1B 3K-7L belonging to him to one Dwarikanath Roy for Rs. 1000 by a sale-deed, of which Ex. 21 is a certified copy. Shortly afterwards, Dwarika mortgaged this land to one Saratchandra for Rs. 1700 by a mortgage deed, of which Ex. 22 is a certified copy. Dwarika died on 4th August 1911 leaving a widow called Ambika Sundari. On 28th November 1911, Ambika Sundari, in order to redeem the mortgaged property and to discharge other debts contracted by her husband, sold an area of 1B-0-7L to plaintiffs 1 and 2 in the present suit for Rs. 1600 by a registered sale-deed (Ex. 1). For the same reason, she sold the remaining 3K to one Harkanta Goswami, the father of plaintiffs 3 to 7, for Rs. 998 by a registered sale-deed, of which Ex. 23 is a certified copy.

[5] It was the case of plaintiffs 1 and 2 in the present suit that they were in possession of the land in their own right and adversely to the temple since their purchase in 1911; that Harkanta Goswami, the father of plaintiffs 3 to 7 constructed a house on the land purchased by him; that Harkanta Goswami died on 4th May 1939 and his heirs, plaintiffs 3 to 7, erected other valuable houses upon this area; that by reason of their adverse possession, the title of the temple, if it had any, had been extinguished.

[6] The circumstances which compelled the plaintiffs to bring the present suit are these: It appears that in the re-settlement of 1911, the names of plaintiff 1 and Harkanta were entered against the lands in suit with the addition of the words "on behalf of the Baneswar Temple." The plaintiffs objected to these words and the then S. D. O. by his order dated 17th June 1912, ordered the deletion of the offending words, and they stood deleted from the jamabandis from 1912 to 1939. Some time before October 1939, the

defendant in the present suit, Jibadhar Goswami, applied to the Deputy Commissioner who, by his order dated 16th October 1939, set aside the order of the S. D. O. and ordered the restoration of the offending words, and directed the plaintiffs to file a mutation case, which they did. The Deputy Commissioner, by his order, dated 21st March 1941, ordered the deletion of the offending words. Against this order, the defendant, Jibadhar Goswami, preferred an appeal to the Revenue Tribunal which, by its order, dated 18th September 1941, referred the plaintiffs to the Civil Court for a decision as to whether or not the plaintiffs had acquired an absolute title to the lands in suit.

[7] The defendants's case is that the land in suit was the subject-matter of a grant by a King of Assam for religious purposes, namely, the maintenance of Baneswar Temple; that the suit was bad for multifariousness; he admitted that Topadhar, during his lifetime, had made a will in favour of his grandsons, Umanath and Ratnanath, but stated that Topodhar himself was a grandson of Gangadhar, the original trustee; that Ratnanath and Umanath and their heirs and successors-in-interest had, therefore, acquired no right, title or interest in the property. He denied that the property in suit was a paternal family temple, and denied Topodhar and his successors-in-title had acquired title to the property by adverse possession against the temple, and denied the alleged sale by Praneswar to Dwarika and Dwarika's mortgage to Sarat Dutta, and the subsequent sale by Dwarika's widow Ambikasundari, to the plaintiffs, he further contended that Gopal Chandra Goswami who had brought the suit in 1899, was not a doloi of the temple, and that the decision in suit No. 792 of 1899 was not, therefore, binding upon the temple.

[8] Upon the pleadings, the trial Court framed the following issues:

1. Is the suit maintainable?
2. Is the claim barred by limitation?
3. Did the plaintiffs or their predecessors-in-interest ever occupy the land in suit adversly to the temple?
4. Have the plaintiffs acquired absolute right and title over the suit land by right of adverse possession?
5. Is the Baneswer Temple bound by the decisions in the Civil Suit No. 792 of 1899?
6. Whether the question of adverse possession is *res judicata* between the parties?
7. To what relief, if any, the parties are entitled?

[9] The trial Court answered Issue 1 in the affirmative. On Issue 2, it held that the suit was not barred by limitation. On Issue 3, it held that the plaintiffs and their predecessors in-title were in possession of the land in suit adversely to the temple. On Issue 4, it held that the plaintiffs had acquired an absolute title to the property in suit by reason of adverse possession. On Issue 5, it held that Baneswar temple was bound by the decision in suit No. 792 of 1899. On Issue 6, it held that the question of adverse possession was decided in suit No. 792 of 1899 in favour of the predecessors-in-title of the plaintiffs and that it operated as *res judicata* against the parties to the present suit. In the result, it decreed the plaintiffs' suit with costs.

[10] The lower appellate Court, agreeing with the findings of the trial Court on these issues, dismissed the appeal with costs. It formulated the material issues in these terms:

(1) Whether it has been rightly held that S. 11, Civil P. C., can be invoked in bar of the present defence set up by the appellant, and

(2) whether the possession of the plaintiffs and their predecessors-in-title has been rightly construed to be adverse to any interest which the temple ever possessed.

[11] On both the issues, it decided against the defendant and affirmed the judgment and decree of the trial Court.

[12] Mr. Panchanan Ghose for the defendant-appellant has contended that the entries in Exs. A and D give rise to a presumption that they were correctly made, that this presumption gives rise to an inference that the property in suit was endowed for a religious or public purpose—an inference which is supported by Exs. 1, 2, 3, 8 and 21, that the decision on the issue of adverse possession in the Suit No. 792 of 1899 does not operate as *res judicata* against the temple as distinct from the manager of the temple, for the following reasons: (a) the transfers made by the manager for the time being of the temple were valid only for the duration of his office; (b) the transferee's interest in the endowed property cannot be put higher than the interest of the manager for the time being who transferred the property, the question, therefore, of adverse possession against the temple can never arise.

[13] We propose to deal with the last contention first. In our view, there is no justification for making a distinction between the manager of a temple and the temple for the purposes of a suit for declaration of title and possession—a subject which must be considered with reference to the substantive law governing the parties, the Code of Civil Procedure and the Law of Limitation. Mr. Ghose's contention is that the Code of Civil Procedure does not permit institution of a suit by the manager of a temple, that it only permits a suit by a temple suing by its next friend who may be the manager, that in a suit brought by a manager on behalf of a temple, any decree passed in such a suit would not be binding on the temple, but on the manager alone.

[14] In rejecting this contention, it is sufficient to say that the plaint in the suit of 1899, as worded, does necessarily lend itself to the interpretation that the suit was brought by the

manager on behalf of the temple and not by the temple suing by its manager. The defendants in that suit pleaded adverse possession not only against the manager but also against the temple, and the issue of adverse possession was decided in favour of the defendants and against the temple. In substance, therefore, the suit of 1899 was by the temple suing by its manager even if exception can be taken to the frame of the suit. In any case, we do not think we can seriously consider Mr. Ghose's contention raised in this behalf for the first time 50 years after the decision of the suit of 1899. So far as the present suit is concerned, the manager of the temple was the defendant, and he raised no objection to the frame of the suit. It was not made an issue in the trial Court. The lower appellate Court has not referred to it in its judgment, nor has it been shown to us that it was taken as a ground in the memorandum of first appeal. Moreover, we are satisfied, in view of the decision of their Lordships of the Privy Council *Sm. Daivasikhamani Ponnambala Desikar* v. *Periyanan Chetti*, 40 C. W. N. 901 : (A. I. R (23) 1936 P. C. 183) that Mr. Ghose's contention in this behalf is not well founded. As we propose to make use of their Lordship's remarks in the concluding paragraph of their judgment in the matter of their application to the facts before us, it is convenient to reproduce it here. Their Lordships observed :

"The plaintiffs are in no strong position if they try to repudiate Nataraja as not being *de jure* the manager this indeed would establish the defendants' case. The question for decision is as to the proper inference to be drawn from these facts — whether it is that the *cowle*, accepted the *cowle* rent as payable in respect of a new tenancy which it was in his power either to create for the period of his own managership or to create for a shorter period and to continue from time to time, or whether on the other hand, it is that he accepted it as payable in respect of a permanent right which it was no longer in the power of his temple to repudiate. Their Lordships are of opinion that the latter of these alternatives is the only one, of which the facts permit. There is no doubt that from 1902 until the original Plaintiff in these suits was appointed Receiver in 1917, the position of the *cowledars* in no way altered; their adverse possession under the *cowle* thus extended over twelve years. The claim to eject the defendants fails in all the suits."

[15] We will now proceed to tabulate the facts of the present case in order to facilitate their consideration with reference to what has been stated by Their Lordships of the Privy Council.

[16] (1). The exact date of the establishment of the Baneswar Temple at Gauhati cannot be ascertained, but, according to the written statement of the defendant in the present suit, it was established by one of the kings of Assam. It may, therefore, safely be stated that the establishment of the Baneswar Temple at Gauhati is a matter of ancient history.

[17] (2). The land in suit was for many years in the possession of Topodhar Goswami before his death, which occurred in 1885, some 63 years ago. Topodhar had acquired the land in suit from an ancestor of the defendant, Jibadhar, by exchange of his (Topodhar's) share in the paternal property situated in North Gauhati.

[18] (3). Before his death, Topodhar made a will, the date of which cannot be ascertained, by which he bequeathed the property in suit to his grandsons, Umanath and Ratnanath, upon whose death, the property devolved upon one Kanakeswar. On the death of Kanakeswar, it devolved upon Praneswar who was a defendant in the suit of 1899. Some time before 1899 (the exact date cannot be ascertained), Praneswar leased the land in suit to tenants and transferred 2K-16L-$\frac{1}{4}$th share of the land in suit, to one Joydev Goswami, retaining the remaing area of 1B 3K.7L with himself.

[19] (4) Some time before 1899 (the exact point of time cannot be ascertained), Gopalchandra Goswami, the plaintiff in the suit of 1899, attempted to recover rents from the tenants of Praneswar and Joydev, but failed, as a result of which he brought the suit of 1899 against Praneswar and Joydev for a declaration of the temple's title and recovery of possession. That suit was dismissed, the trial Court holding that the title of the temple had been extinguished by reason of adverse possession of the defendants, Praneswar and Joydev, and their predecessors-in-title. The first and second appeals preferred against the decision of the trial Court were dismissed.

[20] (5). In 1907, Praneswar sold his $\frac{3}{4}$th share in the property in suit, which he had retained with himself, to one Dwarika Nath Roy for Rs. 1000 : (*vide* Ex. 21).

[21] (6). During his life-time, Dwarika mortgaged the property he had purchased from Praneswar to one Sarat Chandra for Rs. 1700 : (*vide* Ex. 22). Dwarika died on 4th August 1911.

[22] (7). On 28th November 1911, Ambikasundari, the widow of Dwarika, sold 1B.7L of the land in suit to plaintiffs 1 and 2 for Rs. 1600 in order to redeem her husband's mortgage and discharge other debts (*vide* Ex. 1). For the same reason, she sold the remaining 3K of the property in suit to one Harkanta Goswami, father of plaintiffs 3 to 7, for Rs. 998 : (*vide* Ex. 23). Plaintiffs 1 and 2 and plaintiffs 3 to 7 were in possession of the property ever since their purchase. Harkanta died on 4th May 1939; upon the death of Harkanta, plaintiffs 3 to 7, his sons, were in possession of the property in suit and continued to be in possession.

[23] The first material point of time in this case is the year in which Topodhar Goswami

acquired the property in suit from the ancestor of the defendant by exchange of his paternal share in the property situated in North Gauhati. This exchange took place some years before Topodhar's death which, as we have said, occurred in or about 1885. We will assume that the ancestor of the present defendant who exchanged the property in suit for the property of Topodhar situated in North Gauhati, was not competent to validate the transaction of exchange beyond the duration of his office. The record of the case does not show when the transferor of Topodhar ceased to be the manager of the temple; all it shows is that in 1899 or shortly before 1899, Gopalchandra Goswami, the elder brother of the defendant in the present suit, came upon the scene as manager of the temple. The question which arose in the suit of 1899 was—whether Praneswar and Joydev and his predecessor-in-title were in adverse possession of the property in suit. 12 years before 1899 would take us back to the year 1887. Topodhar died in or about the year 1885. The trial Court in suit No. 792 of 1899 found that Praneswar and Joydev were in possession of the property adversely to the temple. Whether the decision in the suit of 1899 was right or wrong is not a matter for our consideration. So far as the temple is concerned, the judgment in that suit establishes the fact that the title of the temple to the property in suit had been extinguished by reason of the adverse possession of Praneswar and Joydev and their predecessors-in-title. Mr. Ghose for the appellant conceded that if the decision of the trial Court in that suit is to be regarded as a decision on the issue of adverse possession against the temple, the decision on that issue would operate as *res judicata* against the defendant in the present suit. In view of what their Lordships of the Privy Council have said in the case to which we have referred, we do not think it is possible to say that the decision of the issue of adverse possession in the suit of 1899 was not a decision against the temple, but merely a decision against the then manager of the temple.

[24] At an early stage of his arguments, Mr. Ghose realised the significance of the decision of the issue of adverse possession in the suit of 1899 as a serious impediment to his case and, therefore, contended that it was possible to infer a fresh dedication after 1899 on the facts of this case, as evidenced by the entries in Exs. A, D, 1, 2, 3, 8 and 21. Mr. Ghose's contention based upon these exhibits is this: That subsequent to the decision in the suit of 1899, a fresh dedication can be reasonably inferred, and that when so inferred, the transactions evidenced by these exhibits amount to transfers of interest valid for the duration of the office of the then manager of the temple.

[25] The question of proper inferences to be drawn from the factum of a transferee's continuing in possession after the transferor manager has ceased to be in office by death, removal or resignation, was the subject-matter of their Lordships' decision, to which we have referred. For the purposes of drawing proper inferences from the facts of the case before us, the position may be shortly stated thus: A Court of competent jurisdiction decided in 1899 that the title of the temple to the property in question had been extinguished. On this issue, the decision of the Court in the suit of 1899 is clearly binding upon the defendant in the present suit, unless the defendant can establish that subsequent to the decision in the suit of 1899, there was a fresh dedication of the property to the Baneswar Temple. We do not think that any of the exhibits upon which reliance has been placed by Mr. Ghose is capable of being properly construed as giving rise to an inference of a fresh dedication. Exhibit A, dated 8th September 1943, is an extract from the General Register of revenue-free estates in the Assam Valley Districts excluding Goalpara, in which, against the entry "Baneswar Temple, Sudhadhor Goswami Doloi," there is an entry which reads: "3 plots in Panbari Mouza, Gauhati, measuring 2B-4K-19L, Jibadhar Goswami Doloi." Exhibit D is a cerified copy of the *jamabandi* containing an entry which reads: "Baneswar Devaloy," followed by the words "Topodhar Goswami Kokini, Musalmani, Madhuram Choudhury." Exhibits 1 to 23, contain an entry which reads: "On behalf of the Baneswar Temple."

[26] The lower appellate Court considered these exhibits and did not agree that a fresh dedication could be inferred from them. We ourselves, on a careful consideration of these exhibits, are unable to draw any such inference. As we will presently indicate, if any inference as to fresh dedication after 1899 were permissible, it has been wholly displaced by what the plaintiffs did in the year 1911. So far as Exs. 1 to 23 are concerned, they must be read as a whole, and when so read, we are not prepared to say that the transfers evidenced by these exhibits justify an inference that a fresh dedication was made. It is significant that Mr. Ghose was unable to say by whom and when a fresh dedication was made. We think it is not possible, in view of the events which happended after 1911, to infer a fresh dedication and to regard the transfers evidenced by the exhibits to which we have referred as valid for the duration of the office of the then manager of the temple, merely because the words "on behalf of the temple" occur.

[27] As the lower appellate Court has rightly observed in its judgment, so far as EXS. A and D are concerned the plaintiff had no control over the making of the offending entries. They were made by the revenue authorities. As to the offending words in EXS. 1 to 23, we think it is not unreasonable to suppose that they were inserted merely because in the *jamabandi* (EX. A) made long before 1899, the words "on behalf of the temple" were to be found. Be that as it may, the most convincing answer to any attempt at drawing an inference as to a fresh dedication is to be found in what the plaintiffs did immediately after they purchased the property. Shortly after their purchase, plaintiff 1, and the father of plaintiffs 3 to 7 objected to the offending words in the *jamabandi* (EX. D) before the then S. D. O. who, by his order dated 17th June 1912, deleted the offending words which entry stood deleted from 17th June 1912 till October 1939, when the then Deputy Commissioner, by his order dated 16th October 1939, restored the offending words. For 22 years at any rate the plaintiffs were in possession of the property by virtue of their title derived from their purchase from the widow of Dwarika. It is reasonable to suppose that between 1912 and 1939, there would be a manager of the Temple, if there was a fresh dedication after 1899. There is nothing on the record to show that there was a manager of the temple. Indeed, we think there was none for if there was one he would have resisted the attempts of plaintiff 1 and the father of plaintiffs 3 to 7 to have the offending words deleted. No attempt was ever made by any person alleging himself to be the manager of the temple to bring a suit for possession between 1912-1939. We think, on the facts of the case, it is reasonable to suppose that the temple had resigned itself to the adverse decision against itself, to the adverse decision against its ownership, in the suit of 1899, and it took no further interest in the matter from 1899 to 1939.

[28] The judgment of the trial Court shows that before Gopal Goswami, the temple was managed by his father, Girdhar Goswami. Before Giridhar, his brother, Jatadhar, was the manager. Before Jatadhar, the manager was his brother, Sridhar. Before Sridhar, the manager was his father, Sudhadhar, and before Sudhadhar, the manager was his father, Lakhidhar. Lakhidhar was the eldest son of Gangadhar the original trustee. Gopal Goswami was senior to Jibadhar by some 30 years and at the time of giving evidence in the suit of 1899, Gopal Goswami was 37 years old. Gopal Goswami appears to have died in the year 1926. From October 1912 right up to the year in which Gopal Goswami died, the plaintiffs were undoubtedly in possession of the property in suit as true owners, tracing their title to the transfers made by Praneswar in 1907. Praneswar succeeded in getting a decision in his favour in the suit of 1899 to the effect that the temple's right to the property had been extinguished, and that he and Joydev were the true owners. It is obvious that if an inference as to a fresh dedication is capable of being drawn, it must be capable of being referred to a dedication by Praneswar who had been declared to be the owner of the property in 1899. He alone was capable of making a fresh dedication, having acquired title to the property in suit by a decision of a competent Court in suit NO. 792 of 1899, on the issue as to adverse possession.

[29] Far from dedicating the property to the temple, Praneswar, the only person who could dedicate the property, transferred the property to Dwarikanath Roy, and the widow of Dwarikanath Roy transferred the property to the plaintiffs in the present suit. These transfers are wholly inconsistent with the inference which Mr. Ghose has invited us to draw from the offending entries. Moreover, the plaintiffs in 1912 succeeded in having the offending words in the *jamabandi* deleted, and for a period of 27 years thereafter they were in possession of the property in their own right to the exclusion of the temple or the manager of the temple. There is no evidence that Gopal Goswami or his brother, Jibadhar, the defendant in the present suit, ever collected rents from the plaintiffs or their tenants. Such evidence as was attempted to be given in this behalf has been rejected by the Courts below. Indeed, having regard to the facts and circumstances of this case, it is impossible that the plaintiffs or their tenants could ever have paid rent or other consideration to the defendant in the present suit.

[30] The acquisition of the property in suit by Topodhar, by exchange of his share in the paternal property in North Gauhati with an ancestor of the defendant, and Topodhar's bequest in favour of his grandsons and the devolution of the property in suit on succession to the heirs of Topodhar's grandsons until it devolved on Praneswar who transferred it to Joydev and Dwarika, and the sale of the property in suit to the plaintiffs in 1911 by Dwarika's widow all point to one conclusion that the property in suit was held by Topodhar and his successors-in-interest in their own right and adversely to the temple, and that at no time there was a fresh dedication after 1899, so as to justify the view that the plaintiffs had acquired a limited interest valid for the duration of the office of the manager of the temple.

[31] In this view, the plaintiffs' suit has been rightly decreed by the Courts below and we see no reason to interfere with the judgment and decree of the lower appellate Court.

[32] The result is that the appeal is dismissed with costs.

Lodge C. J.— I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 98 *[C. N. 38.]*

THADANI C. J. AND RAM LABHAYA J.

Muklesur Rahman and another —*Accused* —*Appellants* v. *The King.*

Jail Appeal No. 39 of 1949, D/-7-2-1950.

(a) Penal Code (1860), Ss. 34 and 304 —Common intention, meaning of — Conviction under S. 304— S. 34 if applies.

The common intention contemplated by S. 34 is anterior in time to the commission of the crime, and does not refer to the time when the act is committed. If, on the facts of a particular case, it is proved that the common intention of two or more persons was to cause death of a person, and in furtherance of the common intention, an act was done by one which caused the death of a person, S. 34 would apply to such a case whether the conviction is recorded under S. 304 (1) or 304 (2), Penal Code: A. I. R. (31) 1944 Cal. 339, *Approved.* [Para 5]

(b) Criminal P. C. (1898), Ss. 297 and 537— Misdirection—Murder trial—Charge to jury suggesting possibility of application of S. 304, Part II, Penal Code though in fact it was not applicable— Verdict of guilty under S. 304, Part II read with S. 34— Error not prejudicing accused — No miscarriage of justice—Verdict will not be interfered with. [Para 13]

Annotation : ('49 Com.) Cr. P. C., S. 297, N. 13.

K. R. Barman, Government-Advocate — for the Crown.

Thadani C. J. — This is an appeal from jail preferred by one Muklesur Rahman and Habibur Rahman who were convicted by the learned Sessions Judge, A. L. D., under S. 304, Part II, read with S. 34, Penal Code, upon a trial held with the aid of a jury. Agreeing with the unanimous verdict of the jury, the learned Judge found the two accused guilty and sentenced the accused Muklesur Rahman to rigorous imprisonment for five years, and Habibur Rahman to rigorous imprisonment for four years, under S. 304, Part II, read with S. 34, Penal Code.

[2] We admitted the appeal to hearing in order to satisfy ourselves whether S. 34, Penal Code, was applicable in point of law to a case when the accused persons are convicted and sentenced under S. 304, Part II read with S. 34, Penal Code.

[3] The question of common intention is a question of fact, which was properly dealt with by the learned Sessions Judge in his summing up to the Jury, and we, therefore, accept the existence of a common intention within the meaning of S. 34, Penal Code, as a fact, which undoubtedly was a matter for the jury alone to decide.

[4] The question whether in point of law, S. 34, Penal Code, applies to a case when accused persons are charged with and found guilty under S. 304, Part II, Penal Code, came up before a Division Bench of the Calcutta High Court in *Ibra Akanda* v. *Emperor*, A. I. R. (31) 1944 Cal. 339 : (45 Cr. L. J. 771). Lodge and Das JJ. differed, Khundkar J., agreed with Lodge J., and referred to the case reported in *Adam Ali* v. *Emperor*, 31 C W. N. 314 : (A. I. R. (14) 1927 Cal. 324 : 28 Cr. L. J. 334), in which the following observations were made :

"There is yet another objection to the charges and verdict. It is that S. 34, which is based on a common intention, cannot possibly be used with Part 2 of S. 304, which expressly excludes intention. Personally I do not think that it could be used with Part I either, except possibly in very rare cases. However, the point is that the jury have found the accused guilty of committing culpable homicide by doing an act with the knowledge that they were likely to cause death but without any such intention in furtherance of a common intention. It is the badly framed charge and the defective summing up that have led the jury to their illogical verdict."

With reference to these observations, Lodge J. remarked :

"With great respect to the learned Judge, I am not quite able to discover whether he did or did not discuss it or give any reason for his decision. But it is clear from a perusal of the judgment that the learned Judge decided the case upon other considerations and that the decision of that case did not depend on the interpretation of S. 34. The learned Judge's remarks, therefore, on the applicability of S. 34 to S. 304, Part 2, may be considered as obiter dicta . . . . . Though the question of the true interpretation of S. 34 has been considered in many reported cases, in the majority of those cases, the term "criminal act" was examined and the Courts did not attempt to explain the meaning of the phrase in furtherance of the common intention of all . . . In the result, therefore, I hold that there is no difficulty in applying Ss. 34 and 35 to cases of culpable homicide punishable under S. 304 (2)."

[5] With respect, we think, the view taken by Lodge and Khundkar JJ, is right. It is to be observed that the common intention contemplated by S. 34 is anterior in time to the commission of the crime, and does not refer to the time when the act is committed. If, on the facts of a particular case, it is proved that the common intention of two or more persons was to cause death of a person, and in furtherance of the common intention, an act was done by one which caused the death of a person, we do not think there is any difficulty in applying S. 34, whether the conviction is recorded under S. 304 (1) or S. 304 (2), Penal Code.

[6] The result is that the appeal is dismissed.

[7] **Ram Labhaya J.** — I agree with my Lord the Chief Justice in the conclusion that the appeal may be dismissed.

[8] The learned Government Advocate has relied on *Ibra Akanda* v. *Emperor*, A. I. R. (31) 1944 Cal. 339 : (45 Cr. L. J. 771), for showing that there is not difficulty in applying S. 34, Penal Code to cases covered by S. 304, Part II, Penal Code. In this case on a difference arising between Lodge and Das JJ., the matter was placed before Khundkar J., under the provisions of S. 429, Criminal P. C.

[9] Lodge J. was firmly of the opinion that there was no difficulty in applying Ss. 34 and 35 to cases of culpable homicide punishable under S. 304, Part. II (see p. 345). Das J., on the other hand, was emphatic in the expression of the view that Part. II of S. 304 expressly excludes intention and could not possibly be read with S. 34, Penal Code. These views represented the two extremes of a very vexed question.

[10] Khundkar J., it appears, could not agree with any of these views. His conclusion stated in his own words is as follows :

"It follows that, as already indicated, I cannot concur with my brother Das in the view that the principle of S. 34 can never be applied to an offence punishable under the second part of S. 304."

[11] He came to this conclusion by giving the words "common intention" occurring in S. 34 a meaning varying with the facts of each case. In his view "common intention" referred to in S. 34 could not be given a constant connotation. It varied with the facts of each particular case. In this view of the matter, he could not hold that S. 34 could never be applied to an offence punishable under S. 304, Part II. He, however, made certain observations which considerably reduced the scope of the applicability of S. 34 to cases falling under S. 304, Part II His observations are as follows :

"Before I leave this subject, however, I ought to add that I am inclined to indorse the observations of Henderson J., that in actual fact, cases in which the principle enunciated in S. 34 can be applied to an offence punishable under Part II of S. 304, are not of very frequent occurrence. Cases of the type out of which the appeals here dealt with have arisen, are really cases in which the offence committed is in fact murder punishable under S. 302. In order to allay the qualms of juries who, in this province, are notoriously averse to returning affirmative verdicts on capital charges, Judges frequently go to artificial lengths, in leaving open an avenue to a verdict under S. 304, Part II, when the evidence shows that it is either murder or nothing.

[12] These observations show that cases which could be appropriately placed under S. 304, Part II, read with S. 34 would be found to be rare in actual life even if full effect is given to the view of Khundkar J. The statement that Judges by their charge make it possible for the juries to return a verdict under S. 304, Part II in order to get over the difficulty created by the disinclination of the juries to return a verdict on capital charges under S. 302 is unfortunately very true and the present case is typical of the attitude of Judges in this respect. A conviction in the present case under S. 302 or S. 304, Part I, would obviously have been more appropriate. The charge suggested the possibility of the application of S. 304 Part II, where in fact it was not applicable. The error, therefore, has been not in the application of S. 34 but in the application of S. 304, Part II.

[13] The misdirection in these circumstances has not prejudiced the accused, and there has been no miscarriage of justice. The appellants on the other hand became entitled to lenient treatment. In this view of the matter, there is no basis for interference in this case and it is not necessary to examine the question of principle whether S. 34 can under any conceivable circumstances be applied to cases falling under S. 304, Part II.

K.S. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 99 *[C. N. 39.]*

THADANI AG. C. J.

Rafiquddin — Appellant v. *Muklusa Bibi and others — Respondents.*

Revenue Appeal No. 37 of 1948 (H. C.), D/- 25th November 1949, against order of Deputy Commissioner, Cachar, D/- 27th August 1948.

Assam Land and Revenue Regulation (I [1] of 1886), S. 147 (b)—Order issuing non-renewal notice to an annual patta-holder or directing him to show cause why he should not be prosecuted under S. 193, Penal Code, is not an order within S. 147 (b) and, therefore, not appealable. [Para 2]

N. M. Dam — for Appellant.
J. C. Sen — for Respondents.

Judgment. — This is an appeal against an order passed by the learned Deputy Commissioner, Cachar, dated 27th August 1948. The order is in these terms :

"The existing settlement with Rafiquddin is terminated by service of non-renewal notice.

Regarding some false statements made by Rafiquddin in this affidavit, he is to show cause why he should not be prosecuted under S. 193, Penal Code, for making false statements on oath before a Magistrate."

[2] It is admitted by Mr. Dam that under cl. (b), S. 147, Assam Land and Revenue Regulation, 1886, an appeal lies from any order, original or appellate, passed by a Deputy Commissioner of a District. Neither Para. 1 of the order in question nor Para. 2 constitutes an order within the meaning of cl. (b) of S. 147. Admittedly, the appellant is an annual patta-holder and under the terms of the settlement, Government has the right to give a non-renewal notice of the annual patta to the patta-holder that the patta will not be renewed for the following agricultural year. A non-renewal notice issued to an annual patta-holder is not an order

passed within the meaning of S. 147 (b), Assam Land and Revenue Regulation : nor is the Rule issued to the appellant to show cause why he should not be prosecuted under S. 193, Penal Code, an order within the meaning of S. 147 (b).

[3] The result is that the appeal is dismissed with no order as to costs.

K.S. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 100 *[C. N. 40.]*

THADANI C. J. AND RAM LABHAYA J.

Sri Ram Saran Kashyap — Petitioner v. *The King.*

Criminal Misc. Case No. 16 of 1949, D/-24-1-1950.

Administration of Police and Justice in the Naga Hills District Rules, R. 22 — Transfer of criminal case from Naga Hills District under S. 526, Criminal P. C.—Criminal P. C. (1898), S. 526.

There is nothing in the rules framed for the administration of police and justice in the Naga Hills District by which the High Court of Assam can transfer a criminal case pending in one of the Courts in the Naga Hills District to a Court outside that District. The language of R. 22 which enjoins that the procedure shall be in the spirit of the Code of Criminal Procedure limits the rule by the words "as far as it is applicable to the circumstances of the district." The rule cannot, therefore, be held to empower the High Court to transfer a case either in terms of the Code or its spirit for it is plain that S. 526 applies to the facts and circumstances of the case and not to the circumstances of the district. [Para 7]

D. R. Das, R. K. Chaudhuri and B. N. Chaudhuri —for Petitioner.

K. R. Barman, Govt. Advocate — for the Crown.

Thadani C. J.—This is an application under the provisions of S. 526, Criminal P. C., praying for the transfer of Case No. C. R. 10 of 1949 pending in the Court of the Magistrate, 1st Class, Kohima, Naga Hills, against one Sri Ram Saran Kashyap under S. 420, Penal Code.

[2] The case is sought to be transferred on the ground of the convenience of the parties. It is stated in the petition that the accused resides in Calcutta; the journey from Calcutta to Kohima is a long and troublesome one and requires frequent changes and takes several days ; that of the 10 prosecution witnesses, 6 reside in Calcutta, 3 in Shillong, and the remaining witness in New Delhi.

[3] We had occasion to consider the question of transfer of a criminal case pending before a Magistrate of Kohima in the Naga Hills District in the case of one Krishna Prasanna Chakravarty. In our judgment, which is reported in *Krishna Prasanna* v. *Jan Mahammad*, A.I.R. (36) 1949 Assam 69 : (51 Cr. L. J. 147), we observed :

"The Governor of Assam is empowered by S. 6, Scheduled Districts Act, 1874, to prescribe rules for the administration of justice and police in the Naga Hills District. It is not disputed that Kohima where the two complaints have been instituted is situated in the Naga Hills District. Rules 15 to 22 of the Rules framed by the Governor of Assam in pursuance of S. 6, Scheduled Districts Act of 1874, appear to us to exclude the operation of the Criminal Procedure Code."

[4] We referred to the terms of S. 1, Criminal P. C., which is in these terms :

".....(2). It extends to the whole of British India, but in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed by any other law for the time being in force, or shall apply to :

(a) the Commissioner of Police in the towns of Calcutta, Madras and Bombay or the Police in the towns of Calcutta and Bombay ;

(b) heads of villages in the Presidency of Fort St. George, or

(c) Village Police Officers in the Presidency of Bombay: provided that the Local Government may, if it thinks fit, by notification in the Official Gazette, extend any of the provisions of this Code, with any necessary modifications, to such excepted persons."

[5] We then examined the scheme of the Rules framed for the Administration of Justice and Police in the Naga Hills and stated :

"It is manifest that Rr. 15 to 19 framed under the Act of 1874, to which we have referred, do not prescribe any procedure for the trial of criminal offences. Sections 20 and 21 deal with the right of appeal and the Governor-General's prerogative of reviewing the proceedings of the Governor of Assam. It is common ground that the powers which the Governor of Assam exercised before the establishment of the High Court of Assam have since been conferred on this High Court. But the powers conferred on this Court are undoubtedly limited in their extent to the powers which the Governor of Assam himself could have exercised under the rules framed under the Act of 1874.

We cannot find anything in the rules framed by the Governor of Assam which authorises the Governor of Assam to transfer a criminal case pending in one of the Courts of the Naga Hills District to a Court outside the Naga Hills District.....It is plain that as the Governor of Assam himself had no power to transfer a case from a criminal Court in the Naga Hills District to a Court outside that district in the Province of Assam, this Court which is enabled to exercise such powers only as the Governor of Assam should have exercised, is not competent to transfer the cases to a Court at Dibrugarh, a place outside the Naga Hills District.....We think the words 'in the spirit of the Code of Criminal Procedure' used in R. 22 are not to be interpreted in a manner so as to enable this Court to apply the provisions of the Code of Criminal Procedure to the trial of offences in the Naga Hills District, when the operation of the Code to the administration of justice in the Naga Hills District is excluded by rules framed under a special enactment, namely, the Act of 1874."

[6] Mr. Das for the petitioner has contended that the Scheduled Districts Act of 1874 has been omitted by the Adaptation Order of 1937, and that as the decision of this Court was based upon the interpretation of R. 22 framed under the Scheduled Districts Act of 1874, the decision arrived at in *Krishna Prasanna* v. *Jan Mahammed*, (A. I. R. (36) 1949 Assam 69 : 51 Cr. L. J. 147), should not be regarded as an impediment to revising our view, so as to enable

us to make an order of transfer under the provisions of S. 526, Criminal P. C. While it is true that the Scheduled Districts Act of 1874 has been omitted by the Adaptation Order of 1937, nevertheless there is a Regulation called the Naga Hills (Administration of Justice and Police) Regulation, 1947, dated 10-10-1947, which retains the provisions of R. 22 of the Rules framed for the Administration of Justice and Police in the Naga Hills District framed under the Act of 1874. Mr. Das, on being satisfied that R. 22 is still in force, contended that even so, R. 22 which enables this Court to invoke the spirit of the Code of Criminal Procedure, empowers us to make an order of transfer from the Naga Hills District to any other district in the Province of Assam. Rule 22 is in these terms:

"22. The procedure of the Governor of Assam, the Commissioner, the Deputy Commissioner and his Assistants shall be in the spirit of the Code of Criminal Procedure as far as it is applicable to the circumstances of the district and consistent with these rules; the chief exceptions are:

(a) Only verbal order or notice shall be requisite, except when the regular police are employed or the person concerned is not resident or in the district at the time; or, if in the district, but resident beyond it, where his place of abode is not known. The order shall be made known to the person affected or to some adult member of his family, or proclaimed at the place he was last known to be at, in sufficient time to allow him, if he see fit, to appear.

(b) A note of the substance of all the proceedings in cases tried before them must be kept by the Deputy Commissioner and his Assistants as required by S. 264, Criminal P. C. In cases requiring a sentence exceeding three years, a full note of the evidence and proceedings must be kept. Examinations and proceedings shall generally be recorded in English only.

(c) The proceedings of the Mauzadars, gaonburas, chiefs, headmen of khels or other duly recognised village authorities need not be in writing.

(d) All fines levied by the mauzadars, gaonburas, chiefs, headmen of khels, or other duly recognised village authorities shall be paid to the Deputy Commissioner or his Assistants or other officer empowered to receive them, within eight days from the date of realisation, unless they are immediately paid to the aggrieved party as compensation.

(e) It shall be discretionary to examine witnesses on oath in any form, or to warn them that they are liable to the punishment for perjury if they state that which they know to be false.

(f) No pleader shall be allowed to appear in any case except with the special permission of the Deputy Commissioner. The term 'pleader' includes 'mukhtar' or any other professional agent recognised by the Court. Such permission shall always be granted when the application is to appear on behalf of a person accused of murder. For the defences of paupers accused of murder, Rr. 19 to 21 of the Assam Law Department Manual, Part II, Criminal Rules, shall be followed *mutatis mutandis*."

[7] The language of R. 22 is, however, significant. While enjoining that the procedure shall be in the spirit of the Code of Criminal Procedure, it limits the Rule by the words "as far as it is applicable to the circumstances of the district", as distinct from "as far as applicable to the circumstances of the case". If the words had been "as far as it is applicable to the circumstances of the case", the interpretation sought to be put by Mr. Das might have been of some assistance to him. If the procedure shall be in the spirit of the Code of Criminal Procedure as far as it is applicable to the circumstances of the district, and not to the circumstances of the case, we cannot see how R. 22 would empower this Court to transfer a case either in terms of the Code of Criminal Procedure or its spirit, for it is plain that S. 526, Criminal P. C. applies to the facts and circumstances of a case, and not to the circumstances of the district.

[8] We find it, therefore, difficult to take a different view to the one which we took in the case of *Krishna Prasanna* v. *Jan Mahammed*, A. I. R. (36) 1949 Assam 69 : (51 Cr. L. J. 147).

[9] The result is that the application fails and is dismissed.

Ram Labhaya J.—I agree.

G.M.J. *Application dismissed.*

A. I. R. (37) 1950 Assam 101 *[C. N. 41.]*

THADANI C. J. AND RAM LABHAYA J.

Tinsukia Municipal Board — Appellant v. *Bankim Chandra Ghose and another — Respondents.*

S. A. No. 34A of 1948, D/- 19-1-1950.

(a) Municipalities—Assam Municipal Act (I [1] of 1923), S. 320 — Applicability—Suit for malicious prosecution against municipality—Period of notice —Exclusion of—Limitation Act (1908), Ss. 15 (2), 29 (2) and Art. 23.

Per *Ram Lahbaya J.*— Section 320 covers a suit for malicious prosecution against a municipality and is subject to S. 15(2), Limitation Act by virtue of S. 29(2), Limitation Act as the operation of S. 15 (2) has not been excluded by anything contained in the Assam Municipal Act. Hence, in computing the period of limitation prescribed by S. 320 (2), the plaintiff is entitled to exclude the period of one month's notice prescribed by S. 320 (1): A. I. R. (19) 1932 Bom. 259, *Rel. on.* [Paras 5, 7, 8,9]

Per *Thadani C. J.* — Section 320 has no application to a suit for damages for malicious prosecution inasmuch as malicious prosecution is not something done under but outside the Act. Such a suit is governed by Art. 23, Limitation Act. [Para 25]

Annotation: ('42 Com.) Limitation Act, S. 15 N. 19; S. 29, N 4; Art. 23 N. 7.

(b) Municipalities—Assam Municipal Act (I [1] of 1923), S. 236 — Prohibition of offensive trade without defining limits.

Section 236 merely authorises the Board to define limits within which certain dangerous or offensive trades may be carried on. The municipality can merely regulate certain trades by defining the areas where they may be carried on within municipal limits. If the municipality merely imposes a fee for carrying on such a trade without defining any limits as regards locality, the action of the municipality would defeat

the very purpose of the section and would be *ultra vires* its powers under the Act. [Para 14]

(c) Tort — Malicious prosecution — Burden of proof—Essential facts to be proved.

The plaintiff in order to succeed in a suit for damages for malicious prosecution has to prove, (1) that he was prosecuted by the defendant, (2) that the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating, (3) that the prosecution was instituted against him without any reasonable or probable cause, (4) that the prosecution was instituted with a malicious intention, that is, not with the mere intention of carrying the law into effect or in furtherance of justice but with some indirect or improper motive. [Para 15]

(d) Tort— Malicious prosecution — Absence of reasonable and probable cause — Legal malice when to be inferred.

In a particular case it may be possible to infer improper motive from the obvious or the apparent illegality of the action taken. But it is not in every case that because there is absence of reasonable or probable cause for a prosecution that a Judge would be justified in inferring malice. Where there is something more to indicate the existence of indirect or improper motive besides the mere absence of reasonable or probable cause, a finding that the prosecution was malicious would be justified. [Para 19]

(e) Tort—Malicious prosecution — Damages — Chairman of municipality *bona fide* demanding license fee from plaintiff in accordance with its resolution—Prosecution of plaintiff for failure to take out license— Discharge — Municipality in demanding fee acting outside its powers under Act—Held there was absence of reasonable and probable cause for prosecution — Municipality not actuated by any indirect or improper motive other than furtherance of justice or vindication of the law in prosecuting—Held, there being absence of malice, claim for damages was not maintainable. A. I. R. (19) 1932 Bom. 259, *Disting.*

[Paras 14, 18 and 21]

(f) Civil P. C. (1908), O. 41, R. 33 — Power to reverse decree against respondent who has not appealed.

Where a suit for malicious prosecution against a municipality and its Chairman in his official capacity is decreed by the trial Court and the decree is reversed in appeal by the municipality alone on a ground common to both the defendants the appellate Court can also reverse the decree against the respondent Chairman who has not appealed. [Para 22]

Annotation: ('44-Com.) Civil P.C., O. 41 R. 33 N. 6.

B. C. Barua and S. C. Chaudhury— for Appellant.

J. C. Sen—for Respondents.

Ram Labhaya J.— This appeal arises out of a suit for recovery of damages on account of the alleged malicious prosecution of the plaintiff by defendant 1, the Chairman of the Tinsukia Municipal Board, and defendant 2, the Board itself. The learned Munsiff of Dibrugarh found that the suit was not within time though the prosecution of the plaintiff at the instance of the defendants was without reasonable and probable cause. He inferred malice from the absence of reasonable and probable cause. The suit, however, was dismissed as barred by time.

[2] On appeal, the learned Additional Subordinate Judge held that the suit was within time. He agreed with the other findings arrived at by the learned Munsiff and as a result decreed the plaintiff's claim with costs against defendants. The Tinsukia Municipal Board (defendant 2) has appealed.

[3] In appeal both the findings arrived at by the learned Additional Subordinate Judge have been assailed. The first contention relates to the question of limitation. It is urged that the suit was barred by time. The plaintiff was prosecuted for not taking a license for the storage of lime. He was discharged on 11th December 1946. The suit was instituted on 20th March 1946. It is pointed out that under S. 320, Assam Municipal Act, the suit should have been instituted within three months from the date of the accrual of the cause of action and this not having been done it is therefore barred by time. The plaintiff, however, claims that he is entitled to add to the period of three months allowed to him by S. 320, Assam Municipal Act the period of one month's notice which he was bound to give to the defendant before being able to institute the suit. If this period of one month is allowed to him, the suit would be within time. The question, therefore, is whether the period of notice can be added to the period of limitation allowed by S. 320, for the institution of a suit against the Municipal Board or any of its officers.

[4] Section 320 provides that:

"No suit shall be brought against any Board or any of its officers, or any person acting under its direction for anything done under this Act, until the expiration of one month next after notice in writing has been delivered or left at the office of such Board."

In cl. (2) it provides that:

"Every such action shall be commenced within three months next after the accrual of the cause of action, and not afterwards."

It is obvious that one month's notice was a necessary prerequisite for the institution of the suit. This is common ground. The controversy is on the second clause of the section which allows three months for the institution of the suit. The period of time allowed for the suit is again undeniably three months. The question is how this period is to be computed or whether in computing this period of three months, the period of notice is to be excluded from computation or not.

[5] Section 320, Assam Municipal Act covers all suits against the Board or any of its officers for anything done under the Act. The suit for malicious prosecution would be covered by it. This is not disputed. The period provided for such a suit is only three months. The Indian Limitation Act provides a different period of limitation for suits for damages or compensation for malicious prosecution.

[6] Section 29, cl. (2), Limitation Act, provides that:

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by sch. 1, the provisions of S. 3 shall apply, as if such period were prescribed therefore in that schedule, and for purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—(a) the provisions contained in S. 4, Ss. 9-18, and S. 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

[7] Section 320, Assam Municipal Act does provide for a period of limitation different from that provided in the Indian Limitation Act for suit, for compensation for malicious prosecution. If Ss. 9-18 apply, S. 320 would be read subject to S. 15 (2), Limitation Act which embodies a general provision to the effect that in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded. The general rule will not be applicable if as laid down in S. 29 (2) the special or local law prescribing a period of limitation different from that provided in Sch. 1, Limitation Act, expressly excludes the application of S. 15. Now, whatever may be said of the implications of S. 320, it certainly does not in express terms exclude the operation or application of S. 15 or other sections of the Limitation Act which would apply by virtue of S. 29, Limitation Act. The learned counsel for the appellant has referred us to the language of cl. (2) of S. 320, Assam Municipal Act, which is as follows:

"Every such action shall be commenced within three months next after the accrual of the cause of action, and not afterwards."

[8] He points that the words "and not afterwards" would show that the Legislature intended that the plaintiff suing a Municipal Board had only three months from the date the cause of action accrued. No suit could be instituted afterwards. The implication of the requirement, he argues, would be that notice of one month must be given within this period and that it cannot be added to the period of suit. We do not think such an intention can be attributed to the Legislature. It cannot be gathered from the language of the clause under consideration. It merely provides a period of limitation in emphatic language. It does not deal with the principles or rules governing the computation of the period. It is in its nature like the clauses of Sch. 1, Limitation Act by which periods of limitation for different kinds of suits are laid down. The Assam Municipal Act is admittedly not exhaustive so far as the statement of the law of limitation is concerned. It does not embody a complete code of limitation. Where therefore it specifies or prescribes a period for a suit, the method of computing that period would be regulated by the general rules laid down in the Limitation Act for that purpose unless it is expressly laid down to the contrary. The learned counsel himself finds it difficult to contend that the application of S. 15 (2) has been expressly excluded. It was held in *Chhagan Lal* v. *Thana Municipality*, A. I. R. (19) 1932 Bom. 259 at p. 266: (56 Bom. 135) that

"express exclusion is clearly exclusion by specific words in that behalf and not by a process of logical reasoning or implication from the words of the special or local law."

In that case a provision (S. 167, Bombay District Municipal Act) analogous to S. 320, Assam Municipal Act was being considered. The provision laid down the period of notice first and then laid down the period of six months for suits against the Board. The arrangement of the section was held not to imply necessarily that the period of notice was not to be excluded in computing the period of limitation. The learned Judges relying on *Banga Chandra* v. *Kailash Chandra*, A. I. R. (7) 1920 Cal. 325: (58 I. C. 189) and *Rewarchand Fatehchand* v. *Karachi Municipality*, A. I. R. (17) 1930 Sind 93: (24 S. L. R. 344), held that:

"Section 167, Bombay District Municipal Act was subject to S. 15 (2), Limitation Act and a plaintiff instituting a suit for damages for malicious prosecution against the Municipality was entitled to exclude the period of one month's notice from the period of limitation prescribed by S. 167, for the suit."

[9] I am in full agreement with this view and hold that S. 320, Assam Municipal Act is subject to S. 15 (2), Limitation Act as the operation of S. 15 (2) has not been excluded by anything contained in the Assam Municipal Act. The plaintiff, therefore, is entitled to exclude the period of one month when computing the period for this suit. In this view of the matter the suit is not time barred.

[10] The second point pressed is that the prosecution of the plaintiff by the Municipal Board has not been proved to be malicious and that no case has been made out for any award of damages. Facts bearing on the question may be briefly stated.

[11] The Tinsukia Municipal Board by its resolution, dated 16th May 1946, resolved that a license fee of Rs. 25 be imposed for the storage of lime. The resolution was to take effect from 1st April 1946. The Chairman of the Board (defendant 1) sent a notice to the plaintiff on 24th June 1946, demanding Rs. 25 as license fee for storage of lime under S. 239, Assam Municipal Act. The plaintiff informed the Chairman on 1st July 1946, that he was not manufacturing

any lime and may be exempted from the levy. The Chairman again by his letter No. 459, dated 16th July 1947, directed him to pay the fee of Rs. 25 and take a license. The plaintiff pleaded by his letter, dated 28th July 1947, that S. 239 of the Municipal Act had no application to his case. On this, the Chairman of the Board again informed the plaintiff that the tax for the storage for lime had been levied by the Board under S. 236 of the Municipal Act, and that if he failed to pay it, action would be taken against him even though he was not manufacturing lime. The plaintiff re-iterated his view of the law that S. 236 could not apply to his case as he was not manufacturing lime. In his view mere storage of lime for sale was not such as act to which S. 236 could apply. He, therefore, intimated to the Chairman that in case he was prosecuted, both the Chairman and the Board would be liable in damages.

[12] A complaint was lodged against the plaintiff. Summons were issued in the first instance and later in order to procure his attendance, a warrant of arrest had to be issued. The Magistrate ultimately held that the action of the Board in levying a fee for the storage of lime was not covered by S. 236 of the Act. He found that the demand was not legal, and discharged the plaintiff on 11th December 1946. Plaintiff now alleges that the prosecution was malicious and claims damages in consequence.

[13] The resolution of the Tinsukia Municipal Board was passed at a meeting of the Board on 16th May 1946. A similar resolution was passed by the Dibrugarh Board on 16th April 1946. The resolution of the Tinsukia Board states that the Board has considered the Deputy Commissioner's letter No. 1567-9, dated 23rd February 1945 as also letter No. 150, dated 26th April 1946 from the Chairman of the Dibrugarh Board. Fees for a number of trades were fixed by this resolution. The storage of lime was one of the several items covered by the resolution. The letter from the Deputy Commissioner as also the letter from the Chairman of the Dibrugarh Board, which are referred in the resolution, have not been placed on the record and their contents are not known. It has, however, been proved that the Dibrugarh Municipality also imposed a fee on the storage of lime by its resolution, dated 16th April 1946.

[14] When prohibiting the storage of lime within municipal limits without a license, the Board purported to act under S. 236. This section does lay down that within such local limits as may be fixed by the Board at a meeting no place shall be used without a license for certain purposes specified in the section. Manufacture of lime is one of such purposes. But it is not denied from the side of the defendants that plaintiff was not manufacturing lime when the resolution in question was passed. He was merely storing it for sale. Storage for sale is obviously not the same as its manufacture. The learned counsel for the appellant has not contended that storage for sale of lime can be covered by the words "manufacture of lime." The only other clause which may be relied by the defendant (appellant) is the one which deals with a business from which offensive or unwholesome smell may arise. It is not contended that stored lime would give rise to unwholesome smell but it is suggested that the business may be regarded as offensive. Assuming that storage of lime for sale can possibly by regarded as an offensive trade within the meaning of S. 236, the Board could only define limits within which storage of lime for sale may not take place without a license. A Board would be exceeding its powers if it prohibited the storage of lime anywhere within the municipal limits without a license, for the question whether a trade is offensive has a very obvious connection with the locality in which it is carried on. If lime is stored far away from the habitation where no one is residing in the neighbourhood, the storage of lime may not offend unless offence is sought by going to the place. It is obviously for this reason that S. 236 merely authorises the Board to define limits within which certain dangerous or offensive trades may be carried on. The Municipality can merely regulate certain trades by defining the areas where they may be carried on within municipal limits. If the Municipality merely imposes a fee for carrying on such a trade without defining any limits as regards locality, the action of the Municipality would defeat the very purpose of the section. The principle underlying the section is that dangerous or offensive trades may be at such places that their dangerous or offensive character ceases to be a source of risk or inconvenience to the people residing within municipal limits, but it is recognised that the trades covered by the section though dangerous or offensive can be carried on within municipal limits. When the Board prohibited the storage of lime without defining the limits within which this trade could be carried on, it exceeded its powers and completely lost sight of the purpose underlying the section. It also fixed a fee of Rs. 25 for a license to store and sell lime. Under cl. (2) of S. 59, Assam Municipal Act, the scale of fees in respect of the issue and the renewal of a license which may be granted by the Board under the Act if it does not amount to a tax covered by cl. (1) of the section must be with the approval of the appropriate higher authority before the fee becomes

chargeable. There is no allegation that the necessary approval of the higher authority was obtained in respect of the fees fixed by the resolution of 16th May 1946. In the absence of any allegation and in view of the fact that if such approval had been obtained it could have been easily proved, no presumption can be made in favour of the Board on this point. The basis of the suit was that the prosecution was malicious or, in other words, the action of the Municipality was actuated by some indirect motive. Considerable emphasis was also laid on the illegality of the action taken by the Municipality. In spite of this no effort has been made to show that the fees levied were approved by competent authority. In these circumstances, the fee was not legally recoverable and the plaintiff could not have been prosecuted for his failure to obtain a license on payment of the prescribed fee. The complaint against the plaintiff was without reasonable and probable cause for reasons given above.

[15] The Courts below have inferred malice from the absense of reasonable and probable cause and it is here that they have fallen into an error. The plaintiff in order to succeed in a suit for damages for malicious prosecution has to prove (1) that he was prosecuted by the defendant, (2) that the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating, (3) that the prosecution was instituted against him without any reasonable or probable cause, (4) that the prosecution was instituted with a malicious intention, that is, not with the mere intention of carrying the law into effect or in furtherance of justice but with some indirect or improper motive. This was so held in *Balbhaddar Singh* v. *Budri Sah*, 30 C. W. N. 866: (A. I. R. (13) 1926 P. C. 46), relied on by the learned counsel for the appellant and in *Ram Chandra* v. *Krishna Rao*, 32 Bom. 259: (10 Bom. L. R. 279) relied on by the learned counsel for the respondent.

[16] It is apparent that the learned counsel are agreed on the question of principle and it is not necessary to consider authorities bearing on the point in any considerable detail.

[17] We have now to see whether plaintiff has proved the necessary ingredients which go to make a prosecution malicious. He was no doubt prosecuted. The prosecution terminated in his favour. He was discharged. We have also come to the conclusion that there was absence of reasonable and probable cause. The first three requirements of the rule stated above do stand satisfied. The question that remains to be considered is whether the elements of malice or the existence of some indirect motive or intention other than the mere intention of carrying law into effect has been made out by direct evidence or can be inferred from facts and circumstances proved in the case.

[18] From the facts proved in this case, it appears that the only objection raised by the plaintiff to the demand from the Board was that the storage of lime was not such a trade to which S. 236 could be applied. The objection came after the resolution of the Board when the demand was made. In making the demand, the Chairman was acting in conformity with the resolution of the Board. The Board was influenced in passing the resolution by letters from the Deputy Commissioner and from the Chairman of the Dibrugarh Municipal Board. A similar resolution imposing license fee for storage of lime was passed by the Dibrugarh Municipal Board also. The Chairman in view of the fact that the Board had passed the resolution after considering letters from the Deputy Commissioner and the Chairman of the Dibrugarh Municipal Board disregarded the protest from the plaintiff. The objection from the plaintiff cannot be regarded as something that was apparent. There was room for difference of opinion. A Municipal Board could honestly though erroneously believe that it could regulate storage of lime for sale treating as a trade which may give offence. The plaintiff has not suggested that there was any personal hostility against him from any quarter or that any member or employee of the Municipal Board had any motive to cause him injury. Malice, in point of fact, was not alleged.

[19] What remains to be seen is whether legal malice or the existence of some indirect or improper motive can be inferred from the proved facts of the case. Now, all that has been proved is that the demand by the Board was not legal and plaintiff was not bound in law to meet it. His refusal to pay did not amount to any offence under the Municipal law. His prosecution in these circumstances was without reasonable and probable cause. It is noteworthy, however, that the only point on which plaintiff resisted the demand was that the sale of manufactured lime was not such a trade to which S. 236, Municipal Act could apply. The reasons on which we have come to the conclusion that the prosecution of the plaintiff was without reasonable and probable cause did not occur to the plaintiff and it seems that they were not brought to the notice of the Chairman. They have been brought out in the course of the present suit. We are thus asked to infer malice or the existence of some indirect motive other than the vindication of law or the furtherance of justice from the solitary circumstance that the

Chairman ignored the interpretation of S. 236 which plaintiff placed on it and which subsequently was accepted in the criminal Court. We do not think that it necessarily follows from this circumstance that the Chairman and even the Board were actuated by any indirect motive. The Board was influenced in its decision by the example of the Dibrugarh Municipality. There was also the Deputy Commissioner's letter. The Board passed a resolution dealing with several trades including the storage of lime. The Chairman felt bound to give effect to the resolution of the Board inspite of the fact that plaintiff differed from the Board in its interpretation of S. 236. We think there was some room for difference of opinion, particularly in the circumstances under which the resolution of the Board was passed. These do not leave any doubt as to the *bona fides* of the Board. The object was not to victimise a trade or any individual. The Chairman could not disregard the resolution and the difference of opinion between the Board and the plaintiff could only be resolved in a Court of law. We do not discover any basis for the belief that the Chairman or the Board had any indirect motive in prosecuting the plaintiff. The resolution of the Board has been found to be in excess of its powers. The Board also failed to obtain the approval of the higher authority as regards fees it imposed for license. These sins of omission and commission do not necessarily lead to the inference that the Board was actuated by malice in instituting criminal proceedings against the plaintiff. Mistakes as to the limits of jurisdiction are not rare even in the legal atmosphere where Judges have trained lawyers to assist them. Municipal Boards are dominated by laymen generally. The chances of honest mistakes are greater. The Board in this case did not take legal advise. But failure to take advice may at the most imply carelessness on the part of the Board, particularly when it was following another Board in the action that it took. The action of the Board may even be regarded as hasty or rash. It may be suggestive of excessive enthusiasm in the furtherance of municipal purposes but it does not give any indication of indirect motive. If malice could be inferred from the illegal nature of the action alone, the task of Municipal Boards would be rendered extremely difficult. In a particular case it may be possible to infer improper motive from the obvious or the apparent illegality of the action taken. But it is not in every case that because there is absence of reasonable or probable cause for a prosecution that a Judge would be justified in inferring malice. Where there is something more to indicate the existence of indirect or improper motive besides the mere absence of reasonable or probable cause, a finding that the prosecution was malicious would be justified.

[20] Mr. Sen has urged that legal malice or the existence of indirect motive was inferred in *Chhagan Lal* v. *Thana Municipality*, A. I. R. (19) 1932 Bom. 259 : (56 Bom. 135), even though there was no direct evidence on the point. That case is easily distinguishable from the present case on facts. It was found in that case from the evidence of municipal servants that facts on which the prosecution was based did not exist to their knowledge and that the conduct of the plaintiff (in that case) would not bring him within any penal clause of the Act. The Board had consulted its legal adviser but did not follow his advice. Besides, malice in point of fact was alleged and Baker J. in delivering his judgment summed up his conclusion in that case in the following words :

"The cumulative effect of all these circumstances beginining with the fact that the Municipality, who must be presumed to have special knowledge of the circumstances, based their action on a wrong interpretation of law and on facts which did not exist, that some of the plaintiff's applications were admittedly kept back, and some of the alterations which he is charged as having done without permission were done after the conclusion of the criminal proceedings, can only lead to the inference that there was some indirect motive other than the desire to vindicate the law in the prosecution of the plaintiff."

[21] Nanavati J. the other learned Judge composing the Division Bench, went even further. It did not seem to him improbable that the General Board itself was influenced by the desire to get cheaply the plaintiff's land for widening the street. It is obvious that the learned Judges did not infer malice from a mere wrong interpretation of law. There were circumstances in the case which strongly suggested the existence of an improper motive. We do not find anything in common between the facts proved in the two cases and do not feel justified in holding on the facts of this case that an indirect or improper motive other than furtherance of justice or the vindication of the law prompted the prosecution of the plaintiff. The claim for damages, therefore, must fail.

[22] The suit was against the Chairman of the Board as also against the Board itself. The appellate decree was against both the defendants. The Board alone has appealed. The Chairman is a respondent. The learned counsel for plaintiff-respondent has pointed out that the decree has become final against the Chairman and cannot now be disturbed he not having appealed. We do not think this decree should stand even against the Chairman. The trial Court held that the Chairman had been sued not in his personal capacity but in his capacity as a Chairman. This finding was not disturbed in appeal. The

decision of the appellate Court proceeds on a basis common to both the defendants. Malice was not attributed to the Chairman in his personal capacity. There is no basis for making any distinction between one defendant and the other. We, therefore, decide to reverse the decree against both the defendants acting under O. 41, R. 33, Civil P. C.

[23] The result is that the appeal is allowed ; the order of the lower appellate Court is reversed and plaintiff's suit dismissed against both the defendants. In view of the findings arrived at by us, we leave the parties to bear their own costs in all the Courts.

[24] **Thadani C. J.** — I agree in the result, but would add a few words.

[25] In my opinion, S. 320, Assam Municipal Act has no application to a suit for damages for malicious prosecution, for the plain reason that malicious prosecution is not something done under the Act; indeed, if anything, it is something done outside the Act. A suit for damages for malicious prosecution is governed by Art. 23, Limitation Act.

[26] I am content to allow the appeal on the simple ground that the plaintiff has failed to prove malice, without going into the question whether the Board exceeded its powers in prohibiting the storage of lime without defining the limits within which this trade could be carried on.

K.S. *Appeal allowed.*

A. I. R. (37) 1950 Assam 107 *[C. N. 42.]*

THADANI C. J. AND RAM LABHAYA J.

Dharameshwar Sarma — *Appellant* v. *Lakhyadhar Borgohain* — *Respondent.*

Second Appeal No. 1554 of 1947, D/- 16-1-1950.

(a) Transfer of Property Act (1882), S. 54 — Sale of right of redemption.

Ram Labhaya J.—The mortgagor's right to redeem, where property is in the possession of the mortgagee, is intangible property and its sale, even where the value of the property is less than Rs. 100, can be effected only by a registered instrument and not by delivery of possession. [Para 18]

Thadani C. J. contra — Sale of property by the mortgagor which he had given in an usufructuary mortgage is a sale of tangible property and can be effected in favour of the mortgagee in the case of property of the value of less than Rs. 100 by delivery of possession, if the change in the character of possession can be fairly regarded as delivery of possession. [Paras 35, 36]

Annotation : ('45-Com.) T. P. Act, S. 54 N. 19.

(b) Transfer of Property Act (1882), S. 98 — Combination of simple and usufructuary mortgage — Assam Money-lenders (Amendment) Act (VI [6] of 1943), S. 5 (2).

Ram Labhaya J. — Where the possession is given to the mortgagee but there is a provision that if the mortgagor fails to pay the mortgage money within the stipulated period the mortgagee would be entitled to enjoy the mortgage land as security for the money, the mortgage is a combination of a usufructuary and a simple mortgage and can only be described as anomalous. Hence S. 5 (2) of the Assam Money lenders (Amendment) Act, 1943 does not apply. [Para 21]

Annotation : ('45-Com) T. P. Act, S. 98 N. 5.

(c) Transfer of Property Act (1882), S. 53A — Contract must be in writing.

Ram Labhaya J. — The mere admission by the vendor before the Revenue authorities in mutation proceedings that the land had been sold to the vendee, even though in writing, cannot be regarded as a written contract between the parties. [Para 19]

Annotation : ('45-Com.) T. P. Act, S. 53A N. 9.

(d) Assam Land and Revenue Regulation (I [1] of 1886), Ss. 39, 154 — Jurisdiction of civil Court to question validity of settlement.

Ram Labhaya J. — If a settlement was granted to the defendant and he had no legal right in the property it would be competent to the Civil Court not only to declare the title of the plaintiff but also to put him in possession by ejectment of the defendant. [Para 20]

B. C. Barua — for Appellant.

P. Chaudhuri and J. C. Medhi — for Respondent.

Ram Labhaya J. — This appeal arises out of a redemption suit which was decreed by the trial Court. Plaintiff was granted a decree for possession without payment of any money as the defendant (mortgagee) having remained in possession for over 12 years from the date of the mortgage was held not entitled to any mortgage money by reason of provisions contained in the Assam Moneylenders' (Amendment) Act 1943.

[2] On appeal, the learned Additional Subordinate Judge giving effect to the defendant's plea held that mortgaged land had been sold to the defendant-mortgagee on 23rd December 1934 in consideration of the mortgage loan and one bigha of the land which the mortgagee had transferred to the mortgagor and that the mortgage had been extinguished by conduct of the parties. As a result of this finding he dismissed the plaintiff's suit. He has come to this Court on second appeal.

[3] The land in suit was mortgaged to defendant-respondent by registered mortgage deed. The mortgage was for Rs. 500 and for a period of three years. Possession was handed over to the mortgagee who was to pay the land revenue. The mortgagor agreed to pay the money within the stipulated period of three years and agreed further that on his default the mortgagee would be entitled to enjoy the land as security for the money. But he reserved to himself the right to get the land released on payment of the money.

[4] The defence set up was that on plaintiff's failure to repay the loan of Rs. 500 within the stipulated period fixed in the mortgage deed, plaintiff sold the mortgaged land to the mortgagee in consideration of the mortgage debt and a bigha of defendant's land which was transferred to the plaintiff. Reliance was placed on certain copies of Chitha, Exs. (b) and

(c) and endorsements on these documents. These endorsements show that on the basis of plaintiff's admission to the effect that the mortgaged land had been sold to the defendant, land was mutated in the name of the mortgagee in possession. Since then defendant-respondent has remained in possession.

[5] The correctness of the order of the learned Subordinate Judge has been assailed on the ground that there was no valid sale either of the land or of the equity of redemption and plaintiff was thus entitled to the redemption of the property and his right of redemption was not lost or extinguished. If land was sold for a consideration of Rs. 500 plus one bigha of land, the sale could only be by a registered document. An oral sale followed by a mutation would not confer any valid title on the vendee. If the transaction is treated as a sale of the 'right to redeem or the equity of redemption' then too the sale was of intangible property and could be made only by a registered instrument. In either case, therefore, there was no sale by which the right of redemption could be extinguished or destroyed.

[6] In support of the contention that a sale of the equity of redemption is a sale of intangible property, the learned counsel relied on *Hushmat* v. *Jamir*, 23 C. W. N. 513 : (A. I. R. (6) 1919 Cal. 325), *Ramasami* v. *Chinnal Asari*, 24 Mad. 449, *Mathura Prasad* v. *Chandra Narayan* 48 I. A. 127 : (A. I. R. (8) 1921 P. C. 8) and on the dissenting judgment of Sulaiman J. in *Sohanlal* v. *Mohanlal*, 50 ALL. 986 : (A. I. R. (15) 1928 ALL. 726 F. B.). The learned counsel for the respondent contended, relying on *Pir Bakhsh* v. *Mangal*, 16 P. R. 1892 F. B. and *Pitambar Khemji* v. *Rajaram*, 60 Bom. 220 : (A. I. R. (23) 1936 Bom. 175) that what was sold was the right to redeem the property in consideration of one bigha of the land. The sale was of tangible property and as the plaintiff-appellant had not shown that it was for more than Rs. 100, the sale was valid. He further pointed out that such delivery of possession as was possible in the circumstances of case had been effected and no registered deed was necessary to complete the sale.

[7] The case of the defendant in the trial Court was that the land was sold to him in consideration of the original debt and a bigha of land. In *Pir Bakhsh* v. *Mangal*, 16 P. R. 1892 F. B., where occupancy rights in land which had been mortgaged for Rs. 400 were sold absolutely on payment of a further sum of Rs. 99 by the mortgagee, a Full Bench of the Punjab Chief Court held on a true construction of the document the sale was of the equity of redemption for a sum of Rs. 99. The Bombay case *Pitambar Khemji* v. *Rajaram*, 60 Bom. 220, also lends support to this view. The contrary view was, however, expressed in a Calcutta case *Barsik Nandi* v. *Gurudas Pal*, 46 C. L. J. 573 : (A. I. R. (15) 1928 Cal. 107) where it was held that a sale by a mortgagor of all his right and interest in the immoveable property subject to the mortgage, in consideration of the mortgagee foregoing his right to recover the mortgage debt and the interest thereon, must be registered where the mortgage debt exceeded one hundred rupees even though the value of the mortgaged property was less than one hundred. I am inclined to the view which prevailed with the Full Bench of the Punjab Chief Court. The mortgagor can sell only his right to redeem when the property is under a mortgage. In essence the sale is of his existing interest in the property. He cannot sell what he himself does not own or possess. His right is compendiously described as the right to redeem, or the equity of redemption. The sale in this case, therefore, would really be that of the equity of redemption.

[8] This leads us to the question whether sale of the equity of redemption is sale of tangible or intangible immoveable property. The learned counsel for the respondent emphasises that the right to redeem, which is also described as the equity of redemption is tangible property and its sale is covered by S. 54, cl. (3), T. P. Act, which provides that in the case of tangible immoveable property of the value of less than one hundred rupees, the transfer may be made either by a registered instrument or by delivery of property. He urges that the requirement of the section as regards delivery was satisfied by the mutation proceedings to which the plaintiff was a party. The word 'tangible' has not been defined in the Act. The section appears to divide immoveable property into three categories, viz., (1) tangible immoveable property of the value of Rs. 100 and upwards, (2) reversion or other intangible things and (3) tangible immoveable property of a value of less than Rs. 100.

[9] Reversion and other intangible things are also treated as immoveable property. In the case of tangible immoveable property of the value of Rs. 100 and upwards and also in the case of a reversion or other intangible things, the sale only can be made by a registered instrument. So far as the third category is concerned, viz., tangible immoveable property of a value of less than Rs. 100 the transfer may be made either by a registered instrument or by delivery of property. The manner in which delivery of tangible immoveable property is to take place is also specified in the section. It is effected when the seller places the buyer, or such person as he directs in possession of the property.

[10] The word 'tangible' occurring in the section, according to its dictionary meaning connotes something perceptible to touch. It follows, therefore, that it should be capable of being touched. It should admit of possession or that it should be capable of being possessed. It should be such that it could be delivered by one person to another. It is for this reason that in this class of cases delivery of property or change of possession is taken as a substitute for registration. In the case of a mortgage where the mortgagee is in possession, the mortgagor has no right to immediate possession or enjoyment of the profits of the property. He can recover possession only on payment of the mortgage money. His right is not capable of being touched or possessed. Its possession cannot pass. A transfer of the right of redemption is the transfer of a right in property as distinguished from the property itself. The property is in the possession of the mortgagee. The mortgagee can sell his right and can part with possession. He can deliver it to his transferee. When selling mortgagee rights, he is selling something tangible. Similarly, a mortgagor who has borrowed money on the security of the property but is having the property in his possession, may sell the property and may deliver it. He is then selling the property and delivering its possession. It is tangible property then. But a mere sale of the right to redeem cannot be regarded as a sale of tangible immoveable property if the word 'tangible' is taken in its literal or dictionary sense and no other meaning can be given to it in the absence of any definition of the word by the Legislature. This was the meaning assigned to the word 'tangible' by Sulaiman J. in *Sohanlal* v. *Mohanlal*, 50 ALL. 986 : (A. I. R. (15) 1928 ALL. 726 F.B.). The view also finds support from *Hushmat* v. *Jamir*, 23 C. W. N. 513 : (A. I. R. (6) 1919 Cal. 325) and *Ramasami* v. *Chinnal Asari*, 24 Mad. 449.

[11] In *Hushmat* v. *Jamir*, 23 C. W. N. 513 : (A. I. R. (6) 1919 Cal. 325), land was mortgaged to the defendant on the stipulation that he was to remain in possession for a fixed period in satisfaction of the debt and interest. Subsequently the mortgagor sold one out of two plots mortgaged to the defendant and thus paid off the mortgage and took back the other plot. The sale was by an unregistered document. The mortgagor sued for the recovery of possession. It was held that the property being in possession of the mortgagee, the sale was of the equity of redemption and being a sale of an intangible thing, could under S 54, T. P. Act, be effected only by a registered document. Walmsley J. was further of the view that the sale was nevertheless ineffective for want of delivery of possession. Bhashyam Ayyangar J., also gave expression to the same view vide : *Ramawami* v. *Clainnal Asari*, 24 Mad. 449 on p. 463

[12] The learned counsel for the appellant has also referred us to the observations of Viscount Finly in *Mathura Prasad* v. *Chandra Narayan*, 48 I. A. 127 : (A. I. R. (8) 1921 P.C. 8). The observations relied on appear on page 132 of the report and are as follows :

"Their Lordships cannot accept the suggestion made on behalf of the appellants that for the purposes of S. 54, some sort of constructive possession resulting from the delivery of the alleged instrument of transfer might be sufficient. For this purpose there must be a real delivery of the property."

[13] The learned counsel has argued that their Lordships distinguished constructive possession from actual delivery which S. 54 insists on. He derived support from these observations for showing that a thing which was not capable of delivery, could not be regarded as tangible.

[14] The above view did not find favour with the majority of learned Judges composing the Full Bench of the Allahabad High Court in *Sohan Lal* v. *Mohan Lal*, 50 ALL. 986 : (A.I.R. (15) 1928 ALL. 726 F.B.) The majority view was followed in *Phequ Mian* v. *Syed Ali*, 15 Pat. 772 : (A. I. R. (24) 1937 Pat. 178) and in *Tukaram* v. *Atmaran*, A.I.R. (26) 1939 Bom. 31 : (I.L.R. (1939) Bom. 71).

[15] In the Allahabad case, the mortgage was usufructuary. It was for a sum of Rs 1000. A deed of sale was executed in respect of the mortgaged property by the mortgagor in favour of the mortgagee for a sum of Rs. 90. The deed was not registered. After the death of the mortgagor, his heir professed to sell the properties to the plaintiffs in that case. They brought a suit for redemption. The learned Judges were of the view that it was not necessary to determine the nature of the property which was transferred subsequently by the mortgagor's heir. But as the question whether a mortgagor's estate is tangible immoveable property or an intangible property had been debated at the Bar, they thought it proper to say something on the point. The remarks, therefore, are obiter. The majority view was that the owner of immoveable property who has parted with some of his rights in the shape of mortgage and lease remains still the owner of the property. There can be no objection to this view. The mortgagor no doubt retains ownership of the property even after he has mortgaged it with possession to someone else. The learned Judges then proceeded to hold that if the mortgagor makes a transfer of his interest, he makes a transfer of the property itself and not merely of an abstract right or of certain rights out of his total bundle of rights originally owned by him. With great respect to the learned

Judges, I find it difficult to agree with this view. The mortgagor can only transfer his right and interest which he has at the time of sale. He cannot sell anything more. When considering whether a sale is of tangible immoveable property or intangible immoveable property, the right and interest of the seller on the date of the sale is to be considered. That would be the determining factor. The mortgagor sells his interest and his interest is merely the right to redeem. It may not be confused with the equity of redemption though it is often described as the equity of redemption. The right of redemption is a legal right in India. This right is heritable as well as alienable. If sold, the transferee gets the right to redeem the property on payment of the mortgage money. The right of redemption may be owned by the transferee but it cannot be possessed as land or a house or other admittedly tangible property can be. I can discover no warrant for the proposition that a mortgagor who may be described as the owner of the property without the right of immediate possession when selling his right is selling the property. An owner may agree to a curtailment of his right by agreement and where such a curtailment of right has occurred by a transaction of mortgage or lease, the owner merely sells the residue of ownership which is still his. In this view of the matter there can be no difficulty in coming to the conclusion that the sale of a mortgagor's estate or his right to redeem is no more than the sale of something intangible.

[16] The learned Judges pointed out a difficulty which would arise if this view was accepted. They pointed out that in the case of a simple mortgage, the mortgagor would sell tangible property and in the case of a usufructury mortgage, the mortgagor would sell something intangible. This distinction they thought could not be made on principle. The mortgagor in the two cases could not be in a different position. Far from being a difficulty in the case, it seems to me that the interests of the mortgagor in the two cases are distinct and they cannot be placed in the same group or class. In a simple mortgage, the mortgagor has got possession of the property. He may sell the property and he may deliver its possession. A tangible thing passes by such transaction but the same cannot be said in the case of the right of a mortgagor who has given his property to another by way of mortgage with possession.

[17] The Patna and the Bombay cases do not give new or different reasons for the view that a mortgagor's estate even when the property is in the possession of a mortgagee is tangible immoveable property within the meaning of section 54.

[18] After a careful consideration of the arguments on both sides I feel no hesitation in adopting the view that the mortgagor's estate or his right to redeem where property is in the possession of a mortgagee is something intangible and its sale is possible only by a registered instrument. In this view of the matter, it is not necessary to consider whether the delivery of possession has taken place in this case as required by law. The property being intangible could not be validly transferred by mere delivery of possession even assuming that it did take place in the manner required by law.

[19] A second contention raised by the learned counsel for the respondent was that the vendee in this case was protected by the provisions contained in S. 53A, T. P. Act. We find no force in this contention. Section 53A applies only in cases where a person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf. In this case the transaction is admittedly oral. There is no written agreement and the mere admission of the mortgagor before the revenue authorities even though in writing cannot be regarded as a written contract between the parties. The statement also does not give all the terms of the transfer. Even the consideration is not mentioned. The case, therefore, does not fall within the ambit of Section 53A.

[20] The third contention was raised somewhat faintly. It was to the effect that following the mutation in defendant's favour a patta was issued in his favour by the revenue authorities under the Assam Land and Revenue Regulation and this patta amounted to a settlement which could not be challenged in a civil Court. Reliance was placed on S. 154 (1) (a) of the Assam Land and Revenue Regulation, which debars civil Courts from exercising jurisdiction if questions as to the validity or effect of any settlement or as to whether the conditions of any settlement are still in force are raised. This section comes into operation only if there is no express provision in the regulation to the contrary. Section 39 of the Regulation is such a provision and affords a complete answer to the contention. This section provides that no person shall, merely on the ground that a settlement has been made with him, be deemed to have acquired any right to or over any estate, as against any other person claiming rights to or over that estate. If, therefore, a settlement was granted to the defendants and they had no legal right in the property, it would be competent to the civil Court not only to declare the title of the plaintiff but also to put him in possession by ejectment of the defendant. This was the view taken in *Askar Mian* v. *Sahed Ali*, 23 C. W. N. 540 : (A. I. R. (5) 1918

Cal. 21) and I entirely agree with it. It was in view of the language of S. 39 of the Regulation and the decision in *Askar Mian* v. *Sahed Ali*, 23 C. W. N. 540 : (A. I. R. (5) 1918 Cal. 21), that the learned counsel did not press the point seriously.

[21] The last contention was that the mortgage in this case is not usufructuary and therefore it is not hit by the provisions contained in the Assam Moneylenders' (Amendment) Act, 1943. The contention is sound. The mortgage in this case is anomalous. It was for a period of three years. The possession was given to the mortgagee but there is a provision to the effect that if the mortgagor failed to pay the mortgage money within the stipulated period of three years, the mortgagee would be entitled to enjoy the mortgage land as security for the money. A covenant to pay the mortgage money exists in the mortgage deed. It is there in express terms or at least by necessary implication. The mortgage, therefore, is a combination of a usufructuary and a simple mortgage and as such can only be described as anomalous. The plaintiff, therefore, cannot redeem the property without payment of the mortgage money. The case does not fall under S. 5 (2), Assam Moneylenders' (Amendment) Act of 1943 which covers usufructuary mortgages only. The result is that though plaintiff is entitled to redeem, he cannot do so without paying the mortgage money.

[22] In my opinion, therefore, the plaintiff can be given a decree for redemption on payment of the mortgage money. In the circumstances of the case I would leave the parties to bear their own costs.

[23] **Thadani C. J.**—This is a second appeal from the judgment and decree of the learned Additional Subordinate Judge, A V D, dated 21st January 1947, by which he set aside the judgment and decree of the trial Court which had decreed the plaintiff's suit for redemption, with no order as to costs.

[24] The plaintiff-appellant brought a suit for redemption of the property in suit, mortgaged with possession to the defendant-respondent by a registered deed, dated 16th February 1928. The appellant sought to redeem the mortgage without payment in virtue of the provisions of the Assam Moneylenders' (Amendment) Act of 1943, and further made a claim for Rs. 100 as mesne profits.

[25] The defence to the suit was that the mortgaged property was sold to the defendant in 1934 in terms of the mortgage-deed which provided that the property will stand transferred to the mortgagee as owner on the failure of the mortgagor to discharge the mortgage debt within the stipulated period.

[26] On the pleadings, the trial Court framed the following issues :

1. Did the plaintiff validly sell the mortgaged land on 27th January 1936 and if so, has the plaintiff lost the right of redemption ?
2. Is the plaintiff entitled to the mesne profits claimed ?
3. Is the suit bad for misjoinder of causes of action ?
4. To what other relief is the plaintiff entitled ?

[27] As a result of its findings, the trial Court decreed the appellant's prayer for redemption of the mortgaged property, but did not award to the plaintiff mesne profits.

[28] The lower appellate Court, however, came to the conclusion that having regard to the documentary evidence adduced by the mortgagee, such as Exs. B C B (2) and C (1), the mortgagee had succeeded in proving that delivery of the property was made to him in pursuance of a contract to sell the property in suit. The lower appellate Court stated that Ex. B (1) shows that the mortgagor sold 6B. OK. 2L, the subject matter of the mortgage, to the mortgagee, and the recital contained therein empowered the mortgagee to get a patta in his own name for this land; Ex. B (2) shows that the mortgagor sold this land to the mortgagee, and the Mandal who wrote the endorsement, Ex. B (2), has supported the mortgagee's case that Ex. B (2) was written at the instance of the mortgagor. It also relied upon the fact that the revenue authorities partitioned the lands covered by the patta in 1936; the mortgaged lands were taken out from the mortgagor's patta and entered in the patta of the mortgagee; that the Sub.Deputy Collector entered the names in the mutation register in accordance with the partition in consultation with the mortgagor and the mortgagee. The lower appellate Court also relied upon the fact that the sale included not only the mortgaged land but one bigha, which was not the subject-matter of the mortgage, and this was later in 1936 partitioned with the consent of the mortgagor and delivery of the partitioned property consisting of the mortgaged land and the one bigha which was not the subject-matter of the mortgage, was made to the mortgagee in pursuance of the partition.

[29] Two questions arise for decision in this appeal: (1) Whether the right to redeem is tangible or intangible property? (2) Whether the delivery of the property agreed to be sold was on the facts of this case made within the meaning of S. 54, T. P. Act? These were the only questions pressed before us, the value of the property agreed to be sold as being of the value of less than hundred rupees not being disputed either in the Courts below or before us.

[30] The Allahabad High Court in *Sohon Lal* v. *Mohan Lal*, 50 ALL. 986: (A. I. R. (15)

1928 ALL. 726 F. B.) had occasion to consider these questions. All the three learned Judges were agreed that there could be no delivery of possession within the meaning of S. 54, T. P. Act, in respect of property agreed to be sold by the mortgagor to the mortgagee while the property was held by the mortgagee under a usufructuary mortgage. But on the question whether the right to redeem was tangible or intangible property, Mukerji and Kendall JJ., took the view that

"the sale by a mortgagor of his interest in property of which he has made a usufructuary mortgage, is a sale of 'tangible immovable property.'"

Sulaiman A. C. J., made a distinction between a simple mortgage and a usufructuary mortgage, and took the view that in the case of usufructuary mortgage, the mortgagor had no right to immediate enjoyment of the property and observed:

"A mortaged property itself is undoubtedly 'tangible', but the interest of the mortgagor in the property, when the mortgage is usufructuary, is not identical with the property itself, as some interest has already passed to the mortgagee, including the right to remain in possession and appropriate the profits. The interest which the mortgagor possesses is not itself capable of being touched nor is it such that an actual delivery of its possession can be effected by the mortgagor to the mortgagee. It seems difficult to conceive of a thing as being tangible when it is not capable of actual delivery of possession. Although, therefore, the mortgagor is the legal owner of the usufructuarily mortgaged property, whatever rights he possesses, so long as the mortgage subsists, cannot be treated as 'tangible' . . . . No case has been cited before us where it has ever been suggested that the interest of a mortgagor in the case of a usufructuary mortgage is 'tangible' immovable property. On the other band, there are numerous authorities to the effect that such an interest is 'intangible.'' *Rahmat Ali* v. *Mahomed Mazar Hasan*, 11 A. L. J. 407 at pp. 409-10: (19 I. C. 818); *Ramasami Pillai* v. *Chinnan Asari*, 24 Mad. 449 (463); *Mahendra Bahadur Singh* v. *Chandra Pal Singh*, 24 O. C 155 : (A. I. R. (8) 1921 Oudh 124) *Hushmat* v. *Jamir*, 52 I. C. 558 : (A. I. R. (6) 1919 Cal. 325).

[31] It is plain that Sulaiman A. C. J., was influenced by the fact that no authority had been brought to his notice in which it held that a right to redeem a usufructuary mortgage is 'tangible' property. A few years later in 1936, the Patna High Court had occasion to consider this question in *Pheku Mian* v. *Syed Ali*, 15 Pat. 772: (A. I. R. (24) 1937 Pat. 178). Khaja Mohamad Noor J., delivering the judgment of the Division Bench, observed :

"Taking up the first point, namely, whether the right left in a mortgagor after he gives his property in usufructuary mortgage, is an intangible or a tangible property, the learned Advocate has referred us to a decision of the Calcutta High Court in the case of *Hushmat* v. *Jamir*, 23 Cal. W. N. 513: (A. I. R. (6) 1919 Cal 325). Where it was held that the sale of equity of redemption which was an intangible thing could, under S. 54, T. P. Act, be effected only by a registered document." .... "On the other hand, there is a decision of a Full Bench of the Allahabad High Court in the case of *Sohan Lall*, v. *Mohan Lal*. 50 All 986: (A. I. R. (15) 1928 All 726) where Mukerji and Kendall, JJ. held that the sale by a mortgagor of his interest in the property which he has given in usufructuary mortgage, is the sale of a tangible immovable property. Now the term 'equity of redemption' is a remnant of the old doctrine of English law where the mortgagor after having mortgaged his property lost all legal rights therein and the only right which was left to him was the equitable right of redemption which he could enforce only in equity Courts. This distinction of legal and equitable rights was never recognised by the Indian Legislature where the right of both the mortgagor and the mortgagee in a mortgaged property is a legal right determined by the statute. Strictly speaking, in India the term 'equity of redemption' is misapplied to the right of the mortgagor. Under the Indian law, mortgage is a transfer of interest in an immovable property and not a transfer of the property itself. There is some interest left in the mortgagor and that interest is in the tangible property."

[32] Khaja Mohamad Noor J. then quoted with approval a passage in the judgment of Mukerji J. in the case reported in *Sohan Lal* v. *Mohan Lal*, 50 ALL. 986: (A. I. R. (15) 1928 ALL. 726 (F B.). The passage reads:

"In the case of a mortgage in England, as pointed out by that erudite jurist, Holland, the mortgagee, from the date of the mortgage, becomes the 'legal' owner of the property and nothing is left in the mortgagor except what has been called 'a bare equity of redemption'. The Indian Legislature has intentionally refused to import the expression 'equity of redemption', and for ample good reasons. It had, however, to use the expression 'right to redeem' (*see* S. 60, T. P. Act). But the expression has been used in an entirely different sense. A 'right to redeem' is not the same thing as 'an equity of redemption' in England. In India, a host of people, besides the mortgagor himself, are allowed to exercise the right of redemption (*see* S. 91, T. P. Act). One of these persons is a judgment-creditor of the mortgagor. Certainly, the interest of a judgment-creditor of the mortgagor and the interest of the mortgagor himself in the property mortgaged are not indentical. It would, therefore be very wrong to substitute the expression 'right to redeem' for the English expression of 'equity of redemption', and then to say that the 'right to redeem' possessed by a mortgagor is an intangible property."

[33] Khaja Mohamad Noor J., then referred to the case of *Dawood Saheb* v. *Moideen Batcha Sahib*, A. I. R. (12) 1925 Mad. 566: (87 I. C. 331) in which it is stated:

"The position has changed even in England since the passing of the Law of Property Act, 1925. The mortgagee no longer holds a legal estate in the mortgaged property. The mortgagor is the owner at law. On the whole, I am inclined to agree with the view taken by the majority of the Judges of the Full Bench of the Allahabad High Court which seems to be more in consonance with the conception of the rights of a mortgagor and a mortgagee according to the Indian law. Therefore, in my opinion, the right of a mortgagor in the property which he has given in usufructuary mortgage, is a legal right in a tangible immovable property."

[34] Yet in another case reported in *Tukaram v. Atmaram*, A.I.R. (26) 1939 Bom. 31 : (I. L. R. (1939) Bom. 71), Broomfield J., in delivering the judgment of the Division Bench, observed:

"Prior to this Full Bench Case *Sohan Lal* v. *Mohan Lal*, 50 All. 986 : (A. I. R. (15) 1928 All. 726 F. B.), the view taken by the Allahabad High Court and also by the Madras High Court in *Ramaswami* v. *Chinnal Asari*, 24 Mad. 449, was that the equity of redemption in a simple mortgage is tangible because the mortgagor is in possession, but in a usufructuary mortgage, it is intangible because he is not in physical possession. Conversely, as to the mortgagee's interest, it is intangible if the mortgage is a simple mortgage, but tangible if the mortgage is a usufructuary mortgage. But "sale" is defined in S. 54, T. P. Act, as a transfer of ownership and "mortgage" is defined by contrast in S. 58 as a transfer of an interest, and having regard to these definitions, the basis of the distinction sought to be made is not very obvious. There is no difficulty about the interest of a simple mortgagee. That is clearly intangible property ; but the real reason is, I should say, not that the mortgagee is not in possession of tangible property but that he is not the owner. The interest which he owns is a right to recover his money out of the property. But can it be said that the usufructuary mortgagee is in any better position in this respect ? It is true that he is in possession of tangible property, but he is not the owner of it and cannot transfer the ownership of it. What he owns and can transfer is an interest in the property entitling him to remain in possession and enjoy the profits until the debt is paid, and that is intangible. On the other hand, the mortgagor is the owner of the property itself, and can transfer the property itself subject to the mortgage, and whether the mortgage is with or without possession, if the mortgagor transfers his rights, that may well be regarded, in my opinion, as a sale of tangible property. The definition of sale says nothing about possession, and though the purchaser is normally entitled to get possession of the property sold at once, it is not always or necessarily so. No doubt it is correct to say, as Sulaiman Ag. C. J., says in *Sohan Lal* v. *Mohan Lal*, 50 All. 986: (A.I.R. (15) 1928 All. 726 F.B), that a tangible thing must be capable of being possessed, but to say that in the case of a sale, it must be capable of being immediately possessed by the transferee seems to me to be adding something to the definition of sale for which there is no warrant. As at present advised, therefore, I am of opinion that the decision of the majority of the Court in *Sohan Lal* v. *Mohan Lal*, 50 All. 986 : (A.I.R. (15) 1928 All. 726 F.B.), is correct."

[35] With all respect, I find myself in agreement with the view expressed by the Full Bench of the Allahabad High Court and relied upon by the Patna and the Bombay High Courts that the sale of the property by the mortgagor which he has given in an usufructuary mortgage, is a sale of tangible property, and not intangible property.

[36] The next question is whether in this case, the sale not being registered, there was delivery of the property agreed to be sold within the meaning of S. 54, T. P. Act. I have given considerable thought to the observations of the learned Judges of the Full Bench in the case reported in *Sohan Lal* v. *Mohan Lal*, 50 ALL. 986: (A.I.R. (15) 1928 ALL. 726 F.B.), in which all the three Judges took the view that in an usufructuary mortgage, there can be no delivery of possession inasmuch as the mortgagee was in possession all along. The learned Judges, however, conceded that there can be a change in the character of the possession in pursuance of an unregistered sale. It is true that they considered the question of the change in the character of the possession in relation to the question of adverse possession, but it seems to me that if on the facts of a case, the change in the character of the possession can be fairly regarded as delivery within the meaning of S. 54, T. P. Act, there is no reason why effect should not be given to it. It appears to be settled law that delivery of possession within the meaning of S. 54, T. P. Act, need not necessarily be made at the time of the sale ; it can be made afterwards. The Patna High Court in a case reported in *Pheku Mian* v. *Syed Ali*, 15 Pat. 772 : (A. I. R. (24) 1937 Pat. 178), had occasion to consider this aspect of the case. In the present case, the facts are much stronger than the facts of the Patna case. It is clear from the judgment of the lower appellate Court that the land agreed to be sold in this case did not consist only of the mortgaged land, but an additional piece of land measuring a bigha, which was not the subject-matter of the mortgage. The land in suit being agricultural property, the patta appertaining to the property was originally granted by the revenue authorities, to the mortgagor. In 1928, when the property was mortgaged the patta was still in the name of the mortgagor. But in 1934 when the mortgagor sold the mortgaged property and a bigha, which was not the subject-matter of the mortgage, proceedings for a perfect or imperfect partition were instituted before the revenue authorities, apparently at the instance of the mortgagee, and at this partition, the mortgagor was also present, and according to the Mandal of the locality (D. W. 2), the S. D. C., ordered partition and mutation of names after consulting both the mortgagor and the mortgagee. Upon this partition, the mortgaged property and the property which was not the subject-matter of the mortgage, were allotted to the mortgagee. This allotment upon partition at which the mortgagor was present, although made by the revenue authorities, must, in my opinion, be regarded as an act of delivery by the mortgagor to the mortgagee, within the meaning of S. 54, T. P. Act, and real delivery within the meaning of the decision of the Privy Council reported in *Mathura Prasad* v. *Chandra Narayan*, 48 I. A. 127 : (A. I. R. (8) 1921 P. C. 8).

[37] The learned Judges of the Allahabad High Court were not dealing with facts such as are present in this case. If in this case, a parti-

tion had not been made by the revenue authorities in the presence of the mortgagor and the mortgagee, or if the mortgagor had objected to the partition. I would have in all probability followed the decision of the Full Bench of the Allahabad High Court in its entirety. But having regard to the partition and allotment, to which apparently the mortgagor assented, the assent of the mortgagor to partition and allotment amounts, in my opinion, to delivery of property by the mortgagor to the mortgagee within the meaning of S. 54, T. P. Act.

[38] In this view, I would confirm the judgment and decree of the lower appellate Court and dismiss the appeal.

ORDER

[39] **Thadani C. J.**—In this case, a difference of opinion having arisen between my learned brother and myself—my learned brother taking the view that the judgment and decree appealed from should be modified, and I taking the view that it should be confirmed, the provisions of sub-s. (2) of S. 98, Civil P. C., are attracted. The result is that the judgment and decree of the lower appellate Court is confirmed.

D.H. *Decree confirmed.*

A.I.R. (37) 1950 Assam 114 *[C. N. 43.]*

THADANI C. J. AND RAM LABHAYA J.

Musafir Ali — Appellant v. *Md. Roysul Haq Chaudhury and others — Respondents.*

Second Appeal No. 1431 of 1946, D/- 22nd February 1950, from judgment and decree of Sub-Judge, Cachar, D/- 7th January 1946.

(a) Arbitration Act (1940), S. 30 (c)—"Otherwise invalid."

Clause (c) of S. 30 is wide enough to cover an award which is sought to be challenged on the ground that the subject-matter of the reference was not capable of being referred to arbitration. [Para 4]

Annotation: ('46-Man.) Arbitration Act, S. 30, N. 6.

(b) Arbitration Act (1940), S. 39—Second appeal.

No second appeal lies against an order setting aside or refusing to set aside an award. [Para 3]

Annotation: ('46-Man.) Arbitration Act, S. 39, N. 1.

(c) Civil P. C. (1908), S. 115—Appeal as revision.

The High Court will not treat the incompetent second appeal as an application in revision where the respondent has not appeared and the subject-matter of the proceedings is a small amount. [Para 5]

Annotation: ('44 Com.) Civil P. C., S. 115, N. 19.

N. M. Dam — for Appellant.

Thadani C. J.—This is a second appeal from the judgment and decree of the learned Subordinate Judge, Cachar, dated 7th January 1946, by which he set aside the judgment and decree of the trial Court which had dismissed the plaintiff's suit with costs.

[2] The facts material to the appeal are these. The plaintiff and defendant 4 referred certain matters in dispute between them to the arbitration of defendants 1-3. The arbitrators gave their award on 20th October 1943, which was duly filed in Court and numbered as a suit. The plaintiff objected to the award and sought to have it set aside. Defendant 4 supported the award and contended that it was not liable to be set aside. The trial Court, however, came to the conclusion that the award was liable to be set aside, and instead of setting aside the award, decreed the plaintiff's suit a matter only of terminological inexactitude. The lower appellate Court reversed the judgment and decree of the trial Court, thereby refusing to set aside the award.

[3] The question for our consideration is—whether a second appeal is competent. Section 39 (1), Arbitration Act of 1940 provides for an appeal against an order setting aside or refusing to set aside an award. There is no provision in the Arbitration Act which provides for a second appeal against an order setting aside or refusing to set aside an award. Mr. Dam for the appellant contended that the subject-matter of the award was one which could not be referred to arbitration, and that the proceedings, therefore, in the Courts below were not proceedings under the Arbitration Act but must be regarded as a suit, and a second appeal was competent under the provisions of the Code of Civil Procedure. We are unable to accept this contention. Section 32, Arbitration Act is in these terms :

"*32.* Notwithstanding any law for the time being in force, no suit shall lie on any grounds whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

Under S. 30, Arbitration Act, an award shall not be set aside except on one or more of the following grounds, namely : (a) that an arbitrator or umpire has misconducted himself or the proceedings; (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after the arbitration proceedings have become invalid under S. 35; (c) that an award has been improperly procured or is otherwise invalid.

[4] Clause (c) of S. 30 is wide enough to cover an award which is sought to be challenged on the ground that the subject-matter of the reference was not capable of being referred to arbitration. The trial Court in this case set aside the award on the ground of misconduct of the arbitrators. The lower appellate Court took the view that there was no misconduct, and that the subject-matter of the award was properly referred. Mr. Dam conceded that if the proceedings before the Courts below are to be regarded as proceedings under the Arbitration Act, a

second appeal was incompetent. We have already observed that the present proceedings were proceedings under the Arbitration Act, and that they cannot be regarded as a suit in view of the provisions of S. 32, Arbitration Act.

[5] Mr. Dam next contended that if a second appeal does not lie, it should be treated as an application in revision under the provisions of S. 115, Civil P. C. We do not propose to treat the appeal as an application in revision for two reasons—(1) The respondent has not appeared and it would entail an adjournment of the proceedings for a formal application to be made under the provisions of S. 115, Civil P. C., regarding which a notice must be served on the respondent; (2) the subject matter of the proceedings is a small sum of Rs. 50.

[6] The result is that the appeal is dismissed with no order as to costs, as the respondent has not appeared.

Ram Labhaya J. — I agree.

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 115 *[C. N. 44.]*

THADANI C. J. AND RAM LABHAYA J.

Suryanarayan Agarwalla — *Appellant* v. *Maheswar Keot*—*Respondent.*

Second Misc. Appeal No. 2 of 1949, D/- 22-12-1949 from order of D. J. L. A. D., D/ 2-3-1949.

Civil P. C. (1908), S. 37—Jurisdiction to execute decree — Alteration in pecuniary jurisdiction — Court, if ceases to exist for execution.

A decree for over Rs. 1000/- was passed by a Court which was presided over by an officer who had pecuniary jurisdiction to try suits valued up to Rs. 2000/. An application for execution of the decree was made to the same Court, but at a time when it was presided over by an officer who had jurisdiction to try suits valued up to Rs. 1000/- only:

Held that the Court had jurisdiction to entertain the application for execution. [Paras 7 & 8]

Annotation; ('44-Com.) Civil P. C., S. 37 N. 4.

D. N. Medhi—for Appellant.

S. K. Ghose—for Respondent.

Thadani C. J.—This is a second miscellaneous appeal from an order of the learned District Judge, L. A. D., dated 2nd March 1949, by which he set aside an order of the learned Subordinate Judge, Lower Assam Districts, dated 13th December 1947, in M. Ex. Case No. 9 of 1947, entertaining an execution application in regard to a decree which had been passed by the Sadar Munsiff of Gauhati, having jurisdiction to try suits up to Rs. 2000, but who was succeeded by a Munsiff who had jurisdiction to try suits up to Rs. 1000 only.

[2] In due course the decree-holder sought to execute the decree by filing an application before the successor Munsiff who took the view that as the decree sought to be executed was for a sum exceeding his pecuniary jurisdiction in the matter of the trial of suits, he was not competent to execute the decree, and returned the application for presentation to the proper Court. The decree-holder did not appeal against the order of the Munsiff of Gauhati and elected to file the execution application before the Subordinate Judge of Gauhati. The judgment-debtor objected to the execution of the decree by the Subordinate Judge contending that as he had not passed the decree, he was not competent to execute it. The learned Subordinate Judge disallowed the objection.

[3] Against the order of the learned Subordinate Judge, the judgment-debtor filed an appeal before the District Judge who set aside the order of the learned Subordinate Judge, relying upon a decision of the Calcutta High Court reported in *Abdus Sattar* v. *Mohinimohan Das*, 37 C. W. N. 679: (A. I. R. (20) 1933 Cal. 694).

[4] Mr. Medhi for the decree-holder has referred us to a decision of the Calcutta High Court reported in *Lutchman* v. *Maddan Mohan*, 6 Cal. 513: (7 C. L. R. 521) but we do not think it assists the contention of Mr. Medhi that the Subordinate Judge, Gauhati, notwithstanding the fact that the Munsiff's Court still exists, and has not ceased to exercise jurisdiction, has jurisdiction to entertain the application. From the judgment of Field, J., it is clear that in that case the Court that had passed the decree had ceased to exist, Field J., observed:

"The words in S. 649 (corresponding to S. 37, Civil P. C., 1908) which have reference to the Court which passed the decree ceasing to exist, refer to a class of cases not uncommon in these provinces, in which a Small Cause Court having been in existence for a certain number of years, has afterwards been abolished by an order of the Local Government. The application for execution of a decree passed by such an abolished Court must now be made to the Munsiff who would have jurisdiction to entertain the suit in which such decree was made, if such suit were instituted at the time when application for such execution is made. Another example is, where the Sudder Ameen who had jurisdiction throughout the whole of the district with a pecuniary limit exceeding that of a Munsiff was abolished as such, the officer who was Sudder Ameen becoming the Munsiff at head-quarters with a local jurisdiction limited to a single Munsiff usually that at head-quarters. A decree passed by such a Sudder Ameen who had a local jurisdiction over the whole district could, therefore, be executed in the Court of the Munsiff before whom a suit would now be instituted in respect of the claim for which the decree was passed by the Sudder Ameen . . . . . The words 'cease to have jurisdiction to execute it' in S. 649 (S. 37, Civil P. C.) were intended to meet such a case as the following: for example, where an Additional or Subordinate Judge, attached to more than one district, having passed a decree in one district, leaves this district and sits in another district under the provisions of S. 15, Bengal Civil Courts Act, such Additional or Subordinate Judge is a Court. When such a Court is sitting in a district other than that in which the decree was passed, it has not ceased to exist, but it has ceased to

have jurisdiction to execute that particular decree. Under the provisions of S. 649, application for execution can then be made to the Court which at the time of making the application would have jurisdiction to entertain the suit in which the decree was passed."

[5] Mr. Medhi for the decree-holder has conceded that the Munsiff's Court at Gauhati has not been abolished, nor has it ceased to exercise jurisdiction within its territorial limits. We do not think there is any conflict between this decision of the Calcutta High Court and that reported in *Abdus Sattar* v. *Mohini Mohan Das*, 37 C. W. N. 679: (A. I. R. (20) 1933 Cal. 684). The facts reported in *Abdus Sattar* v. *Mohini Mohan Das*, 37 C. W. N. 679: (A. I. R. (20) 1933 Cal. 684) are on all fours with the facts of the present case. In 37 C. W. N., as here a decree for over Rs. 1000 was passed by a Court which was presided over by an officer who had pecuniary jurisdiction to try suits valued up to Rs. 2000. An application for execution of the decree was made to the same Court, but at a time when it was presided over by an officer who had jurisdiction to try suits valued up to Rs. 1000 only. Mitter J. referred to a decision of the Patna High Court reported in *Iswari Prasad* v. *Farhat Hussain*, A. I. R. (3) 1916 Pat. 3 : (2 Pat. L. J. 113), and to another decision of the Calcutta High Court reported in *Kartick Nath* v. *Tilokdhari Lall*, 15 Cal. 667, which do not accept the view that if the successor Court has reduced pecuniary jurisdiction in the matter of the trial of suits, the decree passed by its predecessor for an amount exceeding the successor Court's pecuniary jurisdiction is not capable of execution by the successor Court.

[6] Mr. Medhi next referred us to a decision of the Chief Court, Sind, reported in *Narain Das* v. *Saindad*, A. I. R. (31) 1944 Sind 173 : (I. L. R. (1944) Kar. 33). The Sind decision in no way goes counter to the decision of the Calcutta High Court reported in *Abdus Sattar* v. *Mohini Mohan Das*, 37 C. W. N. 679 : (A. I. R. (20) 1933 Cal. 684). The Full Bench decision of the Madras High Court reported in *Seeni Nadan* v. *Muthuswami*, 42 Mad. 821 : (A. I. R. (7) 1920 Mad. 427 (F. B.)), also does not assist Mr. Medhi. The question for decision of the Full Bench in that case, as stated by Wallis C. J. was

"whether a litigant who has been authorised to bring his suit in a particular Court and has obtained a decree in such Court in his favour, which he is strictly bound to execute within the time limited in Art. 182, is not entitled to apply as of course to that Court as the proper Court for the purpose of saving limitation under the Article, or whether, when he decides to apply for execution possibly at the last moment, he is bound to stop and inquire whether the limits of the territorial jurisdiction of the Court which passed the decree have been altered, and, if so, whether the immovable property which is the subject of the suit or the place where the cause of action arose was within the limits of the transferred area, on pain of losing his right to execute under the article if he omits to make these inquiries or comes to a wrong conclusion when he makes them."

The point for the decision of the Full Bench was

"whether the Court which passed the decree is a proper Court for execution within the meaning of cl. (5) of Art. 182, Limitation Act, notwithstanding the fact that the jurisdiction which it had at the time of the decree was taken away from it and assigned to another Court at the time of the presentation of the application for execution."

We do not think it lays down anything that is in conflict with the view taken in *Abdus Sattar* v. *Mohini Mohan Das*, 37 C. W. N. 679 : (A. I. R. (20) 1933 Cal. 684). In the latest decision of the Calcutta High Court reported in *Masrab Khan* v. *Deb Nath Mali*, A. I. R. (29) 1942 Cal. 321 : (I. L. R. (1942) 1 Cal. 289), Mukherjea J. observed

"the expression 'jurisdiction to execute it' as used in S. 37 (b), Civil P. C., does not mean and include the competency of the Court to entertain an application for execution of the decree. Even, if in the circumstances of a particular case, a Court cannot effectively execute the decree, that would not mean that it has ceased to have jurisdiction to execute it. It still remains the competent Court for purposes of execution."

[7] In none of the cases to which Mr. Medhi has invited our attention it is laid down that notwithstanding the fact that a Court has not ceased to exist or ceased to exercise jurisdiction, the Court which had pecuniary jurisdiction to try the suit would be regarded as a Court capable of executing the decree within the meaning of S. 37 (b), Civil P. C.

[8] We think the learned District Judge has taken the correct view and properly set aside the order of the learned Subordinate Judge, dated 13th December 1947. We affirm the order of the learned District Judge, and direct that the execution application be returned to the decree-holder by the learned Subordinate Judge of Gauhati for presentation to the proper Court. If and when it is presented again, it will be subject to all objections at the hearing.

Ram Labhaya J. — I agree.

V.B.B. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 116 *[C. N. 45.]*

THADANI C. J. AND RAM LABHAYA J.

Mohan Singh—Appellant v. *Chandra Sagar Das and others — Respondents.*

F. M. A. No. 186 of 1946, D/- 22-2-1950, against Order of Addl. Deputy Commissioner, Lakhimpur, D/- 17-10-1946.

(a) Workmen's Compensation Act (1923), S. 20 — The Additional Deputy Commissioner in Assam is not *ex officio* Commissioner under Act. [Para 1]

Annotation : ('46-Man.) Workmen's Compensation Act, S. 20, N. 1.

(b) Workmen's Compensation Act (1923), S. 19 (1) — Order by Commissioner holding employer liable to pay compensation—Procedure laid down under S. 10A (4) not followed — Provisions of S. 25 not

complied with — Order is liable to be set aside — *(Obiter)* — Workmen's Compensation Act (1923), Ss. 10A (4) and 25. [Paras 1 & 2]

Annotation : ('46-Man.) Workmen's Compensation Act, S. 19, N. 1, S. 25, N. 1.

K. R. Barooah, J. C. Medhi and D. Darma —for Appellant.

K. R. Barman, Govt. Advocate —for Respondents.

Thadani C. J.— This is an appeal under S. 30, Workmen's Compensation Act directed against an order dated 17th October 1946, passed by the Additional Deputy Commissioner, Lakhimpur, purporting to act as Commissioner under the Workmen's Compensation Act. The order is in these terms :

"Read the causes shown by the contractor, Sardar Mohan Singh. Admittedly the deceased and injured coolies received their injuries while doing work given by the contractor. Apparently those persons were coolies who were engaged in loading and unloading logs. These coolies are "Workmen" vide explanatory note, p. 60, Workmen's Compensation Act. Considering all the points and facts of the case, I find that Sardar Mohan Singh is liable to pay compensation. Office to issue notice.

Sd/-S. I. Chaudhury,
Addl. D. C. & Commer., W. C. Lakhimpur,
17-10-1946."

Mr. Barooah for the appellant, Sardar Mohan Singh, has contended that the learned Additional Deputy Commissioner, Lakhimpur, had no jurisdiction to entertain proceedings brought under the Workmen's Compensation Act, as only the Deputy Commissioners in Assam have been appointed *ex officio* Commissioners under the Workmen's Compensation Act. We issued notice to the Government Advocate to satisfy us whether the Additional Deputy Commissioner, Lakhimpur, who passed the order appealed from, was *ex officio* Commissioner under the Workmen's Compensation Act. Mr. Barman frankly stated that he is unable to satisfy us that the Additional Deputy Commissioner, Lakhimpur, is an *ex officio* Commissioner under the Workmen's Compensation Act. This statement alone, made by Mr. Barman, is sufficient for the purpose of quashing the order in question and ordering a re-trial of the claims made. We would have in any case quashed the order appealed from even if the learned Additional Deputy Commissioner was in fact *ex officio* Commissioner, for the plain reason that the order passed by him is not in accordance with the procedure laid down in the Workmen's Compensation Act. For instance, the procedure laid down under S. 10A (4) has not been followed, in that when the employer Mohan Singh disclaimed liability, the Commissioner should have informed the dependents of the deceased workmen that it was open to them to prefer a claim for compensation. It does not appear from the record that the dependants made any claim at all. Again the provisions of S. 25, Workmen's Compensation Act have not been complied with.

[2] We think this is a matter in which the order appealed from must be set aside, and the proceedings remanded for re-trial by the Deputy Commissioner, Lakhimpur himself, with direction that the proceedings be heard and determined according to law, bearing in mind the provisions of Ss. 10A (4) and 25, Workmen's Compensation Act.

Ram Labhaya J.— I agree.

V.R.B. *Order set aside.*

A. I. R. (37) 1950 Assam 117 *[C. N. 46.]*

RAM LABHAYA J.

Mt. Gahan Priya and another—*Appellants* v. *Bharat Chandra Mahanta and others*—*Respondents.*

Second Appeal No. 1906 of 1947, D/-31st January 1950.

Bengal Public Demands Recovery Act (III [3] of 1913), S. 20—Certificate sale—What passes to purchaser at such sale.

A purchaser at a sale in execution of a certificate under the Public Demands Recovery Act acquires nothing but the right, title and interest of the certificate debtor at the time of the sale.

Hence, where the judgment-debtor has already parted with all his interest in the property long before the certificats sale, the purchaser acquires nothing by the sale. [Paras 10, 11]

M. N. Roy—for Appellants.

J. C. Sen and M. N. Mahanta—for Respondents.

Judgment.— This appeal arises out of a suit for declaration of title to and confirmation of possession or in the alternative for khas possession of the land in suit.

[2] The suit was decreed in part by the trial Court. The decree was in respect of an area of 11 B. 4 K. 7 L. of land in thirty years patta NO. 395 of village Majhirgaon of mouza Ramsha Rani. Defendants appealed from the decree. Plaintiffs put in cross-objections. The appeal was allowed; cross-objections were disallowed. The result was that the suit was dismissed in its entirety. Plaintiffs have appealed to this Court.

[3] The learned counsel for the appellants has not pressed for a decree in respect of the area not allowed to him by the trial Court. He has merely asked for the restoration of the decree of the Court of the first instance by which the suit was decreed in respect of 11 B. 4 K. 7 L. The controversy, therefore, is narrowed down to the rights in this area.

[4] The land in dispute originally belonged to Hutharam Gaonbura, defendant 4, in this case. He mortgaged it with other lands to Garbal Goalia Co-operative Bank on 24th September 1924. Defendants 1 and 2, the contesting defendants in this case, purchased this land from defendant 4 on 30th June 1925. Some years after

the Bank went into liquidation, the liquidator had the land sold in execution of a certificate made under the Public Demands Recovery Act of 1913. It was purchased by the liquidator himself on 19th May 1936. He sold it to plaintiff-appellants on 20th March 1942. They applied for a mutation in their favour on the strength of the sale-deed. This claim was resisted by defendants 1 and 2, who had purchased the land in 1925 long before its sale under the Public Demands Recovery Act. The mutation in plaintiffs' favour was refused. This led to the suit from which the present appeal arises.

[5] The facts above stated are not in dispute. It is, however, contended by the learned counsel for the appellants that the liquidator of the Bank had all the powers of a registrar in the exercise of which he could make an award and direct that the amount due be realised from the mortgage-security. Such an award, he contends, was given and the certificate was based on the award. The case, therefore, according to him, was covered by *Laxman Madhoji* v. *Dhamori Co-operative Credit Society*, A. I. R. (20) 1933 Nag. 211 : (142 I. C. 487), in which it was laid down that a decision given by the Registrar directing the sale of the property comprised in the mortgage deed did not militate against O. 34, R. 14, Civil P. C. The correctness of the proposition laid down in the Nagpur case is not at all in question. What is disputed is whether the liquidator ever made an award directing sale of the property. The learned Second Additional Judge came to the conclusion that there was absolutely no evidence on the record in support of the allegation that the liquidator made an award or passed an order directing the sale of the property mortgaged. He referred to the statement of P. W. 1, the successor of the liquidator, and observed that he was not aware of the contents of the award or the requisition for a certificate. The liquidator himself was not examined. There was thus, according to him, no basis for the finding that the award or the requisition made any mention of the mortgaged property or asked for its sale. The learned Judge found further that there was no evidence on the record showing that the certificate directed sale of the mortgaged property in enforcement of the security. These are findings of fact. They are not open to question at this stage and the learned counsel for the appellants has made no attempt to challenge them. The Nagpur case in these circumstances can have no application to the facts of this case.

[6] The learned counsel has also relied on two other cases. The first of these is *Kalu Sharip* v. *Abhoy Charan*, 25 C. W. N. 253 : (A. I. R. (8) 1921 Cal. 157). This case has no bearing on the question now before the Court. The sale in this case was not under the Public Demands Recovery Act.

[7] The second case is reported in *Ananda Chandra* v. *Jhulon Singh*, 33 C. W. N. 305 : (A. I. R. (16) 1929 Cal 409). In this case a Division Bench of the Calcutta High Court laid down that it was not open to a defendant to challenge a sale held under the Public Demands Recovery Act by way of defence in a suit for possession brought by the purchaser. This proposition is unquestionably correct. But the respondents are not challenging the sale. Their contention is that a purchaser at a sale in execution of a certificate under the Public Demands Recovery Act acquires nothing but the right, title and interest of the certificate debtor. This contention does not militate against the view taken in *Ananda-chandra* v. *Jhulon Singh*, 33 C. W. N. 305 : (A. I. R. (16) 1929 Cal. 409) which is therefore of no avail to the appellants.

[8] I now proceed to examine the hurdle placed in the way of the learned counsel from the respondents' side. It has been contended that the effect of a sale under the Public Demands Recovery Act is to pass to the purchaser merely the right, title and interest of the certificate-debtor. Reliance has been placed in support of this proposition on *Nanda Kumar* v. *Ajodhya Sahu*, 16 C. W N. 351: (11 I. C. 465) and *Lachmi Narain Singh* v. *Nandkishore*, 29 Cal. 537 : (6 C. W N. 484). These authorities no doubt support this proposition but they are under the Public Demands Recovery Act of 1895.

[9] In *Nanda Kumar* v. *Ajodhya Sahu*, 16 C. W. N. 351 : (11 I. C. 465), Mookerjee, J. examined the provisions of the Act which were then in force and came to the conclusion in view of the scheme of the Act and the provisions contained in S. 10 and sub-s. (2) of S. 19 of that Act that the Public Demands Recovery Act did not contemplate the realisation of the security and if a sale was held under that Act, the security must be deemed to have been abandoned.

[10] It is noteworthy that the Public Demands Recovery Act of 1895 did not contain any express provision to the effect that a purchaser at a sale in execution of a certificate shall acquire nothing more than the right, title and interest of the certificate debtor. Section 10 of the old Act merely provided that from and after the date of notice of the certificate on the certificate debtor, the certificate shall bind all immovable property of the judgment-debtor within the jurisdiction of the District Collector in the same manner as if it had been attached under the provisions of the Civil P. C. S. 19 (2) embodied a provision to the effect that the certificate under the Act shall be executed in the manner provided in Chap. XIX, Civil P. C., for the enforcement of decrees for

money. Section 10 now has been replaced by S. 8, Public Demands Recovery Act of 1913, which provides that from the date of the service of notice on the Certificate-debtor all private transfer or delivery of immovable property situated in the district in which the certificate is filed, or of any interest in such property shall be void against any claim enforceable in execution of the certificate. It further provides that the amount due from time to time in respect of the certificate shall be a charge upon the immovable property of the certificate-debtor, wherever situated, to which every other charge created subsequently to the service of the said notice shall be postponed. This section provides greater facilities for the realisation of the amount due under the certificate. The whole of the amount is charged on the entire immovable property of the certificate-debtor. There is no provision in the new Act which would correspond to S. 19 (2) of the old Act, but S. 20 provides in express terms that :

"Where property is sold in execution of a certificate, there shall vest in the purchaser merely the right, title and interest of the certificate-debtor at the time of the sale, even though the property itself be specified."

There was no such provision in the old Act. The scheme of the Act was in the main the basis for the view consistently held in the Calcutta High Court that what passed to the purchaser at a certificate sale was merely the right, title and interest of the certificate-debtor at the time of sale. Section 20 gives statutory recognition to that view and thus shuts out all speculation as to the intention of the Legislature. There are no provisions in the new Act on the lines of those which are contained in O. 34, Civil P. C. It cannot be argued in view of the express provision contained in S. 20 of the present Act that the purchaser can acquire the right, title and interest not only of the mortgagor but that of the mortgagee which would happen if the sale is for the realisation of the security. In fact, the effect of S. 8 of the present Act is to remove all distinction between the property mortgaged and that which is free from the mortgage. The amount of the certificate becomes automatically a charge on the entire property of the certificate-debtor, and what is sold at a certificate sale is not the property but merely the existing interest of the judgment-debtor at the time of the sale. Section 20 emphasises that it is merely the right, title and interest of the certificate-debtor that passes even though the property itself is specified.

[11] It has now to be found out what interest Hutharam, pro forma defendant 4, had at the time of sale in favour of the liquidator. It is not denied that the land had been sold to defendants 1 and 2 in 1925 long before the certificate sale. The equity of redemption vested in them and not in the judgment-debtor at the time of sale. He had no title in the property then. The Bank took advantage of the summary and more effective procedure provided by the Public Demands Recovery Act with the result that what could be sold at the certificate sale was the existing interest of the judgment-debtor, if he had any. In this case he having already parted with all his interest in the property, the liquidator acquired nothing by the sale. The conclusion arrived at by the learned Second Additional Judge is therefore correct.

[12] The appeal, therefore, must fail and is dismissed with costs.

V.B.B. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 119 *[C. N. 47.]*

THADANI AG. C. J. AND RAM LABHAYA J.

Bhubindra Narayan Bhattacharjya — Appellant v. *Mt. Tarupriya Debya and others — Respondents.*

Second Appeal No. 2131 of 1947, D/- 7th February 1950.

(a) Civil P. C. (1908), S. 11 — Res judicata between co-defendants.

Under certain circumstances decision of issues between co-defendants, even though not incorporated in the decree, may operate as *res judicata*. The conditions necessary for a finding to operate as *res judicata* between co-defendants are that there should be a conflict of interest between co-defendants and that it should be necessary to resolve the conflict in order to give relief to the plaintiff. The conflict or the issue must have been finally decided and the co-defendants must have been either necessary or at least proper parties in the former suit. [Para 21]

Annotation : ('44-Com.) C. P. C., S. 11, N. 46, Pts. 1 to 4.

(b) Civil P. C. (1908), S. 96 — Who can appeal— Suit dismissed against defendant — Defendant, if can appeal.

Notwithstanding that a suit has been dismissed against a defendant, he has the right of appeal if he is aggrieved by the decree. The question whether he is aggrieved by the decree is a question of fact to be determined in each case according to its peculiar circumstances. In order to find out whether a defendant is aggrieved by a decree dismissing the suit against him, it is not merely the form but the substance of the decree and the judgment that should be looked into. Where the point adversely decided to such a defendant is directly and substantially in issue and where it will operate as *res judicata* in subsequent proceedings, the defendant should have the right of appeal against the decree though the particular finding is not embodied or incorporated in the decree. [Para 42]

Annotation : ('44-Com.) C. P. C., S. 96, N. 6, Pts. 9 to 14.

(c) Civil P. C. (1908), O. 41, R. 22 (1) — Cross-objections against co-respondent.

A respondent cannot file cross-objections against a co-respondent when he has not appealed from the decree and the crosss-objections do not in any way affect the appellant.

(Cross-objections in this case were held to affect the appellant.) [Para 44]

Annotation:('44-Com.) C. P. C., O. 41, R. 22, N. 14.

(d) Transfer of Property Act (1882), S. 52—Scope —Section, if covers partition.

Section 52 prevents not merely the transfer of immovable property when any right to it is directly and specifically in question but it also prevents dealing with the property otherwise. Partitioning the property is certainly dealing with it. A partition may or may not be regarded as a transfer. It does, however, alter the mode of enjoyment of the property and can produce a result very similar to transfer in certain cases. In any case, the language of the section is wide enough to cover a partition. [Para 50]

Annotation : ('50-Com.) T. P. Act, S. 52, N. 27.

K. R. Borcoah and B. C. Barua—for Appellant.

S. K. Ghose, R. K. Goswami, B. N. Deka and S. C. Sarma — for Respondents.

Ram Labhaya J. — The suit out of which this appeal arises was for a declaration, first, of right and title to and confirmation of possession of 40 bighas of land covered by thirty year B. K. Patta No. 8 of village Barmakhibaha, Mouza Tihu and secondly, that defendant 1 had acquired no right, title and interest in respect of the land in suit by the auction sale of the land in her favour held in execution of her mortgage decree against Dharmanath, defendant.

[2] The suit was decreed in the Court of the learned Additional Munsiff of Gauhati. On appeal the decree of the trial Court was reversed by the learned Additional Judge, A. V. D., and the suit dismissed.

[3] Defendant 2 has appealed, plaintiff-respondent, whose suit has been dismissed, has filed cross objections. The learned counsel for Mt. Tarupriya Debya, defendant-respondent, has raised a preliminary objection. He urges that both the appeal and the cross-objections are not competent. The appellant has no right of appeal as the suit was dismissed, and plaintiff-respondent has got no right to file cross-objections against a co-respondent when he is not seeking any relief against the appellant.

[4] The relevant facts are as follows : Three brothers, namely, Madhanath, Prananath and Chandranath jointly owned land measuring 835B 12 L. of N. K. *patta* No. 2/33. Prananath died leaving a son Kanunath. The land was partitioned between the two brothers and their nephew Kanunath. An area measuring 278 B. 1 K. 17⅓ L. fell to the share of Chandranath. He had two sons, Dharmnath and Anantanath. This Anantanath is the plaintiff in the case.

[5] On 23rd March 1919, Dharmanath, son of Chandranath, Kanunath, son of prananath and Madhu, son of Madhunath, sold 168-B. of land to one Kameswar. Each of the three purported to sell 56 bighas. Dharmnath's brother Ananta was a minor at the time of sale. Kameswar, the vendee, discovered this fact after the sale. He prevailed upon Dharmanath to execute a fresh deed of sale by which the entire 56 bighas of land were conveyed to Kameswar from the share of Dharmanath alone. Kameswar evidently took this step to protect himself against any future attack from the minor. He later brought a suit for a declaration of his right to the entire land purchased by him, viz., 168 bighas from the three vendors. His suit was decreed. On 3rd April 1923, he obtained a separate *patta* for this land. At that time *patta* No. 8 covering an area of 220-B. 1 K. 17½ L. (which increased to 223.B. 1 K. 17½ L. in 1923-28 Resettlement Operation) was issued in the name of Dharmanath and Anantanath.

[6] The result of the sale to Kameswar was that the share of Dharmanath was reduced by 56 bighas. The share of Anantanath remained in tact.

[7] On 2nd June 1924 Dharmanath mortgaged 40 bighas of land to Bhubindra Narayan Bhattacharyya, defendant 2. On the same day he mortgaged 48 bighas to Mt. Tarupriya Debya, defendant 1.

[8] The family, consisting of the two brothers Dharmanath and Anantanath, owed some money to the Kamrup Land Mortgage Bank, Ltd., and also to one Lalit Chandra Dutta. To pay off these debts, they sold an area of 86-B. 1 K. 8 L. of land to Lalit Chandra Dutta on 26th June 1933. Lalit got a separate *patta* (No. 17) for the area sold to him. The share of Dharmanath was reduced by another 43 bighas. The area left with him after the sale came to 40-B. 1 K. 17 L., while Anantanath owned 96-B. 19 L. of land in Patta No. 8.

[9] On 25th April 1935, Anantanath got his name mutated with respect to 96-B. 19 L. of *patta* No. 8. It was alleged in the plaint by Anantanath that as a result of the partition, Dharmanath got certain area in specified *dags*.

[10] On 13th May 1935, Dharmanath sold to Bhubindra Narayan, defendant 2, 40 bighas of land from *patta* No. 8 in consideration of the mortgage debt which had been incurred by him on 2nd June 1924. The vendee got a separate *patta* (No. 19) issued in his name in respect of the area sold to him on 30th August 1939.

[11] Mt. Tarupriya, the other mortgagee from Dharmanath, instituted a suit for sale of the mortgaged property on the basis of the mortgage of 2nd June 1924. Dharmanath was the sole defendant in the case. The suit was decreed on 31st March 1935. She then had the property sold. It was purchased by her at the auction sale on 19th August 1937. Symbolical possession was delivered to her on 22nd July 1938.

[12] Mt. Tarupriya, defendant 1, applied for mutation in her favour on the basis of the auc-

tion sale. Her application was rejected. She appealed. The Deputy Commissioner allowed her appeal without annulling the *patta* in favour of defendant 2. The order was upheld by the Revenue Tribunal.

[13] Plaintiff, Anantanath, feeling aggrieved by the order of the Revenue Tribunal, has instituted this suit. His case in short was that Dharmanath had sold 56 bighas of land to Kameswar, 43 bighas to Lalit Chandra Dutta and 40 bighas to defendant 2. The last sale was on 13th May 1935. On this date his share in the land of *patta* No. 8 was reduced to 1 K. 17½ L. in *dag* No. 567. The rest belonged to the plaintiff. The sale in execution of the decree of defendant 1 came in 1937 when Dharmanath owned only an area measuring 1 K. 17½ L. He, therefore, asked for a declaration that the sale in her favour was invalid and inoperative. It is noteworthy that he admitted that the private sale in favour of Bhubindra Narayan, defendant 2, was valid and binding. The relief was claimed only against defendant 1, the sale in whose favour was the latest in point of time. Defendant 2 was impleaded only as a *pro forma* defendant. No relief was asked for against him. He, in turn, fully supported the plaintiff.

[14] Defendant 1 was the only contesting defendant. Her case was that the sale in favour of Kameswar was not from the share of Dharmanath alone. The sale in favour of Lalit was collusive and fraudulent and the sale in favour of defendant 2 was hit by the doctrine of *lis pendens*. In consequence, she contended that defendant Dharmanath was the owner of the land sold at her instance and purchased by her. There were other defences raised but we are not concerned with them at this stage of the litigation.

[15] The two issues relevant to the question now before us were as follows :

Issue No. 5 ; Whether the alleged sale in favour of one Kameswar Chakravarty was only from the share of Dharmanath alone as alleged in the plaint ?

Issue No. 6 : Whether the alleged sale in favour of Lalit Chandra Dutta and defendant 2, Bhubindra Bhattacharjya are legally operative and binding on defendant ?

[16] The suit was dismissed (?) in the trial Court. The learned Munsiff found in favour of the plaintiff on both the issues (5 & 6). His finding was that the sale to Kameswar was undoubtedly from the share of Dharmanath and the sales in favour of Lalit and Bhubindra were both valid and binding and on the date of the auction sale in favour of defendant 1 Dharmanath was only entitled to about 1 K. 17½ L. He, therefore, granted plaintiff the declaration that he had prayed for against defendant 1. She appealed.

[17] The learned Additional Judge allowed the appeal. He agreed with the trial Court that the sale in favour of Kameswar was from the share of Dharmanath alone. He further agreed with the view that the sale in favour of Lalit was valid and binding. But as regards the sale in favour of defendant 2 (Bhubindra) his finding was that it was hit by the doctrine of *lis pendens* and was, therefore, subject to the title of defendant 1, which she acquired by her sale in execution of her mortgage decree. It will be observed that the sales in favour of Lalit and defendant 2 had been directly challenged by defendant 1, and they formed the subject-matter of Issue 6 reproduced above.

[18] It is clear that plaintiff could get the relief asked for if the sale in favour of defendant 2 as also the previous sales by Dharmanath from his share had been held to be valid and binding on defendant 1. She was stoutly resisting this claim. Defendant 2 in his own interest supported the plaintiff though arrayed on the same side with defendant 1. The legal effect of the sale in his favour was a matter which was in controversy between the two defeadants. This controversy had to be resolved before plaintiff could get the relief he had prayed for. In fact, the sale to defendant 2 was admitted as valid in the plaint. Defendant 1 contested its validity to the extent that it prejudiced her rights. The matter thus was directly and substantially in issue. It was also heard and finally decided. Defendant 2 was a necessary or at least a proper party to the suit. The appellate decree dismissing the suit rests on the finding that the sale to defendant 2 and the partition between plaintiff and his brother both came during the pendency of the mortgage suit instituted by defendant 1 and therefore could not affect the result of that litigation.

[19] In spite of the fact that the suit has been dismissed and the decree in terms does not embody the finding adverse to defendant 2, he has appealed. The decree merely dismisses the suit. The finding adverse to defendant 2 though not incorporated in the decree, forms the basis of the decree undeniably. The question is whether defendant 2 has, in these circumstances, the right of appeal from the decree.

[20] The question is by no means easy as there is considerable conflict of judicial authority on the point.

[21] It is well settled that under certain circumstances decision of issues between co-defendants even though not incorporated in the decree, may operate as *res judicata*. Section 11, Civil P. C., provides that no Court shall try any suit or issue in which the matter was directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, if other conditions of S. 11 are satisfied. It is clear that an issue

between the same parties as distinguished from a suit when directly and substantially in issue shall operate as *res judicata* if it was heard and finally decided. The conditions necessary for a finding to operate as *res judicata* between co-defendants are that there should be a conflict of interest between co-defendants and that it should be necessary to resolve the conflict in order to give relief to the plaintiff. The conflict or the issue must have been finally decided and the co-defendants must have been either necessary or at least proper parties in the former suit. All these conditions are fulfilled in present case. The issue as to the sale in defendant's favour arose between plaintiff and defendant 1. Plaintiff accepted the validity of the sale in defendant's favour. Both plaintiff and defendant 2 were ranged against defendant 1 so far as this issue was concerned. It is obvious that it was heard and finally decided and its decision was necessary for the disposal of the plaintiff's suit, defendant 1 was necessary party and defendant 2 was at least a proper party if not a necessary one. The finding on the issue, therefore, must operate as *res judicata* against defendant 2 in any subsequent litigation between defendant 1 and defendant 2.

[22] The authority on the proposition that in the circumstances stated above an issue would operate as *res judicata* between co-defendants is voluminous with a strikingly large consensus of legal opinion. There is no trace of any serious conflict. Mr. Ghose has not questioned this proposition; he has merely argued that even if the finding against defendant 2 is *res judicata*, he has no right of appeal as the finding is not incorporated in the decree. In these circumstances I shall refer only to *Kishun Parshad* v. *Durga Prasad*, A. I. R. (18) 1931 P. C. 231 : (133 I. C. 721) in support of the proposition.

[23] Section 96, Civil P. C. allows appeals from decrees. 'Decree' means a formal expression of an adjudication which so far as the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. As stated above the contention of Mr. Ghose is that a mere finding not incorporated in the decree gives no right of appeal. In the circumstances of this case I have come to the conclusion that the finding on Issue 6, so far as defendant 2 is concerned, will operate as *res judicata* in any subsequent litigation between him and defendant 1. If he is denied the right of appeal, it would be a case of manifest injustice. Mr. Ghose, however, relies on *Niamut Khan* v. *Phadu Buldia*, 6 Cal. 319 : (7 C. L. R. 227), a Full Bench decision. He points out, relying on this Full Bench decision, that the defendant could have the finding incorporated in the decree before appealing and if he has failed to take the necessary steps for being able to appeal, he cannot complain of any injustice. In this Full Bench case, plaintiff had prayed for the enhancement of rent. The plea was that the rent was not enhanceable. It was held that the defendant was precluded from denying that the rent of the tenure was enhanceable by reason of the fact that the question had been decided in a former litigation between the parties. The former suit was also for enhancement of rent. The defences raised were that no notice of enhancement had been given and that the rent was not enhanceable. The suit was dismissed on the ground that no notice had been given. But the Munsiff had stated in the judgment that he considered the rent enhanceable. He did not believe in the genuineness of the documentary evidence produced by the defendant. The decree merely ordered that the suit should be dismissed. The finding that the rent was liable to be enhanced was not embodied in the decree. The learned Judges held that though defendant had no right of appeal against the finding by reason of its absence from the decree, it would still operate as *res judicata*. They observed that

"the material findings in each case should be embodied in the decree and if they are not, it is incumbent on the parties to avoid their being bound by decision against which they have no right of appeal, to apply to have the decree amended so that it may be in accordance with the judgment."

[24] Though the dispute in this case was not between co-defendants, the decision in the case does support Mr. Ghose's contention to this extent that if a finding is not incorporated in the decree, there is no right of appeal against it in a defendant against whom the suit is dismissed. It is, however, worthy of note that the finding that rent was liable to enhancement did not form the basis of the decree. It was also not necessary for the decision of the plaintiff's case and these are features which distinguish this decision from the present case.

[25] The next Calcutta case which bears on the point is *Krishna Chandra* v. *Mohesh Chandra*, 9 C. W. N. 584. This has been relied on by the learned counsel for the respondent. In this case Woodroffe J. held

"on a review of the authorities that a defendant has the right to appeal notwithstanding that the suit has been dismissed as against him, if he is aggrieved by the decree."

He further held

"that the question whether a party is aggrieved by a decree is a question of fact to be determined in each case according to its peculiar circumstances."

The suit before him was for recovery of rent which had fallen in arrears. It was instituted against 5 defendants. The first 3 defendants were

described as tenant-defendants. The holding of which they were alleged to be tenants was put up for sale at the instance on defendant 5. Defendant 4 was the auction-purchaser of the holding and was alleged to have purchased it on behalf of and as *benamidar* of the first 3 defendants. A decree for rent was prayed for against the first 3 tenant-defendants. These defendants denied that they had any concern with the land or that defendant 4 was their *benamidar*. Defendant 4 supported them. He alleged that he was the sole owner of the tenancy rights and the real tenant. He denied that any rent was due to the plaintiffs.

[26] Plaintiffs had not asked for any relief against defendant 4. Their case was that he was a mere *benamidar*. An *ex parte* decree was passed against the first 3 defendants. Defendant 4 applied to have the *ex parte* decree set aside and also the sale held thereunder which was alleged to have taken place after fraudulent suppression of the sale proclamation. The suit was restored and the sale was set aside. The learned Munsiff found that the tanant-defendants had no connection with the *jumma* in suit and that defendant 4 was not their *benamidar*. He, therefore, decreed the claim against defendant 4 and dismissed it against the first 3 defendants.

[27] The plaintiffs appealed from the decree contending that the first 3 defendants and not defendant 4 were their tenants. The learned District Judge in appeal held that defendant 4 had nothing to do with the case. He, therefore, set aside all previous orders obtained by defendant 4. The result was that the *ex parte* decree was restored. It was argued in the High Court that as the effect of the *ex parte* decree which had been restored was to dismiss the suit against the appellant (defendant 4), he could not appeal against the decree which was in his favour. The learned Judge referring to *Jamna Singh* v. *Kamarunnissa*, 3 ALL. 152 (F.B.), at pp. 156,157 observed that

"it may reasonably be assumed that any party to the suit in which a decree is passed may, if he is dissatisfied with it, appeal from it."

The Code does not expressly say by whom an appeal may be preferred. He, however, inferred from the language of S. 577. Civil P. C. of 1882, which corresponds to O. 41, R. 32 of the Code of 1908, that parties who are allowed to appeal are those who may desire that a decree should be varied or reversed. The test for determing whether there was a right of appeal that found favour with him was the common sense consideration that 'there can be no appeal when there is nothing to appeal about.' It follows from this that only those parties who are adversely effected by the decree may appeal. Applying the test, he proceeded to observe that "In some cases a suit may be dismissed as against the defendant and yet the latter may have a right of appeal." The ratio for this view was that

"it is not because the suit is formally dismissed as against the defendant that no appeal lies but because such dismissal is ordinarily not merely no grievance but an actual benefit to the defendant. In such cases there would be nothing to complain of. But if there is something to complain of then notwithstanding that the suit is dismissed against him he may appeal."

If the decree was apparently favourable to the defendant but was really unfavourable when seen in the light of the record and could prove injurious to him, then the defendant would be aggrieved and could appeal. Whether a party is aggrieved by such a decree is a matter to be decided on the facts of each case. The earlier Full Bench case *Niamut Khan* v. *Phadu Buldia*, 6 Cal. 319 : (7 C. L. R. 227 F. B.) was not referred to or discussed. The decisions in these two Calcutta cases are not reconcilable.

[28] The view of the Full Bench of the Calcutta High Court as expressed in *Niamut Khan* v. *Phadu Buldia*, 6 Cal. 319 : (7 C. L. R. 227 F. B.) was followed by the majority of the Court composing a Full Bench of the Allahabad High Court in *Jamait Unnissa* v. *Lutfunnisa*, 7 ALL. 606 (F. B.). Oldfield and Mahmood JJ., dissented from this view.

[29] Oldfield J., was of the view that the decree to agree with the judgment, should contain the material points for determination arising out of the claim and material for the decision thereon and if this has not been done, the defect is a good ground of appeal notwithstanding that the decree, on its face, may be altogether in favour of the appellant and notwithstanding that he may not have applied for amendment of the decree or for review of judgment.

[30] Mahmood J. agreeing in the conclusion arrived at by Oldfield J., held that the finding of the first Court on the validity or otherwise of the deed in question in that suit was not a mere *obiter dictum* but was binding upon the defendant as *res judicata* notwithstanding the fact that the suit against her was dismissed on another ground :

"that whatever has the force of *res judicata* is necessarily appealable and that the word "from" as used in S. 540 (now S. 96, Civil P. C.) and the expression "objection to the decree" in S. 561, Civil P. C. of 1882 (which corresponds to O. 41, R. 22) refer not only to matters existing on the face of the decree but also to those which should have existed but do not exist there; and that the defendant in the present case was aggrieved or injured by the omission in the decree of the first Court, and therefore, entitled to file objections to it, and, for the same reason, to appeal to the High Court."

The learned Judge was definitely of the view that failure on the part of the defendant to have the decree amended did not make her incapable of obtaining the same result by the exercise of her right of appeal.

[31] It will be observed that the view so forcefully and lucidly expressed by Mahmood J., is completely in accord with the view expressed by Woodroffe J., in *Krishna Chandra* v. *Mohesh Chandra*, 9 C. W. N. 584.

[32] In *Jamna Das* v. *Udey Ram*, 21 ALL. 117:(1898 A. W. N. 201), plaintiffs sued as second assignees of a debt for its recovery and impleaded other assignees, the original debtors, and certain persons whom they alleged to have been prior assignees of the debt, but whose assignment, according to them, had become void through non-fulfilment of the conditions upon which it was made. They got a decree against the original debtors. An appeal by the first assignees was dismissed on the ground that there was no decree against them. On second appeal, it was held that the appeal would lie inasmuch as the decree, though not a decree against the appellants, necessarily implied a finding that the assignment to the appellants, upon the basis of which they resisted the plaintiffs' claim had become void.

[33] The learned Judges of the Division Bench in this case did not agree with the contention that it was necessary for the appellants to procure an entry in the decree of the finding that the assignment in their favour had become void as the decree as it stood necessarily implied a finding to that effect.

[34] The decision of the Full Bench case reported in *Jamait Unnissa* v. *Lutfunnissa*, 7 ALL. 606 (FB) was not referred to though the view taken in the case is in consonance with the rule enunciated by Mahmood J., in his judgment by which he dissented from the majority of the learned Judges composing the Court.

[35] There are two more cases from the Allahabad High Court which have been brought to our notice in the course of the argument. These are *Nirmal Singh* v. *Zamiruddin Khan*, A. I. R. (22) 1935 ALL. 984 : (159 I. C. 447) and *Nirmal Singh* v. *Zamiruddin*, A. I. R. (24) 1937 ALL. 368 : (169 I. C. 395). The last case was relied on by the learned counsel for the respondent.

[36] In *Nirmal Singh* v. *Zamiruddin Khan*, A. I. R. (22) 1935 ALL. 984 : (159 I. C. 447), Allsop J., relied on *Jamna Das* v. *Udey Ram*, 21 ALL. 117 : (1898 A. W. N. 201), and held that a vendor who was the *pro forma* defendant in the suit was aggrieved by the decree even though the suit had been dismissed. The suit was for the recovery of arrears of rent by a person who claimed to be the proprietor on the basis of a sale in his favour by the *pro forma* defendant. The tenants pleaded that they were themselves the proprietors. The suit was dismissed on the finding that the tenants were proprietors. The plaintiff did not appeal. The *pro forma* defendant was allowed to appeal though the suit was dismissed. The basis of the decision was that the finding between co-tenants might operate as *res judicata*. As a result the case was remanded to the lower appellate Court for disposal of the appeal on merits. This was a decision in second Appeal No. 1021 of 1933 decided on 27th August 1935, from the decision of the District Judge of Bareilly dated 5th April 1933. The same case came up before a Division Bench of the Court in December 1936. The decision is reported in *Nirmal Singh* v. *Zamiruddin*, A. I. R. (24) 1937 ALL. 368 : (169 I. C. 395). The learned Judges held that the *pro forma* defendant had no right of appeal. They, however, based their conclusion on the view that the finding adverse to the appellant will not operate as *res judicata* between him and the co-defendant as they were arrayed on the same side. This decision has been relied on by the learned counsel for the respondent. It obviously does not help him for the *ratio decidendi* in the case was that the decision in the case would not operate as *res judicata* in any subsequent litigation. If this conclusion could be arrived at in a case, there would be no right of appeal in the defendant against whom the suit has been dismissed. The ratio adopted would also show that the view that prevailed with the learned Judges was not in consonance with the rule enunciated by the majority of the Judges in the Full Bench decision of the Allahabad High Court reported in *Jamait Ummissa* v. *Lutfunnissa*, 7 ALL. 606 (F. B.).

[37] In Madras the view expressed by Woodroffe J., in *Krishna Chandra* v. *Mohesh Chandra*, 9 C. W. N. 584 has been consistently followed. In *Yusuf Sahib* v. *Durgi*, 30 Mad. 447 : (17 M. L. J. 260), one Yusuf obtained an *ex parte* money decree against Timma as *yejman* of an Aliyasantana family. Timma sued the other members of the family for a declaration that the family property was liable for the payment of certain debts incurred by him including that due to Yusuf for which an *ex parte* decree had been passed against him. Yusuf and other creditors were parties to the suit. The suit was dismissed. After this, on the basis of the *ex parte* decree in his favour Yusuf attached certain immovable property of the family in execution of his decree against Timma. The other members of the family objected to the attachment. The objection petition was dismissed

They then instituted a declaratory suit both against Yusuf and Timma for a declaration that the attached property was not liable to be sold in execution of the decree against Timma. The Courts below decreed the suit holding that Yusuf was bound by the decree in the declaratory suit instituted by Timma. Yusuf appealed. It was held that the decision in the previous declaratory suit in which Timma was the plaintiff was on a matter raised and actively contested between co-defendants and operated as *res judicata* in the subsequent suit in which such co-defendants were arrayed as plaintiff and defendant. It was further held that where a decision dismissing a suit is in fact wholly against the defendant, such defendant can appeal against it. In coming to this conclusion the learned Judges observed as follows:

"We are inclined to take the view of Woodroffe J., in *Krishna Chandra* v. *Mohish Chandra*, 9 C. W. N. 584 and to hold that Yusuf had a right to appeal, the decree dismissing the suit being so far as he was concerned wholly against him except in regard to the immaterial question of costs."

[38] In *Venkates Warlu* v. *B. Lingayya*, A. I. R. (11) 1924 Mad. 689 : (47 Mad. 633), Kumaraswami Sastri, J., following *Krishna Chandra* v. *Mohish Chandra*, 9 C. W. N. 584 and *Yusuf Sahib* v. *Durgi*, 30 Mad. 447 : (17 M. L. J. 260) held

"that where the point adversely decided to the defendant is correctly and substantially in issue and where in other proceedings the matter would be *res judicata*, it would be contrary to all principles of justice and equity to hold that he is precluded from agitating the matter in appeal merely because the suit was decided in his favour on some other ground."

[39] In *Raghava Aiyengar* v. *Irula Thevan*, A. I. R. (13) 1926 Mad. 974: (97 I. C. 346), Krishan, J. following *Venkateswarlu* v. *B. Lingayya*, A. I. R. (11) 1924 Mad. 689: (47 Mad. 633) held that though the decree was formally in favour of the mortgagors there were findings against their contentions on which the Court acted when dismissing the plaintiff's suit and therefore they had a right of appeal.

[40] In *Tansukh Rai* v. *Gopal Mahto*, A. I. R. (16) 1929 Pat. 586: (8 Pat. 617), a Division Bench of the Patna High Court expressed the view that there was no right of appeal to a party against a finding which is against him when the decree is not based on it and the decree is in his favour.

[41] It is clear that even according to this view a party will have the right of appeal if the adverse finding forms the basis of the decree even though the decree may be in his favour.

[42] It is fairly obvious from a review of the authorities considered above that the weight of all recent authority is in favour of the view expressed in *Krishna Chandra* v. *Moheshchandra*, 9 C. W. N. 584. The Full Bench case of the Calcutta High Court reported in *Niamut Khan* v. *Phardu Buldia*, 6 Cal. 319: (7 C. L. R. 227 F. B.) was decided in 1880. It was followed by the majority of the learned Judges composing the Full Bench in *Jamait Unnisa* v. *Lutfunnissa*. 7 ALL. 606 (F. B.) in 1885. Since then these Full Bench decisions have not been referred to or relied on in recent cases considered above and the view that has prevailed is that notwithstanding that a suit has been dismissed against a defendant, he has the right of appeal if he is aggrieved by the decree. The question whether he is aggrieved by the decree is a question of fact to be determined in each case according to its peculiar circumstances. In order to find out whether a defendant is aggrieved by a decree dismissing the suit against him, it is not merely the form but the substance of the decree and the judgment that should be looked into. Where the point adversely decided to such a defendant is directly and substantially in issue and where it will operate as *res judicata* in subsequent proceedings, the defendant should have the right of appeal against the decree though the particular finding is not embodied or incorporated in the decree. This is in accord with the dictum of Savigny that

"everything that should have the authority of *res judicata* is, and ought to be, subject to appeal, and reciprocally an appeal is not admissible on any point not having the authority of *res judicata*."

Following the rule stated above I come to the conclusion that the defendant-appellant should not be denied the right of appeal in this case. The finding on Issue No. 6 was necessary for the decision of the case as set up by the plaintiff. The matter was in issue between the plaintiff and defendant 2, on one side and defendant 1 on the other. It will operate as *res judicata* in any subsequent litigation between the defendants. Even though it is not incorporated in the decree, the right of appeal against it exists in defendant 2. The grounds of appeal are mainly directed against this finding though the relief which the appellant seeks is not expressly stated. His learned counsel would have been content if it could have been held that the finding on Issue No. 6 would not have the authority of *res judicata* in any subsequent litigation but this is not possible. In my opinion, the appeal, therefore, should be heard and disposed of on merits.

[43] The preliminary objection is directed also against cross-objections put in by the plaintiff whose suit has been dismissed. The only point raised in the cross-objections is that the decree of the lower appellate Court has not been correctly drawn up inasmuch as plaintiff-respondent though held entitled to 96 B. 19 L. from the land of *patta* No. 8 this finding or conclu-

sion was not incorporated in the decree. It is clear that all that the plaintiff seeks to achieve by his cross-objections is a declaration that he is entitled to his 96 B. 19 L. His position in the plaint was somewhat different. He then wanted a declaration that the sale in favour of defendant 1 was ineffectual and inoperative. He now apparently does not press that position and leaves the controversial issue for contest between the co-defendants. His appeal therefore is not directed against the co-respondent alone. It is directed equally against the appellant.

[44] The preliminary objection raised by Mr. Ghose, therefore, ought not to prevail. The general rule which has prevailed in the High Courts of Allahabad, Bombay, Calcutta and Patna and the Judicial Commissioner's Courts of Upper Burma and Peshawar is that the right of respondent to urge cross objections should be limited to his urging them against the appellant and it is only by way of exception to this general rule that one respondent may urge cross-objections as against the other respondents. Following this view a Division Bench of the Lahore High Court held in *Jan Mahomed* v. *P. N. Razdon*, A. I. R. (31) 1944 Lah. 433 : (218 I. C. 183), that a respondent cannot file cross-objections against a co-respondent when he has not appealed from the decree and the cross-objections do not in any way affect the appellant. I am in respectful agreement with this view.

[45] In this case, considering the relief asked for in cross-objections, it cannot be said that the cross-objections do not affect the appellant. In fact, if the relief asked for is allowed to plaintiff-respondent either the appellant or the defendant-respondent may be affected. The plaintiff in merely asking for a declaration of title with respect to 96 bighas in his favour is leaving the co-defendants to fight out their own battle between themselves. The cross-objections cannot be regarded as directed solely against a co-respondent and would not be incompetent, therefor.

[46] My conclusion, therefore, is that both the appeal and the cross-objections should be disposed of on the merits. The preliminary objection raised by Mr. Ghose is overruled.

[47] The appeal by defendant 2 is directed against the finding that the sale in his favour was made during the pendency of the mortgage suit instituted by defendant 1 and is therefore hit by the rule of *lis pendens* embodied in S. 52, T. P. Act. The effect of the operation of the rule obviously is that rights acquired by defendant 2 by the decree in her favour and the subsequent auction sale in execution would not be affected by the sale. The learned counsel for defendant-appellant urges that S. 52 would not apply inasmuch as the immovable property which formed the subject-matter of the suit was not properly or adequately described. We do not think there is any force in this contention.

[48] Dharmanath had mortgaged 40 bighas out of his share to defendant 1. The suit was for sale of the mortgaged property and 40 bighas out of the share of Dharmanath from the lands of *patta* No. 8 were sold in execution of the mortgage decree in favour of defendant 1. There can thus be no dispute about the identity of the property sold. The sale in favour of defendant 1 is of specified land from the lands of *patta* No. 8.

[49] The two sales cannot stand together and cannot be given effect to fully. There is an essential conflict between the two. In these circumstances the sale in favour of defendant 2 could not affect the rights acquired by defendant 1 in the litigation which culminated in the sale of the property in her favour.

[50] The learned counsel next pointed out that S. 52 creates a prohibition against transfers of property with respect to which any right is directly and specifically in question. He contended that a partition would not be such a transfer and, therefore, the partition of land between the plaintiff and Dharmanath would not be within the mischief of the section. The learned counsel has not produced any authority in support of this proposition, and we do not think his reading of the section is correct. The section prevents not merely the transfer of immovable property when any right to it is directly and specifically in question but it also prevents dealing with the property otherwise. Partitioning the property is certainly dealing with it. A partition may or may not be regarded as a transfer. It does, however, alter the mode of enjoyment of the property and can produce a result very similar to transfer in certain cases. In any case the language of the section is wide enough to cover a partition. The learned Second Additional Judge was perfectly correct in the view that both the partition between plaintiff and Dharmanath and the sale in favour of the appellant could have no adverse effect on the result of the litigation in favour of defendant 1. The learned counsel has not cited any authority in support of the proposition that S. 52 does not cover partitions. On the other hand, the interpretation we have placed on S. 52 receives support from *Ishwar Lingo Desai* v. *Dattu Gopal*, 37 Bom. 427 : (19 I. C. 885). The learned counsel, therefore, cannot urge that partition would bind defendant 1 and thus enable Dharmanath to dispose of specified *dags* out of the lands of patta No. 8 to defendant 2 during the pendency of her mortgage suit.

[51] The last point taken up by the learned counsel was that the finding that the sale in favour of defendant 2 (appellant) was in contravention of the provisions of S. 52 is likely to prejudice his rights even on the basis of his mortgage which was created in 1924. We think these fears are absolutely groundless. All that the Courts below have decided was that Dharmanath sold 43 bighas of land to Lalit Chandra. On that date he admittedly owned more than 43 bighas though perhaps the entire area then owned by him was subject to encumbrances. He had mortgaged 40 bighas to defendant 1 and 48 defendant 2 in 1924. On the date of sale to Lalit, he certainly owned in excess of what he was selling but he could sell only his rights in that area. After the sale to Lalit he was still the owner of 40B. 1K. 17½L. The total area before the sale that he owned was 83B. 2K. 11½L. The mortgages covered 88 bighas. The area thus sold was encumbered but all questions which may arise between defendants 1 and 2, the mortgagees on one side and Lalit on the other or between the two mortgagees do not arise in this case. They have not been raised either by the plaintiff or by defendant 1; nor have they been heard and decided. The fears of the learned counsel in this respect are absolutely unfounded. The finding against defendant 1 is limited to the sale transaction in his favour and that transaction too is affected by the finding only to the extent to which it militates against the rights of defendant 1 which she acquired in pursuance of her mortgage decree.

[52] The appeal for the reasons given above must fail. The cross-objections can meet with no better fate. The relief claimed now is that it be declared that plaintiff was the owner of 96B. 19L., from the land of periodic patta No. 8. It is pointed out that the learned Second Additional Judge came to that conclusion and it was necessary that this finding should have been incorporated in the decree. We do not think this prayer can be granted. The relief originally claimed by the plaintiff was that he was the exclusive owner of certain specified *dags* and that the auction sale in favour of defendant 1 was inoperative and unenforceable except to the extent of a small area in one specified *dag*. He now wants a declaration to the effect that he is entitled to an unspecified area measuring 96B. 19L., out of the entire lands of the *patta*. The relief now claimed is entirely different and even in excess of that claimed in the plaint.

[53] We do not think that the plaintiff is entitled to have the declaration of ownership with respect to 98B. 19L., incorporated in the decree in this case. So far as the relief claimed in the plaint is concerned, he is obviously not entitled to it. The cross-objections too, therefore, must be disallowed.

[54] The parties have been left to bear their own costs in the Courts below. But defendant-respondent shall recover her costs in this Court from the appellant as well as the plaintiff whose cross-objections have been disallowed.

[55] *Thadani C. J.*—I agree that the appeal and cross-objections should be dismissed, but would refrain from expressing my view as to whether the appeal is competent, as it is not necessary, for the purposes of our decision.

[56] For the same reason, it is not necessary to express my opinion as to whether the decision on issue 6 would operate as *res judicata* between defendants 1 and 2 in a suit should one be brought by one against the other defendant.

V.R.B. *Appeal and cross-objections dismissed.*

A. I. R. (37) 1950 Assam 127 *[C. N. 48.]*

RAM LABHAYA J.

Jitendralal Chatterjee — *Appellant* v. *The State.*

Revenue Appeal No. 65 and Rule No. 63 of 1949, D/- 3-3-1950, against order of Deputy Commissioner, Goalpara, D/- 25-4-1949.

Assam Land and Revenue Regulation (I [1] of 1886), S. 66 — Survey of land in person's favour — Premium enhanced without his knowledge — Ejectment.

A land was surveyed in the name of *A* and was given a number. Payment at the rate ordered was made and *A* came into possession with the consent and the knowledge of the revenue authorities as a person on whom the land was settled. He was not made aware of the order by which premium at enhanced rate was made payable and there was no refusal on his part to pay at this rate. *A* applied for a settlement again on receiving notice to vacate and expressed his willingness to pay the sum to make up the deficiency of the premium calculated at the enhanced rate.

Held, that in the circumstances ejectment of *A* without affording him an opportunity to take the settlement on reasonable terms was not desirable.

[Paras 5 and 6]

S. K. Ghose and N. M. Dam — for Appellant.

B. C. Barua, Govt. Advocate (Jr.) —for the State.

Judgment.— This appeal under S. 147-B, Assam Land & Revenue Regulation is directed against the order of the learned Deputy Commissioner, Goalpara, dated 25th April 1949, by which he disallowed an objection petition put in by the appellant and ordered encroachment made by him on Government land to be removed.

[2] The land in question was admittedly surveyed in the name of the appellant in 1931 when he applied for its settlement. He paid premium at the rate of Rs. 500 per bigha. The area of the *dag* was 1 K. 8 L. The number assigned to it was 854. The record does not show if the

land revenue payable was fixed. The appellant claims that the amount payable by him as land revenue was Rs. 6 15 per annum and that he paid the revenue for some years. The Deputy Commissioner in his report dated 27th April 1949, has denied the truth of the statement that land revenue was paid after the settlement. There is no proof of payment on the record.

[3] After the survey of the land and payment of the premium at the rate mentioned above, a second order was passed by Khan Bahadur T. Ali, the then Deputy Commissioner, by which the premium payable was fixed at Rs. 3,500 per bigha and in pursuance of this order a notice was issued by the Assistant Settlement Officer on 5th November 1931 demanding premium at the rate of Rs. 35 per *lecha* for the *dag* in question. The further payment required to make up the deficiency was not made. The appellant contends that the notice demanding payment at the rate of Rs. 35 per *lecha* or Rs. 3500 per bigha was never served on him.

[4] There is no proof of the service of the order on him. One joint notice was issued to several persons concerned. It cannot be ascertained from the signatures appearing on the notice as to whether appellant was served. The Deputy Commissioner has dismissed this plea as an easy one. He states that as a man of prudence the appellant should have asked for the *patta* of the land. The learned Government Advocate also finds himself unable on this record to contend that the notice demanding further payment was served on the petitioner.

[5] Since 1931, the appellant has remained in possession. He did not obtain any *patta* for the land. It is admitted by his learned counsel that the Commissioner's confirmation for the settlement in appellant's favour, though necessary, was not obtained. This would presumably be owing to the fact that the further payment that was ordered was not made. The fact, however, remains that the appellant cannot claim the status of a settlement holder. But his learned counsel argues that the settlement proceedings in the case of the appellant ought to be treated as pending proceedings. His case was not disposed of by grant or refusal of a settlement. What happened was that the Deputy Commissioner originally promised settlement on payment of a premium at a certain rate. The land was surveyed. It was given a number. Payment at the rate ordered was made. The appellant came into possession with the consent and the knowledge of the revenue authorities as a person on whom the land was settled. He was not made aware of the order by which premium at enhanced rate was made payable. There was no refusal on his part to pay at this rate.

[6] There is considerable force in the contention raised. The appellant is not a settlement-holder speaking strictly. He, however, was offered settlement on payment of a certain sum which he actually paid and got possession of the property. After that if any further sum became recoverable as premium, the revenue authorities had to recover it by serving a notice of demand. There is no proof that any such notice was served. There was thus no obligation on the part of the appellant to pay any more sum; nor can it be said that the appellant was guilty of any default. It may be that he was aware of the order as the notice issued was meant for quite a large number of persons including the appellant. But that knowledge alone will not create an obligation, nor could refusal to pay the amount be inferred from it. There was nothing to prevent the revenue officers from ordering eviction if they believed that the notice of demand had been served and payment not made within the date stated therein. This course was not adopted. Appellant was in possession with their permission and if they did not do anything to recover the money or to obtain a refusal to pay at the enhanced rate, the consequence of their omission may not be visited on the appellant. He certainly has not been guilty of any fraudulent conduct and could well demand settlement even under R. 15 by reason of his occupation of the land, on which he has built some structure also, for about 18 years. The petitioner evidently applied for settlement again on receiving notice to vacate and expressed his willingness to pay the sum to make up the deficiency of the premium calculated at the enhanced rate. Under R. 66 the Deputy Commissioner has the authority to settle waste land in towns subject to the confirmation of the Provincial Government. He, therefore, may refuse settlement. But the question that arises in this case is whether he was justified in refusing settlement which had been offered by his predecessor in office some 18 years before even though the appellant was willing to make up the deficiency in the premium for the non-payment of which he cannot be blamed in law. The refusal would involve ignoring the order of the Deputy Commissioner who offered the settlement and accepted the premium at the original rate. Apart from this, it would not be equitable in the peculiar circumstances of this case to order eviction without offering the appellant an opportunity to have the settlement of the land on reasonable terms. His possession for all these years was not that of a trespasser. If the settlement proceedings in his case have not been finalised and there has been no grant or refusal of settlement, the officers of

Government cannot hold themselves entirely free from blame. If notice of eviction had been served on him when payment was not made within the date fixed by the notice issued in November 1931, the Government would either have received the money it demanded or the appellant would then have been evicted. The appellant has not by any conduct on his part prevented the officers of the Government from taking necessary action. In these circumstances, ejectment of the appellant without affording him an opportunity to take the settlement on reasonable terms does not seem to be desirable.

[7] For the reasons given above, the appeal is allowed and the case is sent back to the Deputy Commissioner for disposal of the application for settlement according to law in the light of the directions given above.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Assam 129 *[C. N. 49.]*

THADANI C. J. AND RAM LABHAYA J.

Gopinath Sarma—Appellant v. *Hangsanath Sarma and another—Respondents.*

Second Appeal No. 991 of 1947, D/- 21-2-1950, from judgment and decree of Special Sub-J., A. V. D., D/- 17-4-946.

(a) Registration Act (1908), S. 49 (a) — Partition deed not registered—Admissibility—Arrangement as to part of property if can be regarded as transfer —Transfer of Property Act (1882), Ss. 53A and 54.

The plaintiff and defendants who were brothers and members of a joint Hindu family partitioned their ancestral and self-acquired properties among which was a house in respect of which it was agreed between them that if the plaintiff paid two-thirds value of the house to the defendants the house would be allotted to him. The partition was effected by an unregistered deed which did not say "we have divided our property" but said "we divide our property" and further stated that if any one objected, it would not be tenable on the strength of this document. The plaintiff having paid two-thirds value of the house to the defendants and having been resisted by them filed a suit for declaration of his title and for possession:

Held that the parties purported to effect a partition of their properties by this deed which fell within the purview of S. 49, cl. (a), Registration Act, and though the deed was admissible in evidence for the purpose of proving the factum of partition, it could not be used for the purpose of proving that a particular property was allotted to the plaintiff upon partition as his share. [Para 8]

Held further (assuming that S. 53A, T. P. Act applied to a partition) that the house could not be isolated from the general scheme of partition and the arrangement in respect thereof could not be regarded as a transfer within the meaning of S. 53A or S. 54, T. P. Act. [Para 8]

Annotation: ('50-Com..) Registration Act, S. 49, N. 29 Pts. 1 and 2; ('50-Com.) T. P. Act, S. 53A, N. 6.

(b) Transfer of Property Act (1882), S. 53A—Applicability—Section has no application to partition. [Para 8]

Annotation: ('50-Com.) T. P. Act, S. 53A, N. 6.

(c) Transfer of Property Act (1882), S. 53A—Act done in furtherance of contract—Payment of consideration.

Per *Thadani C. J.*—An act which can be regarded as having been done in furtherance of the contract must consist of something more than mere payment of the consideration. [Para 10]

Per *Ram Labhaya J.*—Payment of consideration for a transfer of immoveable property where transferee has in part performance of the contract taken possession of the property or part thereof or where he being already in possession continues to remain in possession in part performance of the contract can be an act done in furtherance of the contract. [Para 16]

Annotation: ('50-Com.) T. P. Act, S. 53 A N. 10.

(d) Transfer of Property Act (1882), S. 53A—Act in furtherance of contract—Transferee not in possession—It is not necessary to consider whether some other act has been done in furtherence of contract (Ram Labhaya J.). [Para 15]

Annotation : ('50-Com.) T. P. Act, S. 53A, N. 10.

S. K. Ghose and P, Chaudhuri—for Appellant.

B. C. Barua and N. Goswami—for Respondents.

Thadani C. J.—This is a second appeal from the judgment and decree of the Special Subordinate Judge, A. V. D., dated 17th April 1946, by which he affirmed the judgment and decree of the trial Court which had dismissed the plaintiff's suit with no order as to costs.

[2] The plaintiff brought a suit for a declaration of his right, title and interest in the property in suit and for possession. The plaintiff and the defendants are brothers, and until 16th Ashar 1350 B.S., were members of a joint Hindu family. They owned certain ancestral and self-acquired movable and immovable properties, which they partitioned on 16th Ashar 1350 B. S. Among the properties involved in the partition was the house in suit, valued at Rs. 120, and it was agreed between the three brothers that on the appellant paying a sum of Rs. 80 to the other two brothers for their ⅔ share, the house would stand allotted to the appellant. The appellant paid Rs. 80 to his brothers, the two defendants, but later when he attempted to dismantle the house and remove the materials, the defendants resisted him, as a result of which he brought the present suit.

[3] The defence to the suit was a denial of the averments made by the plaintiff.

[4] Upon the pleadings, the trial Court framed the following issues:

1. Whether the house in question was legally allotted to the share of the plaintiff ? If not, whether the plaintiff is entitled to get his title declared in respect of the house ?

2. What relief, if any, is the plaintiff entitled to ?

[5] On the first issue, the trial Court held that the partition of all the properties belonging to the three brothers was effected by a partition-deed, which was inadmissible in evidence, not having been registered, and accordingly dismissed the plaintiff's suit.

[6] The lower appellate Court agreed with this finding and held that the provisions of S. 91, Evidence Act were a bar to the reception of oral evidence as to the terms of the partition deed.

[7] Mr. Ghose for the plaintiff-appellant has contended that the Courts below were in error in holding that the partition was effected by a deed, that the deed was only a memorandum of partition which had been previously effected between the parties; assuming that partition was effected by a deed and that the deed was required to be registered, nevertheless under the provisions of S. 49, Registration Act, it was permissible to use the deed for collateral purposes; in any case, the value of the property allotted to the share of the plaintiff being less than Rs. 100, the document was not required to be registered, the sale having been completed by delivery of possession to the plaintiff in pursuance of the agreement.

[8] We are unable to accept any of the contentions raised on behalf of the appellant. The partition deed is in these terms :

"Partition deed, executed by Taranath Sarma, Hangsanath Sarma and Gopinath Sarma, on 16th Ashar 1350. We divide our property, ancestral, self-acquired, movable and immovable, all debts, income, homestead, *rupit* land and others in equal three shares as detailed in the following paragraphs. We shall have no objection to that hereafter. If any objects, it will not be tenable on the strength of this document. To this effect we execute this deed in sound mind and health :

Division of Movable property.

We divide in equal three shares the bell-metal and brass utensils and other copper utensils.

2. Division of Houses.

The house on the eastern side, the cow-shed and gate-house, these three remain with Taranath. The house on the northern *bhiti* on the western side and the house on the southern side and the thatched roof of the corrugated iron sheet house remain with me Hangsanath. The house on the northern side in the middle portion, the gate-house of the southern side and store-house on the western side remain with Gopinath. The C. I. sheet house minus the posts is valued at Rs. 120, out of which Rs. 40 having been paid each to Taranath and Hangsanath, the C. I. sheet house remain with me Gopinath.

3. * * * * "

It is plain from the terms of the deed that the entire property belonging to the three brothers, and not only the house in dispute, was partitioned. We cannot isolate the house from the remaining property partitioned. The factum of the alleged partition as a whole cannot be gathered from the evidence of the plaintiff and his witnesses who have not said a word in their evidence about the general partition, but confined their evidence to the allotment of the house in dispute. We can find no justification for splitting the contents of the partition deed, isolating the property in suit, thereby encouraging a party to evade the provisions of the Registration Act or the Evidence Act. Moreover, the deed does not say "we have divided our property;" it says "we divide our property," making their intention clear that they were dividing the property in accordance with the deed itself, and not by any oral agreement. Their intention is further made clear by the words

"If any one objects, it will not be tenable on the strength of this document. To this effect we execute this deed in sound mind and health."

This recital leaves little room for doubt that the parties purported to effect a partition of their properties by this deed a — deed which falls within the purview of S. 49, cl. (a), Registration Act. It may be conceded that the dead was admissible in evidence for the purpose of proving the factum of partition, but it cannot be used for the purpose of proving that a particular property was allotted to the appellant upon partition as his share. As regards the contention that the proviso to S. 49, Registration Act permits an unregistered deed to be used as evidence of part-performance of a contract for the purposes of S. 53-A, T. P. Act, 1882, I do not think S. 53A has any application to a partition. Mr. Ghose argued that taking over of the entire house on payment to the defendants of their 2/3rd share amounts to a transfer within the meaning of Ss. 53A and 54, T. P. Act. Assuming that S. 53 A applies to a partition, the allotment of this particular house was part and parcel of the general partition of the properties belonging to the family and this particular arrangement which the three brothers arrived at between themselves, must be regarded as an arrangement to adjust the equities between them, and does not amount to a transfer of the property. For instance, so far as the other properties are concerned, they were not allotted to the respective parties for any consideration, but as a result of the partition. We cannot, therefore, isolate the house in question from the general scheme of partition and regard it as a transfer within the meaning of S. 53-A or S. 54, T. P. Act.

[9] Mr. Ghose relied upon a decision of the Madras High Court reported in *Ahobilachariar* v. *Tulsiammal*, A. I. R. (14) 1927 Mad. 830; (103 I. C. 231), but the facts of that case are entirely different from the facts before us. In the case before us, the alleged partition took place some time in 1944, and shortly afterwards the plaintiff brought the present suit in 1944. There is nothing on the paper book before us to satisfy us that the plaintiff, in pursuance of the partition, was in possession of this house. On the contrary, it appears that soon after the alleged partition, his two brothers resisted his attempt at taking possession. In the Madras case, possession of the property, upon partition, extended over a num-

ber of years, and that fact may have influenced the learned Judge to apply by implication the terms of S. 53-A, T. P. Act. It is to be observed that S. 53.A was not referred to in express terms by the learned Judge of the Madras High Court.

[10] In the Madras case, apparently Ramesan J. was influenced by the fact that the division in status had lasted from 1910 to 1918 and that the brothers lived as divided brothers. In this case, as we have observed, the alleged partition took place in 1944 and shortly afterwards a suit was brought in 1944. It is, therefore, not possible to say, on the facts of this case, that the plaintiff was in possession of the house in dispute in pursuance of the partition. Assuming in this case that the plaintiff was already in possession, and that he continued in possession in part performance of the contract, the question arises whether he did some act in furtherance of the contract. The act relied upon by Mr. Ghose is the payment of Rs. 80 to the two brothers. But the payment of Rs. 80 was the consideration for the contract, and cannot unequivocally be regarded as an act in furtherance of the contract. An act which can be regarded as having been done in furtherance of the contract must consist of something more than mere payment of the consideration. We have, therefore, come to the conclusion that the plaintiff has failed to bring his case within the purview of S. 53A, T. P. Act.

[11] The result is that the appeal is dismissed with costs.

[12] **Ram Labhaya J.**—I agree in the conclusion reached by my Lord the Chief Justice. I wish, however, to add a few remarks of my own.

[13] I agree with the view that the document in question was a deed of partition by which the property was actually partitioned. It was not a memorandum of any fact which had already been accomplished. It was, therefore, within the mischief of S. 17, Registration Act, and, therefore, inadmissible in evidence for showing that a particular portion or part of the property was allotted to a particular party. It could be used only for showing divided status.

[14] I am also inclined to agree that S. 53A, T. P. Act has no application to partitions. The section covers all transfers for consideration. A partition does not seem to be such a transfer as is referred to in that section. Persons between whom a property is partitioned are co-sharers. The ownership of their shares vests in them before partition. They do not acquire that ownership for consideration on partition. It merely effects the mode of enjoyment of the property. Before partition all co-sharers are in joint enjoyment by virtue of being co-sharers. After partition they agree to enjoy their shares separately. The change in the manner of the enjoyment of the property should not amount to a transfer.

[15] Mr. Ghose has relied on *Ahobelachariar* v. *Tulsiammal*, A. I. R. (14) 1927 Mad. 830 : (103 I. C. 281), for showing that the equitable doctrine of part performance can apply to partitions. This case was decided before S. 53A was enacted. It is no authority for the proposition that partitions are covered by the language of the section, the case having been decided at a time when the section did not exist. The doctrine itself could have applied then even to partitions as S. 53A was not there to regulate its application. There is no justification left now for the application of that rule of equity to partitions. This, however, is a question which need not be decided in this case as even assuming that S. 53A applies to partitions it cannot be relied on by the plaintiff as he himself is suing for possession of the property. The section can be relied on only by a transferee in possession. Even if plaintiff is treated as a transferee, he not being in possession of the property, the section does not come into play at all. To attract the application of the section it is necessary that the transferee should have taken possession of the property or any part thereof or the transferee being already in possession should have continued in possession in part performance of the contract. If this requirement is not satisfied, it is not necessary to consider whether some other act has been done in furtherance of the contract.

[16] Payment of consideration for a transfer of immovable property where transferee has in part performance of the contract taken possession of the property or part thereof where he being already in possession continues to remain in possession in part performance of the contract can be an act done in furtherance of the contract. I regret I am unable to agree to the proposition that even where a transferee is in possession of the property in part performance of the contract, the payment of the consideration cannot be regarded as an act in furtherance of the contract. I do not find any warrant for that proposition in the language of the statute, nor has any authority been cited in its support. If possession of the property has not passed, mere payment of consideration may not be regarded as an act in furtherance of the contract as such an act may be equivocal. But where transferee has taken possession the only act that he may be in a position to perform in many cases would be the payment of consideration. In fact, in another case, No. S. A. 1734 of 1944 I have taken the view that the tender of consideration by a transferee in possession not accepted by the transferor was an act in furtherance of the con-

tract within the meaning of S. 53A. This view, however, does not affect the result of the case. The transferee is not in possession. He is suing for it. He cannot, therefore, avail of the provisions contained in S. 53A. The appeal, therefore, must be dismissed.

V.R.B. *Appeal dismissed.*

A. I. R (37) 1950 Assam 132 *[C. N. 50.]*

THADANI C. J. AND RAM LABHAYA J.

Jalim Chand Saraogi — Petitioner v. *The State.*

Criminal Revn. No. 11 of 1950, D/- 13th March 1950, against order of Magistrate, 1st Class, Golaghat, D/- 8th October 1948.

Essential Supplies (Temporary Powers) Act (1946), S. 7 — Confiscation of vehicle carrying articles — Criminal P. C. (1898), S. 517.

Under S. 7 the vehicle in which the articles are carried cannot be one of the items of property in respect of which an order made under the Act has been contravened and having regard to the restricted scope of the section the general provisions of S. 517, Criminal P. C. cannot override the specific provisions in S. 7. [Paras 2, 4, 6]

Annotation : ('49-Com.) Cr. P. C., S. 517 N. 1.

D. N. Medhi — for Petitioner.

B. C. Barua Govt. Advocate (Jr.) — for the State.

Thadani C. J.—This is a revision application under the provisions of S. 439, Criminal P. C., directed against an order passed by the Magistrate, First Class, Golaghat, dated 8th October 1948, by which in addition to ordering confiscation of cloths, yarn and sugar, in respect of which offences under S. 7 of Act XXIV [24] of 1946 (Central) were committed, he confiscated to Government the truck which was used in the commission of the offence.

[2] It is contended on behalf of the applicant that the order passed by the learned Magistrate purporting to be an order under the provisions of S. 517, Criminal P. C., was in reality, an order passed in pursuance of S. 7 of Act XXIV [24] 1946, which is in these terms :

"7. (1) If any person contravenes any order made under S. 3, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, *and if the order so provides, any Court trying such contravention may direct that any property in respect of which the Court is satisfied that the order has been contravened, shall be forfeited to His Majesty* :"

It is plain from the language of S. 7 that the order of forfeiture must be directed against any property in respect of which the Court is satisfied that the order has been contravened. The property in respect of which the order has been contravened, consists of cloths, yarn and sugar. The vehicle in which these articles were carried, is not one of the items of property in respect of which an order made under Act XXIV [24] of 1946 has been contravened.

[3] Previous to the enactment of Act XXIV [24] of 1946, which is an Act of the Indian Legislature and which received the assent of the Governor-General on 19th November 1946, there was an order passed by the Government of Assam on 27th September 1946 which contained the following provision :

"A Court trying any contravention of this order may, without prejudice to any other sentence which it may pass, direct that any cloth or yarn in respect of which it is satisfied that such contravention has occurred, shall be forfeited to His Majesty."

The language of S. 7 of the Central Act, in so far as it relates to forfeiture, is strikingly similar to the language of S. 20, Assam Cotton Cloth and Yarn Dealers Licensing Order, 1946, dated 27th September 1946.

[4] Mr. Medhi for the petitioner contends that having regard to the restricted scope of S. 7, which does not empower a Court trying a contravention under Act XXIV [24] of 1946 to forfeit to the State the vehicle in which property which is the subject-matter of the contravention, is carried, the general provisions of S. 517, Criminal P. C. cannot serve to override the specific provision contained in S. 7 of Act XXIV [24] of 1946. In support of his contention, he has referred us to two decisions of the Bombay High Court reported in *Hansraj* v. *Emperor*, A. I. R. (31) 1944 Bom. 292 : (46 Cr. L. J. 482 F. B.) and *Raghunath Krishna* v. *Emperor*, A. I. R. (34) 1947 Bom. 239 : (I. L. R. (1946) Bom. 1063) and a decision of the Lahore High Court reported in *Abdul Majid* v. *Emperor*, A. I. R. (32) 1945 Lah. 149 : (47 Cr. L. J. 130 F. B.). In *Hansraj* v. *Emperor*, A.I.R. (31) 1944 Bom. 292 : 46 Cr. L, J. 482 F. B.). Divatia J. observed :

"The words 'if the order so provides' which cannot be regarded as redundant, must be given their plain meaning, and that meaning, in my view, is that although an order of confiscation can be made by the Court in its discretion under S. 517, that discretion is not to be exercised in those cases in which the appropriate authority issuing the order did not think it desirable that such discretion should be used. Rule 81 (4) imposes special penalty for special offences created by that rule consisting in the contravention of any order made under the rule, and when it expressly says that the order of confiscation can be made if it is so provided in the order which is being contravened, it must be take to mean that if the order is silent about it, no order of confiscation, and in some orders issued before the amendment, the power of disposal of of property can be made."

Lokur J. observed :

"Penal statutes have to be strictly construed in favour of the subject. This is particularly so in the case of enactments which create new offences for meeting an emergency and seek to penalise acts which, in normal times, would not amount to an offence."

In the second case reported in *Raghunath Krishna* v. *Emperor*, A. I. R. (34) 1947 Bom. 239 : (I. L. R. (1946) Bom. 1063), the Divi-

sion Bench consisting of Sen and Gajendragadkar JJ., followed the previous decision of the Full Bench of the Bombay High Court reported in *Hansraj* v. *Emperor*, A. I. R. (31) 1944 Bom 292 : (46 Cr. L. J. 482).

[5] The Full Bench of the Lahore High Court, *Abdul Majid* v. *Emperor*, A. I. R. (32) 1945 Lah. 149 : (47 Cr. L. J. 130) consisting of Harries C. J., Teja Singh and Khosla JJ., also took the same view as was taken by the Full Bench of the Bombay High Court. Harries C. J., obeserved:

"It appears to me clear that R. 81, sub-r. (4), Defence of India Rules, impliedly limits the operation of S. 517, Criminal P. C. To hold otherwise would be to hold that the words 'if the order so provides' in R. 81, sub-r. (4), Defence of India Rules are redundant and absolutely meaningless. If the learned Magistrate could confiscate this oil, though the order was silent as to confiscation, then the words which I have referred to, mean nothing whatsoever. On the other hand, if the argument of the petitioner be accepted that confiscation can only be ordered if the order so provides, then due weight and meaning is given to these words. Meaning must be given to every word in a Section, wherever possible, and the natural construction of R. 81, sub-r. (4), Defence of India Ruless, is this is that if the order, contravention of which is alleged, provides for confiscation, then the property which is the subject-matter of the proceedings, can be confiscated. On the other hand, if the order does not so provide, then there is no power of confiscation."

[6] With respect, we are in agreement with the view expressed by the learned Judges of the Bombay and Lahore High Courts.

[7] The result is that the application is allowed, the order of the learned Magistrate confiscating the truck (Ex. 1) is set aside.

[8] The security bond furnished by the petitioner is discharged.

[9] The Rule is made absolute.

Ram Labhaya J.— I agree.

D.H. *Rule made absolute.*

A. I. R. (37) 1950 Assam 133 *[C.N. 51.]*

THADANI C. J. AND RAM LABHAYA J.

Lalit Kumar—*Appellant* v. *Bhagaban Ch. Sarma and others*—*Respondents.*

First Appeal No. 2A of 1948, D/- 21st February 1950, from judgment and decree of Special Sub-J., A. V. D., D/-8th January 1948.

(a) Defence of India Act (1939), S. 19—Arbitrator — Appointment of.

Under S. 19 of the Act, the appointment of an arbitrator is contemplated only when there is no agreement between the Government and the owners of the property. It does not contemplate appointment of an arbitrator for the purpose of settling disputes involving rights of parties in the matter of the apportionment of the compensation. There is, therefore, no question of appointing an arbitrator when there is an agreement between the parties as regards the amount of compensation fixed by the Government. [Para 14]

(b) Specific Relief Act (1877), S. 42, Proviso — 'Further relief.'

Where certain lands are acquired by Government and certain amount is fixed as compensation, a suit for declaration of the right of the plaintiffs to the entire amount of compensation set apart for the defendants, who claim to be occupancy tenants of the acquired land, to which Government is not a party, is not hit by the proviso to S. 42, as there is no further relief which can be claimed against the defendants. [Para 15]

Annotation : ('46-Man.) Specific Relief Act, S. 42, N. 7.

(c) Landlord and tenant—Occupancy rights — Nature of.

Occupancy ryots are not, in the strict sense of the word, mere tenants to whom the right to enjoy the property alone has been transferred; occupancy rights are heritable and transferable and cannot be regarded merely as rights accruing upon a lease. [Para 17]

(d) Defence of India Rules (1939), S. 75A (3)— Requisition followed by acquisition without surrender of property — Rights of claimants to compensation.

The words "and the period of requisition thereof shall end" in sub-r. (3) of R. 75A, Defence of India Rules, mean that when there is requisition followed by acquisition without surrendering the property the rights of the claimants have to be determined as though there was no requisition in the first instance. The rights of the claimants do not become extinct even if they cease on requisition. [Para 17]

(e) Civil P. C. (1908), Ss. 100, 101—Admissibility of evidence—Objection that particular document is not duly proved cannot be taken for first time in second appeal. [Para 19]

Annotation : ('44-Com.) Civil P. C., Ss. 100-101, N. 27.

(f) Civil P. C. (1908), O. 1, R. 3—Suit arising out of same transaction.

Where the plaintiffs' right to relief arises out of the compensation determined by the Government for land acquired under the Defence of India Rules, and they sue for a declaration that they are entitled to the amount of compensation set apart for the defendants who claim to be the occupancy tenants of the land, the suit is not bad for multifariousness as the same common question of law and fact would have arisen if separate suits had been brought against each of the defendants. [Para 21]

(g) Defence of India Rules, (1939), S. 75A — Acquisition under—Owners of property — Position of, vis-a-vis Government.

Obiter. — No question of tenancy, contractual or statutory, arises between the Government and the owner of the property upon requisition under the Defence of India Rules. What happens is that upon requisition when the Government take possession of the property, the claimants are kept out of it, and as the Government take possession in pursuance of their statutory powers they must pay compensation for such possession, and one of the ways in which such compensation might be determined is to determine what rent the landlord would receive if he were to let or had let out the property to a tenant: A. I. R. (33) 1946 Cal. 416, *Ref.* [Para 22]

J. N. Borah—for Appellant.

S. K. Ghose, *B. B. Das*, *K. K. Sarma* and *K. Goswami*—for Respondents.

Thadani C. J.—This is a First Appeal from the judgment and decree of the learned Special Subordinate Judge, A. V. D., dated 8th January 1948, by which he decreed the plaintiff's suit for

a declaration that the defendants had not acquired occupancy right in the lands in suit, and that the plaintiffs alone were entitled to the compensation awarded for the acquisition of the lands, with no order as to costs.

[2] Twenty-three plaintiffs brought the present suit against 121 defendants for a declaration that the defendants had not acquired any occupancy rights in the lands described in schedule Kha, and that they alone were entitled to compensation for the acquisition of the lands.

[3] The facts material to the appeal are these: The lands in suit are situated in the village of Garpandu Kumarpara in mouza Ramcharani. Periodic patta N. K. No. 10 comprises an area of 22 bighas 3 kathas 16 lessas; periodic patta N. K. No. 6, an area of 23B-2K 9L; periodic patta N. K. No. 14, an area of 45B-2K-9L; periodic patta N. K. No. 18, an area of 23B. 1K. 17L; periodic patta N. K. No. 17, an area of 23B-1K-1L; N. K. patta No. 19 an area of 23B-3K-11L; N. K. patta No. 3 comprises an area of 45B-2K-9L; and N. K. patta No. 4, an area of 25B. 0K-17L.

[4] Out of patta No. 10 comprising an area of 22B-3K 16L, the area acquired was 8B-1K-10L; the compensation for this area acquired was assessed at Rs. 2075. Out of patta No. 6 comprising an area of 23B-2K. 9L, an area of 5B-0K.-7L was acquired; the compensation for this area being assessed at Rs. 1272-8; out of patta No. 14 comprising an area of 45B-2K-9L, an area of 5B-0K-3L was acquired, the compensation for this area being assessed at Rs. 1257-4; from patta No. 18 comprising an area of 23B-1K-17L, an area of 2B 0K-11L was acquired, the compensation for this being assessed at Rs. 626-8; from patta No. 17 comprising an area of 23B-1K-1L, an area of 2B-0K-1L was acquired, the compensation being assessed at Rs. 302-8; from patta No. 19 comprising an area of 23B-11L, an area of 2B-3K-9L was acquired, the compensation being assessed at Rs. 672-8; from patta No. 3 comprising an area of 45B-2K-9L, an area of 3B-1K 15L was acquired, the compensation being assessed at Rs. 837-8; out of patta No. 4 comprising an area of 28B-0K-17L, an area of 1B-3K-5L was acquired, the compensation being assessed at Rs. 530. The total compensation for the area acquired amounts to Rs. 7477.

[5] Patta No. 10, at the date of the requisition, stood in the name of plaintiffs 1, 2, 3 and pro forma defendants 101 to 114; patta No. 6 stood in the names of plaintiffs 4 to 6, and pro forma defendants 95 to 100; patta No. 14 stood in the names of plaintiffs 10 to 20; patta No. 18 stood in the names of plaintiff 7 and pro forma defendants 95 and 115 to 118; patta No. 17 stood in the names of plaintiff 8 and pro forma defendants 117 and 118; patta No. 19 stood in the names of plaintiffs 9 and proforma defendants 95, 117 and 118; patta No. 3 stood in the names of plaintiffs 21, 22 and pro forma defendants 119 and 120; patta No. 4 stood in the names of plaintiff 23 and pro forma defendant 121.

[6] The lands described in Schedule Kha were requisitioned by the Government of India under its Notification No. 132/41/67, dated 6th May '42. In due course, notices were issued for evicting the plaintiffs and the defendants who were then in occupation of the *busti* lands. In due course, the plaintiffs and the defendants handed over possession of the lands requisitioned to the Military authorities. Three years later on 25th May '45, the lands which had been previously requisitioned, were permanently acquired for the Railway Department under the Defence of India Act, and notices were duly served on the plaintiffs and the defendants on 25th May '45, by which the Government required the parties to submit within a month their claims for compensation for the houses, trees and crops standing thereon.

[7] The Land Acquisition Staff of Gauhati assessed the value and prepared lists showing the plaintiffs and the defendants as being entitled to compensation. The Land Acquisition Officer took the view that the defendants as occupancy tenants, were entitled to $\frac{1}{4}$th of the amount assessed as compensation. The plaintiffs objected to the setting apart of $\frac{1}{4}$th share of the amount assessed for the benefit of the defendants, and contended that they were entitled to the whole amount. The Deputy Commissioner, Kamrup, passed an order requiring the plaintiffs within one month from 20th March '46 to file a suit for a declaration that the defendants were not entitled to get any share of the compensation assessed. In due course, the plaintiffs brought the present suit for a declaration.

[8] In the plaint, the plaintiffs described the defendants as tenants-at-will. The defendants denied that they were tenants-at-will and contended that they had acquired occupancy rights; they conceded that the distribution as proposed by the Deputy Commissioner was just and equitable.

[9] On the pleadings, the trial Court framed the following issues : (1) Whether the suit is bad for multifariousness ? (2) Whether the defendants are tenants-at-will or are occupancy and permanent riots ? (3). Whether the tenancy was determined as alleged and defendants lost their occupancy rights ? (4) Whether the defendants are entitled to any portion of the valuation made by the Acquisition Officer ? (5) Whether the suit is barred by waiver and acquiescence ? (6). Whether the plaintiffs have put proper court-

fee ? (7) What relief or reliefs, if any, are the parties entitled to ?

[10] At the trial, the plaintiffs contended that the defendants had already received compensation for the houses and crops and that the relationship between them and the defendants as landlords and tenants-at-will had terminated on the requisition of the property by Government in 1942. As a result of its findings on the issues framed, the trial Court decreed the plaintiffs' suit negativing the right of the defendants to any share of the compensation assessed.

[11] Mr. Borah for the appellants has contended that the suit, as framed, did not lie, that in any case, the suit was incompetent as the plaintiffs' rights and remedies were governed by R. 75-A, Defence of India Rules, framed under the Defence of India Act, 1935, which is in these terms :

"75A. *Requisitioning of Property.*—(1) If in the opinion of the Central Government or the Provincial Government, it is necessary or expedient so to do for securing the defence of British India, public safety, the maintenance of public order or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the communinty, that Government may by order in writing requisition any property, moveable or immoveable, and may make such further orders as appear to that Government to be necessary or expedient in connection with the requisitioning :

Provided that no property used for the purpose of religious worship and no such property as is referred to in R. 66 or in R. 72 shall be requisitioned under this rule.

(2) Where the Central Government or the Provincial Government has requisitioned any property under sub-r. (1), that Government may use or deal with the property in such manner as may appear to it to be expedient, and may acquire it by serving on the owner thereof, or where the owner is not readily traceable or the ownership is in dispute, by publishing in the official Gazette, a notice stating that the Central or Provincial Government, as the case may be, has decided to acquire it in pursuance of this rule.

(3) Where a notice of acquisition is served on the owner of the property or published in the official Gazette under sub-r. (2), then at the beginning of the day on which the notice is so served or published ; the property shall vest in Government free from any mortgage, pledge, lien or other similar encumbrance, and the period of the requisition thereof shall end.

(4) Whenever in pursuance of sub-r. (1) or sub-r. (2), the Central Government or the Provincial Government requisitions or acquires any moveable property, the owner thereof shall be paid such compensation as that Government may determine :

Provided that, where immediately before the requisition, the property was, by virtue of a hire purchase agreement, in the possession of a person other than the owner, the amount determined by Government as the total compensation payable in respect of the requisition or acquisition shall be apportioned between that person and the owner in such manner as an arbitrator appointed by the Government in this behalf may decide to be just.

(5) The Central Government or the Provincial Government may, with a view to requisitioning any property under sub-r. (1) or determining the compensation payable under sub-r. (4), by order—

(a) require any person to furnish to such authority as may be specified in the order such information in his possession relating to the property as may be so specified;

(b) direct that the owner, occupier or person in possession of the property shall not without the permission of Government, dispose of it or where the property is a building, structurally alter it till the expiry of such period as may be specified, in the order.

(5a) Without prejudice to any powers otherwise conferred by these Rules, any person authorised in this behalf by the Central Government or the Provincial Government may enter any premises and inspect such premises and any property therein or thereon for the purpose of determining whether and, if so, in what manner, an order under this rule should be made in relation to such premises or property, or with a view to securing compliance with any order made under this rule.

(6) Any orders made, and any action taken, under or in relation to Rr. 76, 79 or 83 before 16th May 1942, shall be deemed to have been made or taken under or in relation to this Rule and to be as valid as if this rule had been then in force.

(7) If any person contravenes any order made under this rule, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both."

[12] The record of the case shows that the notices of acquisition were duly served not only upon the plaintiffs but also upon the defendants. It is reasonable, therefore, to suppose that the Government regarded both the plaintiffs and the defendants as owners of the property. The only other class of persons which is recognised under R. 75-A are the hire-purchasers under a hire-purchase agreement. The rest of the sub-rules of R. 75-A deal with the procedure to be followed in determining the compensation payable under sub-r. (4).

[13] Mr. Borah's contention that the present suit was not competent in virtue of S. 19, Defence of India Act, we think, is not well founded. Section 19, Defence of India Act is in these terms :

"*19. Compensation to be paid in accordance with certain principles for compulsory acquisition of immovable property etc.*—Where by or under any rule made under this Act any action is taken of the nature described in sub-s. (2) of S. 299, Government of India Act, 1935, there shall be paid compensation the amount of which shall be determined in the manner, and in accordance with the principles, hereinafter set out, that is to say :

(a) Where the amount of the compensation can be fixed by agreement, it shall be paid in accordance with such agreement.

(b) Where no such agreement can be reached, the Central Government shall appoint as an arbitrator a person qualified under sub-s. (3) of S. 220 of the above-mentioned Act for appointment as a Judge of a High Court.

(c) The Central Government may, in any particular case, nominate a person having expert knowledge as to the nature of the property acquired, to assist the arbitrator, and where such nomination is made, the

person to be compensated may also nominate an assessor for the said purpose.

(d) At the commencement of the proceedings before the arbitrator, the Central Government and the person to be compensated shall state what in their respective opinions is a fair amount of compensation.

(e) The arbitrator in making his award shall have regard to :

(i) the provisions of sub-s. (1) of S. 23, Land Acquisition Act, 1894, so far as the same can be applicable ; and

(ii) whether the acquisition is of a permanent or temporary character.

(f) An appeal shall lie to the High Court against an award of an arbitrator except in cases where the amount thereof does not exceed an amount prescribed in this behalf by rules made by the Central Government.

(g) Save as provided in this section, and in any rule made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this Section.

(2) The Central Government may make rules for the purpose of carrying into effect the provisions of this section.

(3) In particular and without prejudice to the generality of the foregoing powers such rules may prescribe—

(a) the procedure to be followed in arbitrations under this section;

(b) the principles to be followed in apportioning the costs of proceedings before the arbitrator and on appeal;

(c) the maximum amount of an award against which no appeal shall lie."

[14] Mr. Borah contends that the proper remedy of the plaintiffs was to seek arbitration under S. 19, Defence of India Act 1935, and not to bring a suit. The contention is manifestly based upon a misunderstanding of the provisions of S. 19 of the Act. Under S. 19 of the Act, the appointment of an arbitrator is contemplated only when there is no agreement between the Government and the owners of the property. Section 19 does not contemplate appointment of an arbitrator for the purpose of settling disputes involving rights of parties in the matter of the apportionment of the compensation. The question of apportionment of compensation as between the claimants is not to be decided under the Defence of India Act or the rules framed thereunder. Mr. Borah attempted to argue that there was no agreement between the Government on the one hand and the plaintiffs and the defendants on the other as to the amount of compensation to be fixed. So far as the plaintiffs are concerned, their Advocate has frankly stated that his clients have never disputed the compensation fixed by Government and that, in fact, all the parties had agreed to the amount so fixed. This statement of the plaintiffs' advocate is substantiated by what the defendants have stated in paragraph 5 of their written statement which is in these terms. [After quoting Para. 5, his Lordship proceeded:] We are satisfied that there was an agreement between the plaintiffs and the defendants on the one hand and the Government on the other as to the amount fixed as compensation by Government.

[15] It was next contended by Mr. Borah that the suit being one for a declaration only without any consequential relief, no decree could have been passed in view of the provisions of S. 42, Specific Relief Act. The proviso to S. 42 is in these terms:

"Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

It is plain that in this case the plaintiffs are not able to seek any further relief as against the defendants. The plaintiffs' suit is clearly for a declaration of their right to the entire sum of Rs. 7000 odd set apart by Government for the benefit of the defendants. The amount claimed by the plaintiffs is not in the possession of the defendants; it is in the possession of Government who are ready to pay it to the plaintiffs if their right to it is declared by a Court of law. The Government not being a party, the plaintiffs cannot obtain relief in the matter of the payment of the amount from Government by a decree.

[16] Out of the 121 defendants 94 have appealed. Mr. Borah for the appellants has drawn our attention to an inconsistency in the operative part of the judgment in which it is declared that the defendants have no occupancy rights in the *busti* lands, whereas the finding of the trial Court on issue No. 2 is in these terms:

"I hold that the defendants were occupancy ryots at the time they were made to vacate these lands."

Mr. Borah contends that upon this finding, the defendants were clearly entitled to the entire sum of Rs. 7,000 odd which has been set apart as their share, the share of the plaintiffs having been withdrawn by them.

[17] Mr. Ghose for the respondents has attempted to explain the inconsistency by stating that what the learned Judge meant was that notwithstanding the fact that the defendants were occupancy tenants at the date of the requisition, they were not so at the date of the acquisition, the relationship between the plaintiffs and the defendants as landlords and tenants having ceased at the date of the requisition. The explanation, though plausible, is not convincing. Occupancy ryots are not, in the strict sense of the word, mere tenants to whom the right to enjoy the property alone has been transferred ; occupancy rights are heritable and transferable and cannot be regarded merely as rights accruing upon a lease. I am unable to accept the position that when there is a requisition of property under the Defence of India Rules in the first instance, followed by acquisition without

surrendering the property, the rights of the claimants have to be ascertained first with reference to the requisition and, if those rights cease upon requisition, they must be regarded as extinct if there is a subsequent acquisition, even though there is no surrender in the interval. The acceptance of this contention would militate against the words " and the period of requisition thereof shall end " in sub-r. (3) of R. 75A, Defence of India Rules. These words in sub-r. (3) mean that notwithstanding the fact that when there is requisition followed by acquisition, the rights of the claimants have to be determined as though there was no requisition in the first instance. I, therefore, propose to examine the finding of the trial Court whether the appellants have established their status as occupancy tenants.

[18] Mr. Borah argued that all the appellants have succeeded in establishing their status in view of the fact that the plaintiffs failed in their allegation that they were tenants at will. It is true that the plaintiffs failed to establish that the defendants were tenants at will, but it was not the case of the plaintiffs that the defendants were occupancy tenants; that was the case of the defendants, which they had to establish. The question, therefore, arises whether all the defendant-appellants have succeeded in proving their status as occupancy tenants. The evidence on this issue is to be found at pp. 28, 29, 31, 34, 35 and 114 of the paper-book. [After discussing the evidence and holding that only defendant 21 has succeeded in establishing his status as occupancy tenant and that defendants 60 and 61 have not, his Lordship proceeded.]

[19] The only reliable evidence which appears on the record is Ex. F a copy of a cheeta of 30 years of Ramcharani mouza, 1923-28. Mr. Ghose for the respondents contended that Ex. F has not been duly proved. We are, however, unable to entertain this objection for the first time in this Court. No objection appears to have been taken to the reception of Ex. F at the trial. Mr. Ghose contends that even if Ex. F were taken into consideration, it serves to establish that defendants 21, 32 and 37 only were occupancy tenants. We think this contention must be upheld. Mr. Borah for the defendants was unable to point out from Ex. F that any other defendants had acquired occupancy rights. Exhibit F contains, with the exception of defendants 32 and 37, the names of persons who are not defendants in the suit. Mr. Borah urged that the other defendants did not give evidence at the trial because they relied upon the evidence of the three defendants and the 2 other witnesses; that, in any case, the failure of the defendants other than defendants 21, 32 and 37 to depose to their status was due to the manner in which the suit was framed—suit in which 23 plaintiffs had impleaded 121 defendants, notwithstanding the fact that the title of the plaintiffs and the defendants was to be found in different pattas. In other words, in his submission, as the suit was bad for multifariousness the plaintiffs were not entitled to take exception to the failure of the defendants other than defendants 21, 32 and 37, to depose to their status. It is to be observed, however, that this aspect of the case was not argued or pressed in the Court of first instance. For the first time; Mr. Borah raised this question in reply to the respondents' advocate's address. Even so, we decided to permit Mr. Borah to address us on this aspect of the case.

[20] It is plain that unless Mr. Borah succeeds in taking the suit out of the purview of O. 1, R. 3, Civil P. C., the objection as to multifariousness must fail. Order 1, R. 3 is in these terms :

"3. *Who may be joined as defendants*—All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise."

[21] Mr. Borah contends that the plaintiffs' right to relief in this case does not arise out of the same act or transaction or series of acts or transactions, so as to attract the provisions of R. 3. But we think the plaintiffs' right to relief clearly arises out of the compensation determined by Government for the land acquired under the Defence of India Rules. We are unable to accept Mr. Borah's contention that the act or transaction in this case is not the compensation assessed by Government but rather a series of acts or transactions resulting in the deprivation of the rights of the plaintiffs and the defendants in the property acquired. It is true that upon acquisition, the plaintiffs and the defendants lost all rights in the property, but it is equally true that upon a statutory acquisition under the Defence of India Rules, no rights remained with the persons whose lands were so acquired, except the right to compensation. The right to relief, therefore, of both the plaintiffs and the defendants arose as a result of the amount fixed by Government as compensation. In this view, it is plain that if separate suits had been brought against the defendants or each of them by the plaintiffs or each of them, the common questions of law and fact would have been (1) whether the defendants were occupancy tenants (2) what compensation, if any, were they entitled to ?

[22] The legal position of the Goverment *vis-a-vis* the persons whose lands are acquired under the Defence of India Rules has been stated by the learned Judges of the Calcutta High Court in "*Province of Bengal* v. *Board of Trustees for the Improvement of Calcutta*," A. I. R. (33) 1946 Cal. 416 : (227 I. C. 117). With respect, I agree with all that the learned Judges have stated except in one particular, where the learned Judges have regarded the position of Government vis-a-vis the owners of the property upon requisition as amounting to a statutory tenancy in favour of Government. With all respect, I do not think any question of tenancy, contractual or statutory, arises between the Government and the owners of the property upon requisition under the Defence of India Rules. What happens is that upon requisition when the Government takes possession of the property, the claimants are kept out of it, and as the Government have taken possession in pursuance of their statutory powers, they must pay compensation for such possession, and one of the ways in which such compensation might be determined is to determine what rent the landlord would receive if he were to let or had let out the property to a tenant. If the learned Judges of the Calcutta High Court meant this when they said that there was a statutory tenancy created between the Government and the persons who were kept out of possession upon requisition under the Defence of India Rules, I would be content to endorse it.

[23] On the merits of the appeal, we have come to the conclusion that defendants 21, 32 and 37 only have established their status as occupancy tenants. The Calcutta High Court had occasion to consider the right of occupancy ryots upon acquisition of land under the Land Acquisition Act. Garth C. J., delivering the judgment of the Division Bench observed:

"The parties who usually suffer most from lands being taken for Government purposes are either the ryots with right of occupancy, or the holders, whoever they may be of the first permanent interest above the occupying ryots. The actual occupier is of course turned out by the Government, and if he is a ryot with a right of occupancy, he loses the benefit of that right, besides being driven possibly to find a holding and a home elsewhere; and the holder of the tenure immediately superior to the occupying ryots, whatever the nature of his holding may be, loses the rent of the land taken during the period of his holding. These two classes, therefore, would, generally speaking, be entitled to the larger portion of the compensation, and if the *darpatnidar* in this instance belongs to the latter class, the larger portion of the compensation ought presumably, to have gone to him."

We have accordingly come to the conclusion that defendants 21, 32 and 37 who have established their status as occupancy ryots, should be awarded compensation. There is no evidence before us to indicate to what share of the compensation determined by Government an occupancy ryot is entitled, vis-a-vis the owner. In the absence of such evidence, it is to be supposed that if compensation is awarded to more than one person and their shares *inter se* cannot, with any degree of certainty, be ascertained, they would be entitled to an equal share. Happily in this case it is not necessary to determine the shares of defendants 21, 32 and 37 as they have claimed a stated sum and Mr. Ghose has stated that the plaintiffs will not withdraw the amount claimed by these 3 defendants. We would accordingly modify the judgment and decree of the trial Court by declaring the right of the plaintiffs to the entire amount lying in deposit with Government less the amount which has been claimed by defendants 21, 32 and 37.

[24] The trial Court made no order as to costs of the suit presumably in view of the peculiar circumstances of the case. We allow the appeal to the extent of the modification to which we have referred, with no order as to costs.

Ram Labhaya J.—I agree.

D.R.R. *Appeal partly allowed.*

A. I. R. (37) 1950 Assam 138 *[C. N. 52.]*

RAM LABHAYA J.

Dhanaram Namasudra and others—*Petitioners* v. *Kalicharan Namasudra*—*Opposite Party.*

Criminal Revn. No. 57 of 1949, D/- 17th March 1950.

Criminal P. C. (1898), S. 133 (1)—Channel used by public—Obstruction.

Where a channel can lawfully be used by the public for 6 months when there is water in it, the application of S. 133 is clearly attracted if the people are prevented by the obstruction created by the person proceeded against from plying boats in the channel. [Para 9]

Annotation: ('49-Com.) Cr. P. C., S. 133, N. 13.

B. C. Barua—for Petitioners.

J. C. Sen and R. K. Chaudhury—for Opposite Party.

Order.—An order under S. 137 (3), Criminal P. C. directing removal of an obstruction from a water channel within 14 days of the order was passed against 8 persons on 30th June 1949. On a petition of revision against this order, the learned Sessions Judge, L. A. D., after considering the evidence in the case came to the conclusion that question involved was one of fact and that there was no sufficient ground for a reference of the matter to this Court. He rejected the petition therefore.

[2] Three out of the 8 persons against whom the order was made have come up on revision to this Court.

[3] The case for the O. P. Kalicharan Namasudra, on whose complaint the order in question

was passed, was that the petitioners along with others had constructed a bund over a channel which opened up during the rains, in order to catch fish there. It was also stated that this act was likely to lead to a breach of the peace. The petition was sent to the O/C. Hajo Police Station for enquiry and report. From the report it appeared that the petitioners with others had constructed a bund in the channel which connected Pitkati Beel to Lakhaitari river. The enquiry further revealed that there was apprehension of the breach of the peace also. The police report formed the basis of the proceedings under S. 133, Criminal P. C.

[4] The case of the 2nd party was that the channel in question was not a public one and S. 133, Criminal P. C., had no application to the facts of the case.

[5] Besides the complainant, Kalicharan Namasudra, two other witnesses were examined on his behalf. The petitioners examined only one witness, the Mandal of the lot in which the channel is situate. The complainant's witnesses stated that the obstruction in question prevented people from plying boats in the channel. The witness on behalf of the 2nd party admitted that a bund had been constructed by the petitioners for purposes of catching fish. He stated that it did not cause any obstruction to boats as whenever boats came near the bund it was opened.

[6] On this evidence the learned Magistrate passed the order, the correctness of which has been assailed by this revision petition. The learned Judge was evidently of the view that the members of the public had access to the channel for 6 months when there was water in the channel and that they could lawfully ply boats therein. This finding receives support from the statement made by the Mandal of the lot who appeared as a witness on behalf of the petitioners.

[7] The learned counsel for the petitioners contends that the channel was private property and the dispute between the parties relates to private rights. Section 133, therefore, he argued, could not be applied to the facts of this case. In support of his contention he relied on *In re Jaswantsangji Fatesangji*, 22 Bom. 988 and *Jagannath Sahu* v. *Parmeshwar Narayan*, 96 ALL. 209: (A. I. R. (1) 1914 ALL. 213: 15 Cr. L. J. 229).

[8] In the *Bombay case* it was decided that where a dispute arose between the proprietors of two *talukdari* villages situate on the banks of a river about the diversion of the course of the river by means of a dam and a trench made by one of them in the current of the river, and each *talukdar* claimed the river as his own private property, S. 133, Criminal P. C., had no application.

[9] In the *Allahabad case*, it was held "that a field, which is on a lower level than the adjoining fields and over which the surplus water of those adjoining fields used to flow into a tank, even if it could be described as a channel, is not such a channel as could lawfully be used by the public, and action cannot be taken under S. 133, Criminal P. C. for the removal of any obstruction from it."

The learned counsel for the opposite party has no quarrel with the interpretation placed on S. 133 in these cases. He points out that in this case the channel could lawfully be used by the public for 6 months when there was water in it. If this finding is correct, the application of S. 133 is clearly attracted.

[10] I have no reason to differ from the finding arrived at in the Courts below. In these circumstances, the authorities relied on by the learned counsel for the petitioners would not apply and the order of the learned Magistrate would not be without jurisdiction.

[11] The learned Magistrate has pointed out in his report dated 3rd January 1950 that the obstruction in the channel has already been removed. This makes the dispute somewhat academic. There is no reason for interference. The petition of revision, therefore, is dismissed.

V.R.B. *Revision dismissed.*

A. I. R. (37) 1950 Assam 139 *[C. N. 53.]*

THADANI C. J. AND RAM LABHAYA J.

Rukmini Kumar Das — Appellant v. *The Chairman of the Silchar Municipal Board and another — Respondents.*

Second Appeal No. 28 of 1949, D/- 13-3-1950, from judgment and decree of Sub-J., U. A. D. D/-28-2-1949.

Municipalities — Assam Municipal Act (I [1] of 1923), Ss 320 and 286 — Plaintiff served with notice by Chairman of Municipal Board calling upon plaintiff to turn off water connection from his premises — Suit by plaintiff against Municipal Board for permanent injunction — Notice under S. 320 held necessary — Notice of Chairman held act of Board within S. 286. [Paras 9 and 10]

S. K. Ghose and P. Chaudhuri — for Appellant.

N. M. Dam — for Respondents.

Thadani C. J.—This is a second appeal from the judgment and decree of the Subordinate Judge, U. A. D., dated 28th February 1949, by which he affirmed the judgment and decree of the trial Court which had dismissed the plaintiff's suit, with no order as to costs.

[2] The plaintiff-appellant brought a suit against the Silchar Municipal Board for a permanent injunction restraining the Board from turning off a water-pipe connection from a building in occupation of the plaintiff within the municipal area of Silchar.

[3] The defence taken to the suit was that the plaintiff's failure to comply with the provisions of S. 320, Assam Municipal Act was a

bar to the institution of the suit. Both the trial Court and the lower appellate Court upheld the defence.

[4] The relevant part of S. 320, Assam Municipal Act is in the these terms :

"*320.* No suit shall be brought against any Board or any of its officers, or any person acting under its direction for anything done under this Act, until the expiration of one month next after notice in writing has been delivered or left at the office of such Board, and also (if the suit is intended to be brought against any officer of the said Board or any person acting under its direction) at the place of abode of the person against whom such suit is threatened to be brought, stating the cause of suit, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the person who intends to bring the suit;

and unless such notice be proved, the Court shall find for the defendant."

[5] Mr. Ghose for the appellant contends that in this case, no notice was necessary as the suit brought by the appellant was not a suit for anything done under the Assam Municipal Act by the Board or any of its officers or any person acting under its direction; it was a suit for injunction in respect of a threatened act which the Municipal Board of Silchar intended to take in the event of the appellant's failure to comply with a notice served upon him by the Board calling upon him to turn off the water-pipe connection from the premises in question; in other words, the Silchar Municipal Board merely contemplated doing something in the future in the event of the failure of the appellant to comply with the terms of the notice; to such an act to be done in the future, the provisions of S. 320 were not applicable.

[6] In support of his contention Mr. Ghose has relied upon certain decisions of the Bombay High Court reported in *Panachand* v. *Ahmedabad Municipality*, 22 Bom. 230, *Kashinath* v. *Gangabai*, 22 Bom. 283; *Manohar Ganesh* v. *Dakor Municipality*, 22 Bom. 289 (F.B.); *Shidmallappa* v. *Gokak Municipality*, 22 Bom. 605 and *Harilal Ranchodlal* v. *Himat Manekchand*, 22 Bom. 636, and to a case reported in *Municipality of Parola* v. *Laxman Das*, 25 Bom. 142 : (2 Bom. L. R. 857). But many years later, a Division Bench of the Bombay High Court in a case reported in *Vithoba Balaji* v. *Sholapur Municipality*, A. I. R. (34) 1947 Bom. 241 : (I. L. R. (1947) Bom. 94), had occasion to review the previous decisions of the Bombay High Court to which Mr. Ghose has referred. In the Bombay case reported in *Vithoba Balaji* v. *Sholapur Municipality*, A. I. R. (34) 1947 Bom. 241 : (I. L. R. (1947) Bom. 94), the act done or purporting to be done under the Bombay Municipal Boroguhs Act was a notice served on the plaintiff as a licensee of the Municipality, to quit. Before the matter came to the stage of litigation, the plaintiff claimed to be a tenant, contending that the notice to quit was illegal in view of certain orders made under the Defence of India Rules, and asked the Municipality to reconsider the matter. The municipality however adhered to its previous resolution and the notice was served upon the plaintiff to quit. At page 245 of the report *Vithoba Balaji* v. *Sholapur Municipality*, A. I. R. (34) 1947 Bom. 241 : (I. L. R. (1947) Bom. 94), Sen J. observed :

"In the present case, by their notice of August 1942, the Municipality (a) had purported to terminate their contract with the plaintiffs, and (b) had attempted to evict them. It seems to us that as regards the termination of the contract, the Municipality was perfectly within its rights. The terms of the contract with the plaintiffs are to be found in the *pavati* Ex. 24, one of the terms of which was, 'The permit-holder should vacate the site without any objection, whenever the municipality requires it and without the notice being given to the permit-holder.' Section 48 (1) of the Act enables the Borough Municipality *inter alia* to enter into and perform all such contracts as it may consider necessary or expedient in order to carry into effect the provisions and purposes of the Act ..... The termination of the contract was necessitated, according to the municipality, because it was going to start town planning operations. Many, if not all, of those operations would mean carrying out duties imposed on the municipality by S. 68 and the exercise of its discretionary powers under S. 71 of the Act. Thus, there can be no doubt that the termination of the contract was done, or at least it purported to be done, in pursuance of the Act ..... there can be no doubt that the municipality was dealing with property lawfully vested in it when it attempted to evict the plaintiffs. The question, therefore, arises whether the notice of August 1942 and the municipality's subsequent resolution and the letter to the plaintiffs, dated 7-6-1948, should not be regarded as acts done or purporting to be done in pursuance of the Act within the meaning of S. 206 of the Act, acts which, according to the plaintiffs' contention, were illegal, in view of the District Magistrate's order."

Sen J., then referred to the decision of the Privy Council reported in *Bhagchand Dagdusa* v. *Secretary of State*, 54 I. A. 338 : (A. I. R. (14) 1927 P. C. 176), in which the act in question was, in their Lordships' opinion, the Government order or Notification directing that the sums in question should be recovered by the Collector from the shop-keepers of Malegaon. Sen J. observed :

"though their Lordships' decision was not based on the argument that the threatened enforcement of the same was the act that came under S. 80, Civil P. C., it was based on the argument that the order of Government did so ..... It is important to remember that no overt action by the Collector in pursuance of the Government Notification against the shop-keepers, had yet been taken. It seems to me that in the present case also, the notice of August 1942, the resolution and the subsequent letter of the municipality sent to the plaintiffs in June 1943 can be said, within the meaning of S. 206, to be acts done or purporting to be done in pursuance of the Act. It does not seem to me that there is any material difference as to the principle involved

between the wording of S. 80, Civil P. C. and S. 206, Bombay Municipal Boroughs Act, . . ."

[7] Sen J. then referred to the previous decisions of the Bombay High Court and observed :

"That, however, was a case of an intentional breach of contract on the part of a Municipality and it was held, relying on *Ranchordas Moorarji* v. *Municipal Commr. Bombay*, 25 Bom. 387 : (3 Bom. L. R. 158) and *Vishwanath* v. *Municipal Corporation, Bombay*, 40 Bom. L. R. 685: (A. I. R. (25) 1938 Bom. 410), that it would be difficult to say that a Municipality or an officer of a Municipality committing a breach of a contract entered into by the Municipality does such act, or purports to do it, in pursuance of the provisions of the Act. Such a consideration cannot be said to arise in our present case, and we do not think that the decision in *S. V. Mandlik* v. *Borough Municipality of Jalgaon*, 45 Bom. L. R. 1059 : (A. I. R. (31) 1944 Bom. 97) can be regarded as any guide in this case."

[8] The facts before us are similar to the Bombay case reported in *Vithoba Balaji* v. *Sholapur Municipality*, A. I. R. (34) 1947 Bom. 241 : (I. L. R. (1947) Bom. 94). The statutory provisions relating to the powers of the Municipal Board of Silchar in the matter under consideration are to be found in S. 286, Assam Municipal Act (I [1] of 1923). Section 286 is in these terms:

"The Board may cause the water to be turned off from any premises which are supplied with water, after giving notice in writing of not less than twenty-four hours: . . . ."

Then follow the conditions under which a notice can be given. Condition (d) reads:

"if the owner or occupier of the premises wilfully or negligently misuses or causes waste of water; . . . ."

Under S. 41, Assam Municipal Act, a Municipal Board

"at a meeting may appoint from among its members or, if it so desires, from among its members and the residents of the Municipality not being members, committees to assist it in the discharge of any specific duties or class of duties devolving upon it under this Act, ..."

[9] It is reasonable to suppose that it was in pursuance of S. 41 that the Committee considered the question of the water supply to this house and, having found that there were two water-pipe connections, it came to the conclusion that one of them should be turned off, apparently to prevent waste of water. The Chairman of the Board, on receiving the resolution of the Water Works Committee, Silchar, served a notice upon the appellant, the terms of which constitute, in our opinion the cause of action for the present suit. To meet this difficulty it was contended by Mr. Ghose that assuming that the giving of a notice is an act done under S. 286, Assam Municipal Act, nevertheless S. 286 contemplates the giving of notice by the Board itself, and not by the Chairman, that as there has been a departure from the strict observance of S. 286, the giving of notice in this case cannot be regarded as an act done under the Assam Municipal Act. We do not think there is any substance in this contention. The Board must act through its officers, and in this case, it has acted through its principal officer, namely, the Chairman. The act of the Chairman, therefore, must be regarded as the act of the Board within the meaning of S. 286, Assam Municipal Act. In any case, it must be regarded as purporting to be done under the Act. It is true that the words "purporting to be done" do not find place in S. 320 as they do in S. 206, Bombay Municipal Boroughs Act (I [1] of 1923), but we do not think that the omission of the words "purporting to be done" in S. 320 is of any consequence, for the words "purporting to be done" are a necessary implication of the words "an act done." Apart from this necessary implication, the act of the Chairman in giving notice in pursuance of S. 286, must, on the facts of this case, be regarded as an act done by the Board within the meaning of S. 320.

[10] Our conclusion then is that the giving of notice by the Chairman of Silchar Municipal Board to the plaintiff, was an act done under S. 286, Assam Municipal Act, and that a notice under S. 320, Assam Municipal Act, was therefore, obligatory before a suit could be brought. In the absence of such a notice, the suit must fail.

[11] The result is that the appeal is dismissed. As the Courts below have dismissed the suit with no order, we do not propose to make any order as to costs of the appeal.

Ram Labhaya J.—I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 141 *[C. N. 54.]*

THADANI C. J. AND RAM LABHAYA J.

Sib Charan Das — Appellant v. *Manik Chandra Agarwalla and another — Respondents.*

Second Appeal No. 24-A of 1948, D/- 15-3-1950, from judgment and decree of Special Subordinate Judge, A. V. D.

(a) Assam Land and Revenue Regulation (I [1] of 1886), Ss. 81 and 151— Powers of Revenue Tribunal under S. 151 — Tribunal if can set aside sale on ground of hardship after one year from date of sale — Civil Court, if can declare Tribunal's order as nullity—Civil P. C. (1908), S. 9— Specific Relief Act (1877), S. 42.

The powers of the Revenue Tribunal under S. 151 of the Regulation are apparently very wide. But it has no power to pass arbitrary orders. The section merely empowers the Tribunal to pass any orders it may deem fit within the scope of its authority. Its orders also must be legal and within the limits of its jurisdiction. It may, therefore, interfere on appeal or in revision under S. 151 with orders of sale on all legal grounds. But if a sale is sought to be set aside on the ground of hard-

ship and injustice, it could be set aside only within one year from the date the sale became final. The Tribunal even in the exercise of its revisional jurisdiction cannot enlarge its powers in this respect, If the Tribunal exceeds its jurisdiction in setting aside the sale more than one year after the date on which it becomes final, it contravenes an express direction contained in the statute and the civil Court has jurisdiction to declare the order of the Tribunal a nullity. [Paras 15 and 16]

Annotation : ('44-Com.) Civil P. C., S. 9 N 21 ; ('46-Man.) Specific Relief Act, S. 42 N 34.

(b) Assam Land and Revenue Regulation (1 [I] of 1886), S. 154—Tribunal exceeding its jurisdiction in setting aside sale — Section 154 will not help person in whose favour sale is set aside. [Para 17]

(c) Civil P. C. (1908), O. 41, R. 33 — Decree by trial Court—No appeal by plaintiff — Modification of decree in second appeal.

The trial Court granted the plaintiff a decree for the declaratory decree claimed by him but not for possession. He did not appeal from the decree; nor did he put in any cross-objections. The defendant appealed and obtained a reversal of the decree of the trial Court. The plaintiff appealed to the High Court and prayed for the reversal of the appellate decision and also for the modification of the decree of the trial Court :

Held, that the decree of the trial Court could not be modified in plaintiff's favour as he did not appeal from the decision of the trial Court. [Para 20]

Annotation : ('44-Com.) Civil P. C., O. 41, R. 33 N. 16.

(d) Specific Relief Act (1877), S. 42 and Proviso—Order of Revenue Tribunal setting aside sale – Suit for declaration that order was without jurisdiction and that it be set aside — No relief for possession claimed—Decree, if can be passed.

Where the plaintiff sued for a declaration that the order of Revenue Tribunal setting aside the sale of the defendant's land, which the plaintiff had purchased, was illegal and without jurisdiction as being contrary to the provisions of the Assam Land and Revenue Regulation and that it be set aside, without claiming a relief for possession:

Held (Per *Ram Labhaya J.*; *Thadani C. J. Contra*) — That the setting aside of the order of the Tribunal was not a further or present relief, because, the order being without jurisdiction, it required no setting aside. The suit was, therefore, one for mere declaration when further relief of possession which was available and which should have been claimed was not claimed and, consequently, the plaintiff was not entitled to a decree. [Paras 40 and 41]

Per *Thadani C. J.*—The suit brought by the plaintiff was, in fact and in essence, a suit to set aside the order of the Revenue Tribunal as being contrary to the provisions of the Assam Land and Revenue Regulation, and, as such, it was not hit by the proviso to S. 42. There was, therefore, no impediment to the passing of a decree for the plaintiff for a declaration as prayed for by him without more. [Paras 43 and 44]

Annotation : ('46-Man.) Specific Relief Act, S. 42 N 7 and 8.

(e) Specific Relief Act (1877), S. 42, Proviso—Mere use of word "declaration" — Proviso, if attracted.

Per *Thadani C. J.* — The mere use of the word 'declaration', whether in the title of the plaint or in the prayer clause, does not necessarily make a suit for declaration so as to attract the proviso to S. 42. [Para 45]

Annotation: ('46-Man.) Specific Relief Act, S. 42 N. 7.

(f) Specific Relief Act (1877), S. 42—Applicability.

Per *Thadani C. J.*—Section 42 does not apply to a case where a plaintiff seeks to have an order set aside the existence of which is an impediment to the restoration of his rights, rights of which he has been deprived as a result of the impugned order. [Para 47]

Annotation : ('46-Man.) Specific Relief Act, S. 42 N. 1.

K. R. Baroah and B. N. Deka—for Appellant.
J. N. Borah—for Respondents.

Ram Labhaya J.—This is an appeal from the judgment and decree of the Special Subordinate Judge, A. V. D., by which the order of the Sadar Munsiff, dated 31st July 1947, decreeing plaintiff's suit was reversed and plaintiff's suit dismissed.

[2] The suit was for a declaration that the order of the Revenue Tribunal dated 27th April 1946 setting aside the sale of the land belonging to defendant 1 was illegal and without jurisdiction. The plaintiff it is alleged also prayed for khas possession of the land in suit.

[3] The facts leading to the litigation are as follows:

[4] The land covered by *patta* No. 152 of Majgoan village stood in the name of Manik Chandra Agarwalla, defendant 1. The land was sold for recovery of arrears of land revenue for the year 1348 and 1349 B. S. on 29th November 1943. The plaintiff was the purchaser. The sale was confirmed on 11th May 1944, and the sale certificate was issued on 12th May 1944. On plaintiff's application for delivery of possession, the Additional Deputy Commissioner directed the Sub-Deputy Collector on 19th May 1944 to deliver possession of the property to him. The possession was delivered on 4th November 1944. The *patta* in respect of the land stood in the name of Manik Chandra Agarwalla, defendant 1. In this *patta* he was shown as a minor with his mother as the guardian.

[5] Dhanaraj Agarwalla, father of Manik Chandra Agarwalla, acting as guardian of his son, preferred an appeal against the order directing sale of the minor's property and prayed that the sale be set aside. The appeal was sent by registered post and it was received in the office of the Revenue Tribunal on 27th August 1945. On 27th April 1946, the Revenue Tribunal ordered that the sale be set aside on usual conditions, viz.,

"On payment of the arrears of revenue for which the estate was sold, the cost of the sale, interest at 6 per cent per annum of the purchase money, as also intermediate payments of Government dues that may have been made by the auction-purchaser or any sum paid out or decreed as surplus sale proceeds."

The order of the Revenue Tribunal was a very brief one. The appeal was described as a case for setting aside the sale under S. 151, Assam Land & Revenue Regulation. The sale was set

aside on the ground that the revenue for the two years (1348 and 1349 B. S.) was actually sent by money order to the Mouzadar but owing to the change of Mouzadars the amount was not credited to the Government as the statement showed. The gist of the finding was that the Mouzadars had failed to function and this had materially contributed to the sale and the loss of an estate to a minor. It was observed that the delay in moving the Court had not been satisfactorily explained but it was condoned in the special circumstances of the case. The only special circumstances referred to in the order are that the sale was of a minor's estate and the failure on the part of the Mouzadar to function properly had contributed to the sale materially.

[6] The plaintiff, who was the purchaser, instituted the suit out of which this appeal arises. His case was that the defaulter Manik Chandra Agarwalla was not a minor at the time of the revenue sale. He had attained the age of majority at the time. His father could not represent him in his appeal or application for setting aside the sale. The appeal that was preferred was barred by time and the order of the Revenue Tribunal setting aside the sale was illegal and without jurisdiction.

[7] The main defence was that the sale itself was invalid and the order of the Revenue Tribunal whether right or wrong could not be challenged in a civil Court. The allegation that defendant 1 had attained the age of majority at the time of the sale was denied. The learned Munsiff found that on the date of sale defendant 1 was not a minor. He had attained the age of majority. The land revenue for the years for which the land was sold had not been received by the Mouzadar who had reported about the accumulation of arrears. He had received only a portion of the amount due for one year. The finding arrived at thus was that some money on account of land revenue was due on the date of sale. It was further found that the order of the revenue tribunal setting aside the sale was without jurisdiction and therefore null and void. As regards the relief, the learned Judge held that the plaintiff had not asked for possession of the property, he had not paid the court-fee on this relief and that it was not necessary to grant consequential relief. He treated the suit as in substance a suit for declaration only and granted plaintiff a declaration that the order of the Revenue Tribunal dated 16th April 1946 was null and void and not binding on the plaintiff.

[8] On appeal the learned Sub-Judge reversed the decree of the trial Court holding that the order of the Revenue Tribunal was not in excess of jurisdiction or illegal and therefore was not assailable in the civil Court. He also found that plaintiff was not in possession of the property. He had not prayed for this consequential relief which was available to him and was not therefore entitled to even the declaratory relief.

[9] Plaintiff has appealed. His learned counsel has assailed the correctness of the appellate decree on both the grounds on which it rests.

[10] The first question that arises for determination in this appeal is whether the order of the Revenue Tribunal is without jurisdiction. The learned counsel for the respondent has urged with considerable vigour that an appeal had been preferred to the Revenue Tribunal on behalf of defendant 1. This appeal was against the order of the Deputy Commissioner directing the sale of the property and was covered by S. 147 (b), Assam Land & Revenue Regulation. The Tribunal in the exercise of its powers under S. 148 cl. (3) of the Regulation condoned the delay and then set aside the sale on the merits. The order, he contended, was entirely within the scope of the powers of the Revenue Tribunal and the civil Court was precluded from exercising jurisdiction in the case as the claim of the plaintiff arose out of the collection of land revenue. In fact, he contended that it arose directly from the process of sale for the recovery of the arrears of land revenue. In support of this contention he relied on S. 154 (g), Assam Land & Revenue Regulation.

[11] The sale in this case was held on 29th November 1943. It was confirmed on 11th May 1944. The appeal to the Revenue Tribunal must be deemed to have been preferred on 27th August 1945 on which date it was actually received in the office of the Revenue Tribunal some 15 months after the date of confirmation of the sale. The order directing sale is an appealable order. It is covered by S. 147 of the Regulation. Under cl. (b) an appeal would lie to the Revenue Tribunal if the order directing sale was passed by the Deputy Commissioner as in this case. The learned counsel for the appellant had nothing at all to say against this view. It is also clear that the Revenue Tribunal had the power to admit the appeal after time if it was satisfied that the appellant had sufficient cause for not presenting the appeal within the period allowed by law. Even on this point there is no conflict between the learned counsel for the parties. But from this point onward, there is no agreement. The learned counsel for the appellant urges that there was no sufficient cause for admitting the appeal after time. The Tribunal in its order observed that no satisfactory explanation for the delay had been given. In extending time, in spite of this finding, presumably with a view to save the defendant, who was wrongly described

as a minor, from possible hardship, it exceeded its powers and acted in defiance of the provisions of the law contained in cl. (3) of S. 148. He relies on this contention as the first ground of his attack.

[12] His second and the main ground of attack was that in setting aside the sale under S. 151, the Revenue Tribunal clearly exceeded its jurisdiction. His contention was that remedies for getting orders of sale set aside are all contained in Chap. V of the Regulation and a sale under no conceivable circumstances can be set aside by the Tribunal in the exercise of its powers under S. 151. The remedies against orders of sale contained in Chap. V, he urged, are exhaustive. An application for setting aside sale may be made under S. 79 on the grounds specified in the section. The sale may be annulled by the Revenue Tribunal under S. 81 on an application made to it on the ground of hardship or injustice within one year from the date of the sale becoming final. A suit for annulment of the sale may be instituted under S. 82 but that it was not open to the Revenue Tribunal to interfere with any order of sale in the exercise of its very wide powers under S. 151 under any circumstances.

[13] In order to decide whether the Revenue Tribunal acted within the limits of its jurisdiction, we have first to determine under what provision of the law the Tribunal acted. The Tribunal had an appeal before it admittedly, and a time barred appeal at that. Before condoning delay it treated the appeal as an application under S. 151 without giving any reasons for the adoption of this course. The delay in preferring the appeal, inordinate though it was, was condoned but without reference to the provisions contained in S. 148 (3) and in spite of the finding that this delay had not been satisfactorily explained. Such a condonation could more appropriately be ordered under S. 151 which prescribes no limitation for petitions under it. The sale itself was set aside on the ground that a minor's estate had been sold when the land revenue for the period in question appeared to have been remitted to the Mouzadar though the amount had not been credited to the Government owing to the change of Mouzadars, which in the opinion of the Tribunal materially contributed to the sale. The learned Munsif, who heard the suit giving rise to this appeal, had to submit a report to the Tribunal in a different capacity before the Tribunal directed that the sale be set aside. His report then was that the appeal was time barred though interference was possible on the ground of hardship and also on the ground of irregularity in publishing or conducting the sale. The Tribunal evidently was not satisfied that there was any irregularity in publishing or conducting the sale but it set it aside presumably on the ground of hardship.

[14] We are driven to this conclusion as according to the order of the Tribunal the land revenue for the two years in question had not been credited. The evidence in the case shows that a part of the revenue had not been even remitted to the outgoing Mouzadar. There was still some balance due from the *pattadar* (defendant 1). The report before the Tribunal indicated hardship. The order directing sale could not be shown to be illegal and without jurisdiction. No irregularity in publishing or conducting the sale is mentioned or referred to in the order. There was thus no other ground for setting aside the sale except that of hardship. The word 'hardship' has not been used by the Tribunal. But as there was no other conceivable basis on which the Tribunal could set aside the sale, we think, the Tribunal was influenced by the consideration that the sale occasioned hardship to the *pattadar*. This to our mind is the only reasonable interpretation of the order.

[15] We now proceed to consider whether the Tribunal could set aside the sale on the ground of hardship. This is the crucial question in the case. The powers of the Tribunal under S. 151 of the Regulation are apparently very wide. It may pass any order it deems fit after calling for the proceedings held by any subordinate officer. But it will be readily conceded that it has no power to pass arbitrary orders. This section, correctly interpreted, merely empowers the Tribunal to pass any orders it may deem fit within the scope of its authority. Its orders also must be legal and within the limit of its jurisdiction. This limitation on its apparently unrestricted powers is necessarily implied. The orders, therefore, must be within the framework of the Regulation. The Tribunal cannot for instance pass an order which the Regulation forbids. Whether the jurisdiction that the Tribunal is exercising is original or appellate or revisional, it cannot pass orders in disregard of any statutory direction contained in the Regulation whether express or implied. It may therefore interfere on appeal or in revision under S. 151 with orders of sale on all legal grounds. But if a sale is sought to be set aside on the ground of hardship and injustice, it could be set aside only within one year from the date the sale became final. The Tribunal even in the exercise of its revisional jurisdiction cannot enlarge its powers in this respect.

[16] It is noteworthy that the Regulation does not empower the Tribunal to extend the

period of one year in order to exercise its jurisdiction on the ground of hardship or injustice. When the Tribunal extends the period for an appeal or condones delay in revision, it merely can exercise its powers, appellate or revisional, as the case may be, that it possesses but it cannot exceed those powers merely because the appeal or the petition for revision are treated as within time. Even after the condonation of delay, if the sale could not be set aside on any ground except hardship or injustice, the Tribunal had no power to set it aside after one year from the date that it became final. I understand that this was what my Lord the Chief Justice wanted to convey when he held in *Mt. Monondari Nepalini* v. *Saruram Siring* in Revenue Appeal No. 54 of 1948 that where the subject-matter of the case before the Court involved a setting aside of the sale, it would be governed by S. 81 which prescribes a period of limitation within which powers given to the Tribunal could be exercised. In this view of the matter, it must be held that the Tribunal exceeded its jurisdiction in setting aside the sale more than one year after the date on which it became final. In doing so, the Tribunal also contravened an express direction contained in the statute and this transgression on its part makes the order easily assailable in the civil Court on the ground of obvious illegality.

[17] Section 154 of the Land and Revenue Regulation will not help defendant-respondent if the Tribunal in setting aside the sale exceeded its jurisdiction. This proposition has not been disputed. In fact, the matter is concluded by the decision of their Lordships of the Privy Council in *Secy. of State* v. *Mask & Co.*, A. I. R. (27) 1940 P. C. 105: (I. L. R. (1940) Kar. P. C. 194), wherein their Lordships have gone further and have laid it down that

"exclusion of jurisdiction of the Civil Court is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure."

[18] This pronouncement of their Lordships was followed by a Division Bench of the Allahabad High Court reported in *Allah Taala* v. *Dist. Board of Pilibhit*, A. I. R. (32) 1945 ALL. 273 : (I. L. R. (1945) ALL. 661).

[19] It is obvious that in directing that the sale be set aside the Tribunal exceeded its jurisdiction or at least disregarded a mandatory direction contained in the statute, unconsciously though it may be, thus making it possible for the civil Court to come to the aid of the aggrieved party. The jurisdiction of the civil Court to declare the order null and void in this case is, therefore, undoubted.

[20] The plaintiff, however, has another difficulty in his way. The trial Court granted him a decree for the declaratory relief claimed by him. He did not appeal from the decree of the trial Court, nor did he put in any cross objections. The defendant alone appealed and obtained a reversal of the decree of the trial Court. Plaintiff has come to this Court and has prayed for the reversal of the appellate decision and also for the modification of the order of the trial Court. He now wants a decree for possession also.

[21] It is clear that not having appealed from the decision of the trial Court, he allowed it to become final against him. He cannot directly appeal against the decision of the trial Court to this Court. He is entitled to ask for a reversal of the appellate decree and the restoration of the decree of the trial Court. But the decree that the trial Court granted was a decree for a declaration only. The plaintiff is out of possession. His own statement in the trial Court was that he got only symbolical possession as a result of the sale in his favour and that after the Tribunal ordered the sale to be set aside, defendant took possession of the land. His counsel now has urged that the plaint included a prayer for confirmation of possession or in the alternative for *khas* possession. He refers to the final para of the plaint which embodies this double relief. He contends that the trial Court was wrong in suggesting that the relief for possession was not claimed or that it was not necessary. He also urges that the appellate Court was in error in holding that the relief for possession had not been claimed. The finding arrived at the appeal stage is one of fact. The learned Judge found that the relief though originally included in the plaint was expunged. This statement of fact is admittedly correct so far as the title of the plaint goes where the relief claimed was described. In the last para of the plaint, where also the relief claimed was described, the prayer for possession was allowed to remain. The title of the plaint and the final para were thus in conflict. The court-fee appeared to have been paid only on the declaratory relief. The trial Court's interpretation of the plaint was that relief for possession was not meant to be claimed. He referred to the fixed court-fee of Rs. 10 paid by the plaintiff in support of this view. This view was accepted without demur by the plaintiff. He did not appeal against the virtual dismissal of the suit so far as possessory relief was concerned. He did not file any cross-objection against

the decision. In these circumstances it seems that the view taken by the lower appellate Court was correct. But assuming as is now urged by the learned counsel for the plaintiff that the relief for possession was not meant to be excluded though payment of a fixed court fee of Rs. 10 is an indication to the contrary, the decree (of the Court of first instance) as pointed out above cannot be modified in plaintiffs favour as he did not appeal from the decision of the trial Court. A modification of the trial Court's decree at the stage would involve permitting an appeal direct to this Court from the decision of the Court of the first instance. This is not possible in law and this view is fully supported by clear pronouncements from their Lordships of the Privy Council contained in *Nobin Chandra* v. *Chandra Madhab*, 44 Cal. 1 : (A. I. R. (3) 1916 P. C. 148) and *Mahomed Khaleef Shirazi & Sons* v. *Les Tanneries*, A. I. R. (13) 1926 P. C. 34: (49 Mad. 435). In the latter case, *Mahomed Khaleef Shirazi & Sons* v. *Les Tanneries*, A. I. R (13) 1926 P. C. 34: (49 Mad. 435), it was held that an appeal direct to His Majesty in Council from the decree of the trial Judge is not allowable under the Civil Procedure Code or under the Letters Patent of the High Court, and that O. 41, R. 33 is not intended to apply to such cases.

[22] The learned counsel for the appellant has relied on *Ponnari Rao* v. *Lakshmi Narasamma*, A. I. R. (25) 1938 Mad. 322: (177 I. C. 693), *Tricomdas Cooverji* v. *Gopinath Jiu Thakur*, A. I. R. (3) 1916 P. C. 182: (44 Cal. 759) and *Iswarayya* v. *Swarnam Iswarayya*, A. I. R. (18) 1931 P. C. 234: (54 Mad. 774), for showing that it is open to this Court under O. 41, R. 33 to pass any order which in the view of the Court may be necessary for doing complete justice between the parties. It is not necessary to consider these cases in detail as the question now before the Court did not arise in any of these three cases. They have really no bearing on the point. Besides the pronouncements of their Lordships of the Privy Council referred to above leave no room for doubt in the matter and I am quite clear that it is not open to this Court now even in the exercise of its powers under O. 41, R. 33 to grant plaintiff any other relief than the restoration of the trial Court's decree.

[23] The question then arises whether the declaratory relief allowed by the trial Court offends against the provisions contained in S. 42, Specific Relief Act. The learned counsel for the appellant contends that S. 42, Specific Relief Act does not stand in the way of the plaintiff getting the relief allowed to him by the trial Court. This contention of his is based on the view of a Division Bench of the Calcutta High Court expressed in *Mahomed Manjural Haque* v. *Bissesar Banerjee*, 47 C. W. N. 408: (A. I. R. (30) 1943 Cal. 361). Relying on this, the learned counsel argues that in this case the decree has the effect of giving present relief in addition to the declaration that the order of the Revenue Tribunal setting aside the sale was null and void and was therefore governed not by S. 42, Specific Relief Act but by the provisions of the Civil Procedure Code.

[24] In order fully to appreciate the view expressed in *Mahomed Manzural Haque* v. *Bisseswar Banerjee*, 47 C. W. N. 408: (A. I. R. (30) 1943 Cal. 361), it is necessary to refer to the facts of this case.

[25] The suit was for a declaration that a certain order made by the Board of Revenue, Bengal, was *ultra vires* and void. A certain share of a revenue paying estate was sold for the recovery of arrears of land revenue. The plaintiff was the purchaser at the revenue sale held under S. 13, Bengal Land Revenue Sales Act, 1859 (Act XI [11] of 1859). The sale was confirmed and a certificate of sale was issued to the purchaser under S. 28 of the Act. On 7th April 1937, the Collector ordered delivery of possession to him under S. 29. Before the last order could be carried out and plaintiff placed in possession, the defendants preferred an appeal to the Commissioner praying that the sale be set aside. The appeal was dismissed as barred by time. On 25th May 1937, they presented a petition to the Board of Revenue against the Commissioner's order. The Board after considering the report from the Commissioner set aside the sale. It appeared from the order of the Board that it was influenced by considerations of hardship. It was against this order of the Board that the suit was mainly directed. The relief asked for in the plaint was as follows:

"That the Board's order be declared *ultra vires*, void and unenforceable and set aside;

That the plaintiff be declared entitled to get possession of the property in suit under S. 29 of the Bengal Land Revenue Sales Act;

That such other or modified reliefs as the plaintiff may be entitled to, be granted to him, besides costs and interest."

[26] The suit was decreed in the trial Court. On appeal, it was contended that the suit was not maintainable without a prayer for recovery of possession as consequential relief and without the addition of the Collector as a party.

[27] On behalf of the appellants reliance was placed on *Moothoo Vijia* v. *Dorasinga Tevar*, 2 I. A. 169: (15 Beng. L. R. 83 P. C.) and *Sheoparsan Singh* v. *Ram Nandan Prasad*, 43 I. A. 91: (A. I. R. (3) 1916 P. C. 78), while the respondents' counsel contended on the strength of *Robert Fischer* v. *Secy. of State*, 26 I. A. 16;

(22 Mad. 270 P. C.) that S. 42, Specific Relief Act was not exhaustive of the cases in which a declaratory relief without more may be granted. In *Moothoo Vijia* v. *Dorasinga Tevar*, 2 I. A. 169: (15 Beng. L. R. 83 P. C.), their Lordships laid down that the Courts in India had no power to make a merely declaratory decree otherwise than under S. 15, Civil P. C. of 1859 which was as follows:

"No suit shall be open to objection on the ground that a merely declararory decree or order is sought thereby, and it shall be lawful for civil Courts to make binding declarations of right without granting consequential relief."

[28] In delivering the judgment of their Lordships Sir James Colville said:

"They (their Lordships) at first conceived that the power of the Courts in India to make a merely declaratory decree was admitted to rest upon S. 15 Civil P. C., the effect of which has been so much discussed. Mr. Doyne, however, raised some question as to that and suggested that the power was possessed by the Courts in the mofussil before the Code of Civil Procedure was passed, and had not been taken away thereby. No authority which establishes the first of these propositions was cited; and their Lordships conceive that if the Legislature had intended to continue to those Courts the general power of making declarations (if they ever possessed such a power), it would not have introduced this clause into the Code of Civil Procedure, which, if a limited construction is to be put upon it, clearly implies that any decree made in excess of the power thereby conferred would be objectionable."

[29] Their Lordships were of the opinion that the application of S. 15, Civil P. C. must be be governed by the same principles as those upon which the Court of Chancery proceeded in reference to the Chancery Procedure Act, S. 50. The Code of 1859 was repealed by the Code of 1877 and the provision as to declaratory decrees was taken out of the Civil Procedure Code and appeared in a modified form in the Specific Relief Act as S. 42.

[30] In *Robert Fischer* v. *Secy. of State*, 26 I. A. 16: (22 Mad. 270 P. C.), S. 42, Specific Relief Act came up for consideration before their Lordships of the Privy Council. In that case, the Collector, with the subsequent sanction of the Board of Revenue, ordered on notice to the proprietor and lessees of a *zamindary*, that separate registration and sub-assessment of the appellant's village situate therein be made under Regulation XXV [25] of 1802, S. 8, and Act I [1] of 1876. Thereafter the Government, on the application of one of the lessees, without notice either to the appellant or the Collector, ordered the latter to cancel the registration. A suit was instituted by the appellant by which he prayed for a declaration that the order of the Government was *ultra vires* and illegal.

[31] Act I [1] of 1876 (S. 2) empowered the Collector to hold an inquiry and either in the absence of or on disallowing objections of parties interested, to register the alienated portion in the name of the alienee and to apportion the assessment of such alienated portion. Any person aggrieved by either the grant or refusal of separate registration could sue in a civil Court. It was contended before their Lordships of the Privy Council that the suit for a declaratory decree alone was not entertainable in view of the provisions contained in S. 42, Specific Relief Act. Lord Macnaghten, who delivered the judgment of their Lordships of the Privy Council observed as follows:

"Now in the first place it is at least open to doubt whether the present suit is within the purview of S. 42, Specific Relief Act. There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of S. 50, Chancery Procedure Act of 1852 as interpreted by judicial decision. Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is in substance a suit to have the true construction of a statute declared and to have an act done in contravention of the statute rightly understood pronounced void and of no effect. That is not the sort of declaratory decree which the framers of the Act had in their mind. But even assuming that the Specific Relief Act applies to such a suit as this, what is the result? What further relief can be required? The so-called cancellation is pronounced void, the order of the Government falls to the ground, and the decision of the Collector stands good and operative as from the date on which it was made. The vitality of the decision is not impaired or affected merely by destruction or mutilation of the entry in the Collector's book."

[32] It is clear that their Lordships decided the case on the assumption that the Specific Relief Act applied. They found that no further relief could have been asked for in the case. It is also noteworthy that the suit was instituted under the express provisions of the Madras Act I [1] of 1876. The jurisdiction reserved for the civil Court by that Act was in its nature appellate. Any person aggrieved by either the grant or refusal of separate registration could sue in the civil Court. The order of the Collector granting separate registration was cancelled by the Government of Madras. A declaration that the order of the Government was *ultra vires* would have been sufficient to restore the order of the Collector. In these circumstances the suit was held to be not open to any objection. The expression of doubt whether a suit of that nature was within the purview of S. 42, Specific Relief Act, however, remains. There is also the observation that a suit which was in substance to have the true construction of a statute declared, and to have an act done in contravention of the statute rightly understood pronounced void and of no effect was not of the type which the farmers of the Specific Relief Act had in mind. This dictum has been interpreted as im-

plying that S. 42, Specific Relief Act is not exhaustive of the cases in which relief for mere declaration may be asked for.

[33] In *Sheoparsan Singh* v. *Ram Nandan Prasad*, 43 I. A. 91 : (A. I. R. (3) 1916 P. C. 78), their Lordships of the Privy Council laid down as follows :

"The Court's power to make a declaration without more is derived from S. 42, Specific Relief Act, and regard must, therefore, be had to its precise terms."

[34] This interpretation of S. 42 was not easily reconcilable with the observations made in *Robert Fischer* v. *Secy. of State*, 26 I. A. 16: (22 Mad. 270 P. C.) The learned Judges of the Calcutta High Court found themselves confronted with an apparent conflict between the two pronouncements from their Lordships of the Privy Council. They interpreted the remarks in *Fischer's case*, 26 I. A. 16: (22 Mad. 270 P. C.) as conveying that S. 42 was not intended to apply to cases where the declaration asked for included present relief.

[35] Now, let us see what the present relief in *Fischer's case* (26 I. A. 16: 22 Mad 270 P. C.) was. The suit was for a mere declaration that the order of the Madras Government was *ultra vires* and illegal. It was under a particular provision of Act I [1] of 1876. That provision virtually allowed an appeal to the civil Court if any party felt aggrieved by the decision of the revenue authorities in the matter of registration. The declaration that the order of the Government was *ultra vires* could restore the order of the Collector. The restoration of the Collector's order was to lead to the undoing of any act, e. g., entry or remarks indicating the cancellation of registration—by the Collector in pursuance of the illegal order of the Madras Government. The result would follow automatically. It was not necessary for the plaintiff to ask for any further relief in that case. The effect of the declaration in that case was exactly the same as in the case of an appellate decree of a civil Court which sets aside or modifies the decree of the Court below. If before reversal or modification the lower Court has allowed its decree to be executed, it will have to put the parties in the same position which they occupied before the original order was given effect to in execution. The declaration granted by the civil Court in *Fischer's case*, (26 I. A. 16: 22 Mad. 270 P. C.) gave it the effect of an appellate order. It automatically granted all necessary relief. The plaintiff was put in the position which he had occupied before the cancellation of the Collector's order by the Government. This, according to the learned Judges of the Calcutta High Court, would be the present relief which the declaration in that case included.

[36] The situation was similar in the Calcutta case. The Collector had ordered delivery of possession. But before this order could have been given effect to, the sale was set aside by the Board of Revenue. A declaration that the order of the Board of Revenue was null and void was enough for plaintiff's purpose. The Collector could then have given possession in pursuance of his own order which would have been revived by the declaration sought for. The declaration impliedly gave all the relief that the plaintiff required. It was not necessary for him to ask for possession as he could get it in execution of the Collector's order. The declaration in that case also afforded the necessary present relief.

[37] The observations in *Fischer's case* (26 I. A. 16 : 22 Mad. 270 P. C.) that the framers of the Act did not intend that S. 42 should apply to cases in which in substance the suit was to have the true construction of a statute declared, and to have an act done in contravention of the statute rightly understood pronounced void and of no effect were, however, not made the basis of the decision in the case. It was assumed that the case was governed by S. 42 and it was then held that as no further relief was necessary the claim was not hit by the proviso to S. 42, Specific Relief Act. Similarly, in the Calcutta case the interpretation that was placed on the observations of Lord Macnaghten with a view to reconciling them with what was clearly held by their Lordships of the Privy Council in *Sheoparsan Singh* v. *Ram Nandan Pd.*, 43 I. A. 91: (A. I. R. (3) 1916 P. C. 78) was not the basis of the decision. The case was decided on the assumption that S. 42 applied to it but it was not necessary for the plaintiff to ask for possession as after the declaration that the order setting aside the sale was *ultra vires* he could take possession in execution of the Collector's order who had not completed the proceedings by delivery of possession. I am in respectful agreement with the learned Judges of the High Court in the interpretation they have put on the observations of Lord Macnaghten contained in *Fischer's case* (26 I. A. 16 : 22 Mad. 270 P. C.). It would seem that S. 42 can have no application to suits which are provided for expressly by the statute which gives a sort of an appellate jurisdiction to the civil Court in cases which are decided either summarily as under O. 21, R. 63, Civil P. C., or by executive or revenue authorities as in *Fischer's case*, (26 I. A. 16 : 22 Mad. 270 P. C.). Such cases would be outside the purview of S. 42. But the Calcutta case did not belong to this class. It, however, was not within the mischief of S. 42 as the declaration asked for served exactly the same purpose as it did in the case of Fischer.

[38] Both these cases are distinguishable from the present case. The suit in this case is not covered by any provision of Assam Land & Revenue Regulation. The civil Court in entertaining this suit is not exercising any jurisdiction which is expressly vested in it by the statute. This is one feature which distinguishes it from the case of Fischer. The other distinguishing feature is that a mere declaration is not all that the plaintiff could claim. He got possession from the Collector. It was symbolical possession according to him and according to his own statement possession was taken over by defendants after the order of the Board by which the sale was set aside. The situation created was that not only was the sale set aside but plaintiff was deprived of the possession as well. A declaration that the order setting aside the sale was *ultra vires* would not help the plaintiff in getting possession from the Collector. He has already given him possession and did not take it back after the order of the Board. The defendants dispossessed the plaintiff. If the order of the Board is declared null and void and the sale is held to be valid, plaintiff would be entitled to possession of the land. This relief he can now obtain only by a suit. This further relief he cannot seek from the revenue authorities in the circumstances of this case. The suit is not covered, therefore, by the observations of Lord Macnaghten in *Fischer's case*, (26 I. A. 16 : 22 Mad. 270 P. C.), as interpreted by the learned Judges of the Calcutta High Court. The declaration asked for in this case does not include any present relief. It will be a mere declaration which may entitle the plaintiff to sue for possession later. The circumstance that the plaintiff will be put to the necessity of instituting a separate suit for possession even if the declaration sought for is granted to him was not present in either of the two cases relied on. In both the cases it was found as a fact that no further relief was necessary to be claimed on the facts which were different from the facts of the present case.

[39] It cannot be ignored that S. 42, Specific Relief Act was applied to both the cases and thus the position that the proviso to S. 42 was imperative was recognised. The requirements of the proviso are mandatory and this case does not fulfil these requirements. It cannot be regarded as including any present relief in the sense in which the expression was understood in the Calcutta case.

[40] The learned counsel for the appellant has argued that the relief claimed in the case is that the order of the Board of Revenue is *ultra vires* and that it be set aside. He points out that setting aside of the order is the further or present relief and that it is not necessary for the plaintiff to claim all available reliefs. This contention must be repelled. If the order of the Board is without jurisdiction, as we have found, it requires no setting aside. This part of the relief is a mere surplusage and cannot serve as a substitute for the substantial or real further relief without which plaintiff's grievance cannot be completely redressed and for which a separate suit which the proviso to S. 42, Specific Relief Act aims at preventing will be absolutely necessary. In the Calcutta case also, the plaintiff had prayed that the order of the Board of Revenue be set aside. But the analogy is merely illusory. As pointed out above, the plaintiff in that case could get possession from the Collector without instituting a suit, which is not the case here.

[41] My conclusion, therefore, is that the learned Subordinate Judge was right in dismissing the suit as being one for mere declaration when further relief which was available and which should have been claimed to meet the requirements of the proviso to S. 42, Specific Relief Act was not claimed. This view finds support from *Jit Singh* v. *Ghetlu*, A. I. R. (26) 1939 ALL. 446: (182 I. C. 911), in which it was held that :

"No civil suit lies for a mere declaration that a decree of a Revenue Court was invalid for want of jurisdiction."

[42] In the result I hold that this appeal must be dismissed. I shall leave the parties to bear their own costs.

[43] **Thadani C. J.**—I have had the advantage of reading the judgment of my learned brother. While I agree that the Revenue Tribunal in this case exceeded its jurisdiction in directing the sale to be set aside, and that the civil Court has jurisdiction to declare the order of the Tribunal a nullity, I am unable to agree that there is any impediment to the passing of a decree for the plaintiff appellant for a declaration as prayed for by him without more, having regard to the facts of this case.

[44] It is true that Mr. Barooah invited us to decree the relief as to possession, as prayed for by the plaintiff in the trial Court, which the trial Court, either deliberately or through oversight, did not grant. But at the same time, Mr. Barooah stated that he would be content with a mere declaration that the order passed by the Revenue Tribunal is a nullity. If the plaintiff is entitled to a declaration that the order passed by the Revenue Tribunal is a nullity, the fact that he did not appeal against the judgment and decree of the trial Court which had either declined to decree the plaintiff's prayer as to possession or had omitted to do so, is wholly immaterial when it is remembered that the suit brought by

the plaintiff was, in fact and in essence, a suit to set aside the order of the Revenue Tribunal as being contrary to the provisions of the Assam Land and Revenue Regulation, and, as such, it was not hit by the proviso to S. 42, Specific Relief Act.

[45] The mere use of the word 'declaration' whether in the title of the plaint or in the prayer clause, does not necessarily make a suit a suit for declaration so as to attract the proviso to S. 42, Specific Relief Act. For instance, where a suit is in substance a suit for cancellation of a deed of sale relating to immovable property, the fact that the plaintiff prays for a declaration that the deed do stand cancelled, can scarcely be regarded as being hit by the proviso to S. 42, Specific Relief Act. The moment a sale-deed is cancelled or set aside by a decree of the Court, the rights present in the parties before the execution of the sale-deed are automatically restored, even though in a given case it might be that the plaintiff would find it difficult to obtain possession, except through the intervention of a Court.

[46] I am unable to subscribe to the view expressed by my learned brother that where an order passed by a duly constituted authority is without jurisdiction, it does not require to be set aside, and that the principal relief, therefore, in a case where an order does not require to be set aside, is not one setting aside the order. In my opinion, the facts of the case before us are on all fours with the facts present before the learned Judges of the Calcutta High Court in the case reported in *Mohd. Manjural Haque* v. *Bisseswar Banerjee*, 47 C. W. N. 408 : (A. I. R. (30) 1943 Cal. 361) in which they had occasion to consider the decisions of their Lordships of the Privy Council reported in *Moothoo Vijia* v. *Dorasinga Thevar*, 2 I. A. 169: (15 Beng. L. R. 83 P. C.) ; *Robert Fischer* v. *Secy. of State*, 26 I. A. 16 : (22 Mad. 270 P. C.) and *Sheoparsan Singh* v. *Ram Nandan Prasad*, 43 I. A. 91 : (A. I. R. (3) 1916 P. C. 78). Rau J. delivering the judgment of the Division Bench observed at p. 112 of the report :

"It would, therefore, seem that the expressions 'merely declaratory decree' and 'declaration without more' used in the Privy Council judgments in *Katha-ma Natchair's case*, 2 I. A. 169: (15 Beng. L. R. 83 P. C.) and *Sheoparsan Singh's case*, 43 I. A. 91 : (A. I. R. (3) 1916 P. C. 78) refer to a declaration which merely serves to define rights, present or future, without giving present relief. The power of the Courts in India to make merely declaratory decrees in this sense is, under the above decisions, governed entirely by S. 42, Specific Relief Act. But where a decree has the effect of giving present relief as well, the power to make it will be governed by the general provisions of the Code of Civil Procedure, e.g., S. 9 or O. 7, R. 7 of the Code, and not by S. 42, Specific Relief Act. Such a view would be consistent not only with their Lordships' observations in the above two cases, but also in *Fischer's case*, 26 I. A. 16 : (22 Mad. 270 P. C.). On this view, the present suit would not be governed by S. 42, Specific Relief Act."

[47] My learned brother's judgment is silent upon this passage from the judgment of the Calcutta High Court. If this passage from the judgment of the Calcutta High Court in *Mohd. Manjural Haque* v. *Bisseswar Banerjee*, 47 C. W. N. 408 : (A. I. R. (30) 1943 Cal. 361) is to be given effect to—and it must be given effect to,—it seems to me that the presence of a fact namely that in the case the Collector had not yet delivered possession, to the party concerned is wholly immaterial. The learned Judges of the Calcutta High Court mentioned this particular fact only for the purpose of showing that the proviso to S. 42, Specific Relief Act, did not hit the plaintiff's case, even if it were assumed that S. 42, Specific Relief Act, applied. In my opinion, their decision means that S. 42, Specific Relief Act, does not apply to a case where a plaintiff seeks to have an order set aside the existence of which is an impediment to the restoration of his rights, rights of which he has been deprived as a result of the impugned order. This is what the learned Judges of the Calcutta High Court say at p. 413 of the report :

"But even assuming that the Specific Relief Act applies to such a suit as this, let us see what is the plaintiff's claim and who are the parties concerned. The plaintiff is undoubtedly a person who claims to be entitled to certain rights as to property, namely, the right to own and possess separate account No. 2 of Touzi No. 655 by virtue of his purchase on 14th January 1937 (as in this case). The defendants, who are the recorded owners and are in possession of that share of the estate, deny and are interested to deny his title. The Collector, on the other hand, has not denied, nor is he interested to deny, the plaintiffs' title, although he could do nothing to assist the plaintiff after the Board has set aside the sale, (as in this case). In terms of S. 42, therefore, the plaintiff may institute a suit against the defendants, but not against the Collector, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such a suit ask for any further relief. We now come to the proviso: 'Provided that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so'. In considering this proviso with reference to this case, we have to bear in mind that long before the Board's order of September 1937, the Collector had already passed an order for delivery of possession to the plaintiff. Once the Board's order is pronounced *ultra vires* and the plaintiff's unimpaired title declared, the Collector's order of 7th April 1937, would revive, and it would be his statutory duty to proceed to give effect to it under S. 14 and S. 29, Bengal Land Revenue Sales Act, 1859. The plaintiff was not able to seek further relief in his plaint for the simple reason that he needed no more. The annulling of the Board's order would give him all that he wanted. The circumstances are very similar to those in *Fischer's case* (26 I. A. 16: (22 Mad. 270 P. C.) where the Privy Council made a declaratory decree, holding that no further relief was required. The proviso to S. 42,

Specific Relief Act is no more a bar to a declaration of the plaintiff's title in the present suit than it was in that suit."

[48] I am unable to agree that the case before us can be distinguished from the case present before the learned Judges of the Calcutta High Court, merely because in the case before us the Deputy Commissioner had not delivered possession to the purchaser. Even in the Calcutta case the recorded owners were in fact in possession as here and yet the learned Judges did not think that the existence of that fact was an impediment to the passing of a decree declaring the order of the Revenue Board a nullity. Indeed the learned Judges of the Calcutta High Court, in considering the question from the dual aspect namely—(1) whether S. 42, Specific Relief Act applied to the facts before them, and (2) whether assuming that S. 42, Specific Relief Act, applied—the proviso to S. 42, operated as a bar to the plaintiff getting a decree for a mere declaration closely followed the observations of Lord Macnaghten in *Fischer's case* (26 I. A. 16: 22 Mad. 270 P. C.) which are in these terms:

"Now, in the first place, it is at least open to doubt whether the present suit is within the purview of S. 42, Specific Relief Act. There can be no doubt as to the orign and purpose of that section..... It is, in substance, a suit to have the true construction of a statute declared, and to have an act done in contravention of the statute rightly understood pronounced void and of no effect. That is not the sort of declaratory decree which the framers of the Act had in their mind."

I do not think these observations of Lord Macnaghten can be regarded as *obiter dicta*. The learned Judges of the Calcutta High Court apparently did not regard them in that light. The learned Judges of the Calcutta High Court have definitely stated that the suit before them was not one under the provisions of S. 42, Specific Relief Act. Just as Lord Macnaghten then proceeded to deal with the case before the Board on the assumption that the Specific Relief Act applied, the learned Judges of the Calcutta High Court proceeded to do likewise. Lord Macnaghtan had observed:

"But even assuming that the Specific Relief Act applies to such a suit as this, what is the result? What further relief can be required? The so called cancellation is pronounced void, the order of the Government falls to the ground, and the decision of the Collector stands good and operative as from the date on which it was made. The vitality of the decision is not impaired or affected merely by destruction or mutilation of the entry in the Collector's book."

Applying these observations to the facts before us, as soon as the cancellation of the order of the Revenue Tribunal is pronounced void, it falls to the ground and the sale of the Deputy Commissioner made in pursuance of the Assam Land and Revenue Regulation stands good and becomes automatically final under S. 80, Assam Land and Revenue Regulation, and under S. 85 of the same Regulation, the Deputy Commissioner *shall put the plaintiff into possession of the property*. The fact that the Deputy Commissioner in the present case delivered possession to the respondents after the Revenue Tribunal had set aside the sale, is, in my opinion, wholly immaterial for the purpose of deciding whether the proviso to S. 42, Specific Relief Act applies. The act of that Deputy Commissioner in this case after he was made aware of the order of the Revenue Tribunal setting aside the sale, was an act done in pursuance of S. 85, Assam Land and Revenue Regulation. The Deputy Commissioner will act in precisely the same way the moment he comes to know that the order of the Revenue Tribunal has been set aside by this Court. He will then forthwith act under S. 85 of the Regulation, the sale having become final under S. 80 of the Regulation and put the plaintiff into possession. I can see no reason, therefore, for thinking that the decision of the learned Judges of the Calcutta High Court would have been different if, in that case, the Collector had, in fact, put the other party into possession. In any case even in the Calcutta case somehow or the other the other party was in possession.

[49] In my opinion, the circumstances before us are similar to those in *Fischer's case* (26 I. A. 16 : 22 Mad. 270 P. C.) and identical with those in the case reported in *Mohd. Manjural Haque* v. *Bisseswar Banerjee*, 47 C. W. N. 408: (A. I. R. (30) 1943 Cal. 361). To borrow the language of the learned Judges of the Calcutta High Court, "the proviso to S. 42, Specific Relief Act, is no more a bar to a declaration of the plaintiff's title in the present suit than it was in *Fischer's case* (26 I. A. 16: 22 Mad. 270 P. C.)," or in the case reported in *Mohd. Manjural Haque* v. *Bisseswar Banerjee*, 47 C. W. N. 408 : (A. I. R. (30) 1943 Cal. 361). In my opinion, the declaration of the plaintiff's title in this case follows automatically upon setting aside the order of the Revenue Tribunal, which in my view is the principal relief.

[50] In the view I have taken of the decision of the Calcutta High Court reported in *Mohd. Manjural Haque* v. *Bisseswar Banerjee*, 47 C. W. N. 408 : (A. I. R. (30) 1943 Cal 361), it follows that the decision of the Allahabad High Court reported in *Jit Singh* v. *Ghellu*, A. I. R. (26) 1939 ALL 446 : (182 I. C. 911) has no application to the facts of this case.

[51] I will accordingly set aside the judgment and decree of the lower appellate Court and restore that of the trial Court setting aside the order of the Revenue Tribunal with no order as to costs and leave it to the Deputy Commissioner

to put the plaintiff into possession of the property under S. 85, Assam Land and Revenue Regulation.

ORDER

[52] **Thadani C. J.**—A difference of opinion having arisen between my learned brother and myself—my learned brother taking the view that the decree of the lower appellate Court should be affirmed and I taking the view that it should be set aside and that of the trial Court restored—the provisions of S. 98, Civil P. C., are attracted, and the judgment and decree of the lower appellate Court is confirmed.

V.R.B. *Decree confirmed.*

A. I. R. (37) 1950 Assam 152 *[C. N. 55.]*

THADANI C. J. AND RAM LABHAYA J.

Abdul Ali—Accused—Petitioner v. *The State.*

Criminal Revn. No. 1 of 1950, D/- 13th March 1950.

Assam Opium Prohibition Act (XXIII [23] of 1947), Ss. 5 (a) and 28—Possession—Meaning—Presumption—Burden of proof—Opium Act (1878), Ss. 9 and 10—Evidence Act (1872), Ss. 101-103.

Possession of opium within the meaning of S. 5 (a) must imply knowledge. It must be conscious possession making some kind of control possible, or, in other words, there must be *mens rea* or guilty knowledge before a person could be convicted of an offence under S. 5 (a) for possessing opium. [Para 7]

Thus, a person charged with the possession of opium must be shown to have knowledge of the existence of the opium in his house before he can be said to be in possession of it. Mere recovery of opium from a house in which he lives along with other persons, would not be sufficient to show that he was in possession with knowledge of its existence. [Para 10]

Unless conscious possession on the part of the accused has been proved, no presumption under S. 28 arises in favour of the prosecution. [Para 13]

The burden of proving conscious possession on the part of the accused remains on the prosecution and that burden is not shifted to the accused by anything that is contained in S. 28. [Para 13]

Annotation: ('46-Man) Opium Act, S. 9, N. 1, 2, S. 10, N. 1; Evidence Act Ss. 101-103, N. 3, 4.

[*See also* ('46-Man) Arms Act, S. 19, N. 10].

S. N. Buragohain and J. C. Medhi—for Petitioner.

K. R. Burman, Sr. State Advocate—for the State.

Ram Labhaya J.—The petition of revision is directed against the order of the learned Sessions Judge, U. A. D., by which the petitioner's appeal against his conviction and sentence under S. 5 (a) of the Assam Opium Prohibition Act, 1947, was dismissed. The petitioner was sentenced to undergo rigorous imprisonment for 2 years and a fine of Rs. 500 in delault to rigorous imprisonment for 6 months.

[2] The house in which Abdul Ali, petitioner, lived was searched on 6th January 1949. An elder brother, Abdul Suvan and a younger brother, Abdul Mannan of the petitioner also lived in the same house. The Excise Sub-Inspector, who conducted the search, recovered one seer of opium from the house. There were two cakes each weighing half a seer. They were found in two brass utensils wrapped in brown paper. The two utensils were covered by a half-pant. They were placed inside the hollow of a *Murah*. The Murah itself was under a table in an inner room of the house occupied by the petitioner and his two brothers. Abdul Suvan, the eldest, absconded. Abdul Ali, the petitioner and Abdul Mannan were sent up for trial. Both were found guilty under S. 5 (a), Assam Opium Prohibition Act by the Magistrate, 1st class, Dibrugarh.

[3] On appeal, Abdul Mannan was given the benefit of doubt but the conviction of Abdul Ali was maintained. In upholding the conviction, the learned Judge remarked that in his opinion the petitioner had definite knowledge of the existence of opium inside his house.

[4] In the trial Court, as also before the learned Sessions Judge, one plea raised was that opium had been planted in the house by some one. The learned counsel for the petitioner has not pressed this plea before us. The circumstances under which the opium was recovered, its quantity, the place where it was kept and the manner in which it was deliberately concealed, all lead irresistibly to the conclusion that planting was completely out of question. The learned counsel has raised only one contention. He argues that the mere fact that opium was recovered from the house in which the petitioner lived was no evidence or proof of the fact that the accused was in possession of the opium. There was nothing for him, therefore, to account for under S. 28 of the Act. There is considerable force in this contention.

[5] Section 3, Assam Opium Prohibition Act, 1947, prohibits import, export, transport or possession of opium amongst other things. Section 5 (a) punishes contraventions of S. 3. Under S. 5 (a) possession of opium is punishable. Anyone found in possession of opium in Assam is liable to punishment with imprisonment of either description for a term which may extend to 6 years, and with fine which may extend to Rs. 5000. Obviously this is a very serious offence in this province. The question is what is meant by the word 'possession' which is made punishable by the Act.

[6] We think 'possession' implies dominion and control. A person cannot be said to be in possession of an article if he is not in a position to exercise any dominion over it. The exercise of dominion would be possible only if there is knowledge of its existence or presence at a particular place. Knowledge or consciousness of the existence of the article at a place where dominion could be exercised would therefore be necessary to constitute possession. A father,

living in a house with half a dozen sons, may not know what his sons or a particular son may bring to the house. Anyone of them may bring some quantity of opium. It may be placed in some part of the house which though accessible to all is not frequented. The father and the other inmates of the house may be wholly unaware of its existence. They would not be in a position to exercise dominion or control over it. They could not be said to be in such possession as the law seeks to punish. There would be no *mens rea* or guilty knowledge.

[7] Possession of opium within the meaning of S. 5 (a), therefore, must imply knowledge. It must be conscious possession making some kind of control possible, or in other words, there must be *mens rea* or guilty knowledge before a person could be convicted of an offence under S. 5 (a) for possessing opium. There would not be any culpable possession if there is no knowledge on the part of an occupant of a house or room as to the existence of opium in the house or the room as the case may be.

[8] Opium Act of 1878 also prohibits possession of opium. In a Division Bench of the Calcutta High Court, reported in *Cyril C. Baker* v. *Emperor*, A. I. R. (17) 1930 Cal. 668 :(32 Cr. L.J. 245), it was held by their Lordships that:

"Possession implies knowledge, and there would be no possession when there is no knowledge on the part of the ostensible occupant of the cabin or room as the case may be".

[9] In *Emperor* v. *Santa Singh*, A. I. R, (31) 1944 Lah. 339 : (46 Cr. L. J. 1 F. B), a Full Bench of the Lahore High Court held that possession of an unlicensed arm or ammunition within the meaning of S. 19 (f), Arms Act meant something more than mere constructive or legal possession. Possession necessary for constituting an offence under S. 19 (f), meant conscious possession.

[10] The view as to the meaning and connotation of the word 'possession' as occurring in the Opium Act of 1878 was followed in *Bholanath* v. *The King*, A. I. R. (36) 1949 Assam 73: (51 Cr. L. J. 51). It was held, in the circumstances of that case, that the knowledge of the presence of opium in the house of the accused could be properly attributed to him and therefore it was for the accused to account satisfactorily for his possession under S. 10 of that Act. This knowledge was considered an essential ingredient of the offence. There can be no doubt that the word 'possession' in the Assam Opium Prohibition Act also means conscious possession. There is nothing in the context to indicate that it can be given a different meaning for the purpose of this Act. The person charged with the possession of opium must be shown to have knowledge of the existence of the opium in his house before he can be said to be in possession of it. Mere recovery of opium from a house in which he lives along with other persons would not be sufficient to show that he was in possession with knowledge of its existence.

[11] The learned advocate for the State has referred us to S. 28, Assam Opium Prohibition Act. This section lays down that:

" In trials under cls. (a) to (c) of S. 5, it shall be presumed, unless and until the contrary is proved, that the accused has committed the offence with which he is charged in respect of the opium for the possession of which he fails to account satisfactorily".

[12] The learned counsel urges that the opium having been recovered from the house of the accused, it should be presumed to be in his possession and further by reason of the statutory presumption created by S. 28, it should be for the accused to explain this possession.

[13] We do not think this interpretation of the section is correct. Under S. 28, the accused has to explain his possession. But if he has not been shown to be in possession, there is nothing which is to account for. The word 'possession' appears in Ss. 3, 5 and 28 of the Act. In all these sections, the meaning to be attributed to it ought to be the same, unless the context in a particular section indicates a contrary intention. If possession ought to be conscious, then before the presumption under S. 28 comes into operation, conscious possession on the part of the accused has to be proved by the prosecution. Where such possession is not proved, no presumption arises in favour of the prosecution. The burden of proving conscious possession on the part of the accused remains on the prosecution and that burden is not shifted to the accused by anything that is contained in S. 28. The contention of the learned counsel would be correct if S. 28 had provided that it shall be presumed unless and until the contrary is proved that the accused has committed the offence with which he is charged in respect of the opium recovered from the house in which he resides. This is not what the law lays down and all this cannot possibly be read into S. 28.

[14] Section 10, Opium Act of 1878 is a provision analogous to S. 28, Assam Opium Prohibition Act. It provides that:

" In prosecutions under S. 9, it shall be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily, is opium in respect of which he has committed an offence under this Act."

Under S. 9, a person if found in possession of opium is liable to prosecution. Statutory presumption as held in *Cyril C. Baker* v. *Emperor*, A. I. R. (17) 1930 Cal. 668: (32 Cr. L. J. 245

can be availed of by the prosecution only if conscious possession of opium on the part of the accused is proved.

[15] We do not think a different interpretation can be put on S. 28 of the Assam Act, nor can the word 'possession' occurring in S. 28, be given a different meaning from that which it must have under S. 5 (a) and therefore by virtue of this section the prosecution cannot claim that mere recovery of opium from a particular house casts an obligation on every adult occupant of the house to account for it or that it is proof presumptive of the guilt of every one residing in the house.

[16] It is conceded that apart from the recovery of opium from the house, there is no other evidence against the accused showing that he had any hand in bringing or placing the opium there or that he had any knowledge of its existence.

[17] We think, therefore, that there was no basis for a finding that the petitioner was in conscious possession of the opium or that he had knowledge of its existence in the house. His conviction, therefore, is not sustainable. The petition of revision is allowed. The conviction is quashed and the petitioner acquitted. He shall be released forthwith. The fine, if paid, shall be refunded.

Thadani C. J.— I agree.

V.B.B. *Conviction set aside.*

A. I. R. (37) 1950 Assam 154 *[C. N. 56.]*

THADANI C. J. AND RAM LABHAYA J.

Siva Kanta Barua and others—*Appellants*
v. *Rajaniram Nath and others*—*Respondents.*

Second Appeal No. 207 of 1948, D/- 21-3-1950, from judgment and decree of D. J., A. V. D., D/- 13-8-1947.

(a) Hindu law—Religious endowment — Endowment created by will—Manager dealing with endowment contrary to terms thereof—Endowment, if fictitious—Succession Act (1925), S. 74—Construction of will—Intention of testator.

Where a question arises as to whether an endowment is real or fictitious, the mode of dealing with it by its donor and successors is an important element for consideration. But where an endowment takes effect upon the death of the testator, and there is nothing to show that the testator had during his lifetime given oral or written directions contrary to the terms of the endowment created under the will, or where there is absence of facts or circumstances leading to the inference that the endowment created under the will is fictitious one, the question of the testator's mode of dealing with the endowment does not really arise, and if the Manager of the endowment deals with it in a manner contrary to the terms of the endowment, he can properly be regarded as a Manager *de son tort* whose wrong acts cannot be regarded as reflecting the intention of the testator so as to characterise the endowment which is to take effect upon his death as fictitious. A solemn document such as a will, must be respected by Courts of law, and it would be an act of injustice to attribute to a dead man who has created an endowment to take effect on his death, an intention to create a fictitious endowment merely because the person in whom he reposed confidence has betrayed his confidence. [Paras 15 and 18]

Annotation: ('46 Man.) Succession Act, S. 74 N. 3.

(b) Hindu law—Religious endowment — Manager appropriating income of endowed property—Endowment, if fictitious — Inference — Evidence Act (1872), S. 114.

An endowment is not to be regarded as fictitious merely because the members of the settler's family, who are nominated as *shebaits* or *mohunts* to the endowed property, are to be remunerated out of its income. The remuneration no doubt must be reasonable having regard to the income of the endowed property. But where under the terms of the will creating an endowment, no remuneration is allowed to the manager and only a portion of the income of the endowed property is used for expenses of the endowment and the remaining income is appropriated by the manager, no inference of a fictitious endowment can be drawn against the testator by reason of greed or miserliness of the manger. [Para 17]

Annotation: ('46 Man) Evidence Act, S. 114 N. 35.

S. K. Ghose, K. R. Barooah and H. Deka — for Appellants.

A. P. Goswami and D. N. Medhi—for Respondents.

Thadani C. J.—This is a second appeal from the judgment and decree of the learned District Judge, A. V. D., dated 13th August 1947, by which he affirmed the judgment and decree of the trial Court which had dismissed the plaintiffs' suit with costs against the contesting defendants.

[2] It appears that an appeal against the decision of the trial Court, dated 24th November 1941, was preferred to the then District Judge, A. V. D., Mr. N. L. Hindley who delivered judgment on 23rd March 1942. On a second appeal preferred to the High Court of Calcutta against the decision of Mr. Hindley, Biswas and Blank JJ. remanded the appeal with the following, among other directions:

"The question that we have got to consider is whether the testator did create any endowment and, if so, what were the terms of such endowment?"

It is not necessary to set out the other directions which the learned Judges of the Calcutta High Court gave to the lower appellate Court in their order of remand, in view of the fact that the only question argued before us was the question set out above.

[3] The facts material for the appeal are these. One Phanidhar Barua had 2 sons—Payodhar (defendant 4) and Lakshmidhar (plaintiff 1). Plaintiff 2, one Premodhar, is the son of Payodhar (defendant 4). Phanidhar left a will, dated 2nd of Chaitra, 1311 B. S., by which he left some 733 bighas of land to Lakshmidhar, and 564 bighas to Payodhar, and in respect of 700 other bighas, he created an endowment for the maintenance of *namghar* and appointed Payodhar as the Manager. The in-

come from the 700 bighas was to be devoted to the maintenance of the *namghar* and meeting expenses connected with the lighting of lamps and smearing of the floor with wet earth. Panidhar Barua lived for some 5 years after the making of the will. During his lifetime, he had installed in the *namghar*, a manuscript of the 10th canto of the "Dashamskanda Bhagabat Gita" given to him by his spiritual preceptor. The sacred manuscript, so enshrined in the *namghar*, was to be maintained from the income of the endowment which is said to have been in the neighbourhood of Rs. 200 per annum.

[4] Some 20 years after the death of Phanidhar in 1315 or 1316 B. S., plaintiff 1 Lakshmidhar applied for letters of administration of the will executed by his father, which were granted to Lakshmidhar six years later in 1939.

[5] Some time before plaintiff 1 applied for letters of administration. It appears that defendant 4 (Payodhar) mortgaged some 130 bighas odd out of the endowed property to defendant 2 in 1930. In due course defendant 2 brought a suit upon the mortgage and obtained a decree in 1934, and purchased the property in execution of his decree. The sale was confirmed on 27th January 1936. Defendant 4 had also mortgaged some 53 bighas odd out of the endowed property to defendant 1, who brought a suit upon the mortgage and obtained a decree on 6th October 1936, and in execution of the decree, purchased 53 bighas odd on 10th September 1940. While the property was under attachment in execution of the decree obtained by defendant 1, defendant 4, as judgment-debtor sought to have the property released from attachment on the ground that the property was endowed property. This application was dismissed on 24th February 1940. Defendant 4 had also mortgaged 283 bighas odd out of the endowed property in favour of defendant 3 (a), the Gauhati Bank Ltd., which obtained a decree, and the Court ordered a sale of the 283 bighas odd to take place on 4th August 1941. The present suit was instituted in the beginning of 1941 by plaintiffs 1 and 2, for a declaration that the property alienated by defendant 4, was endowed property under the will of Phanidhar Barua, and that the property was not liable to be attached and sold for the personal debts of defendant 4.

[6] On the pleadings, the trial Court framed the following issues:

"(1) Whether the plaintiffs have got any *locus standi* to file this suit? (2) Whether the suit is bad for multifariousness of causes of action? (3) Whether the suit is properly valued? (4) Whether the suit is barred by limitation? (5) Whether there is the institution by the name of "Rajaduar Desamskandha Bhagabat Sthapita Namghar", as alleged in the plaint, and whether the plaintiffs and defendant 4 (*pro forma*) are the *de facto Shebayets* of the said institution? (6) Whether the property in suit is the trust property of the alleged *namghar* and has been used as such, or is the private property of defendant 4 and has been used as the private property of the said defendant 4? (7) Whether the alleged endowment is a real and *bona fide* one, or a colourable and nominal one, as alleged in the W. S.? (8) Whether the purchases of defendants 1 and 2 in Civil Court's sales are *bona fide* and for value, and without notice? (9) Whether the plaintiffs have any title and interest over the property in dispute? (10) To what relief, if any, are the plaintiffs entitled?"

[7] As a result of its findings, the trial Court dismissed the plaintiffs' suit. The lower appellate Court, on remand by the Calcutta High Court, has affirmed the judgment and decree of the trial Court.

[8] We think the lower Appellate Court has erred in holding that a valid endowment had not been created by Phanidhar Barua under his will, dated 4th April 1905. The lower appellate Court has taken the view that the alleged endowment was a colourable transaction designed to keep the property in question with the family of the deceased in perpetuity. We are not impressed by the reasons which the lower appellate Court has given for coming to this finding. It is true that the testator's son, Payodhar (defendant 4) did not carry out the terms of the will made by his father, that contrary to the terms of the will, he had his name mutated in the record of rights as owner, instead of as a Manager, that he kept no accounts of the income and expenditure of the trust property, and proceeded to create mortgages some years later for his personal debts. But as the learned Judge himself points out, these acts of Payodhar would not necessarily affect the question as to whether the endowment made by Phanidhar under his will, was an endowment validly created. It is true that even under a will, a fictitious endowment might be created for the purpose of preventing the family property from being alienated, but each case has to be decided on its merits, and we are unable to characterise the will in question as a document designed to create a fictitious endowment.

[9] The learned Judge has stressed the fact that at the time of making the will, the *namghar* itself was a private family property, and continued to remain so at the death of the testator—a circumstance which, according to the learned Judge, tends to show that the testator did not divest himself of all his rights in the endowed property.

[10] We think the learned Appellate Judge had misdirected himself on certain material facts in the case. He appears to think that the endowment was created by Phanidhar Barua during

his lifetime. That is clearly erroneous. The endowment was expressly created by the will of Phanidhar to take effect upon his death, and not before. There was, therefore, no question of the testator divesting himself of his rights in the endowed property during his lifetime. The Lahore case, to which reference has been made by the learned Judge *Jai Dayal* v. *Ram Saran Das*, A I. R. (25) 1938 Lah. 686 : (I. L. R. (1938) Lah. 704) was not a case where the trust was created by a will, to come into effect on the death of the testator.

[11] We will now proceed to consider the circumstances from which the learned Judge has inferred that the endowment was fictitious. It appears that under the will, the testator had left 733 bighas to Lakshmidhar, plaintiff 1, whereas he left only 500 bighas odd to Payodhar (defendant 4). The learned Judge has drawn from this unequal division the inference that as a smaller area was given to Payodhar, the testator intended to compensate him by ostensibly setting apart some 700 bighas as endowed property, but, in fact, it was set apart for the benefit of Payodhar and his successors in perpetuity. The inference is scarcely logical. There may be a variety of reasons which induced the testator to give more land to one of his sons. Indeed the recitals in the will show that the properties which were allotted to the testator's sons were allotted to them as a result of a partition made by the testator himself. The intention of the testator in this case must be gathered from the language and terms of the will, and not from any logically erroneous inferences which the Courts think proper to draw. It is not inconceivable that the property made over to Payodhar (defendant 4) was more valuable than that made over to Lakshmidhar. We do not think that the apparently unequal division of the property between the two sons, is any indication of the testator's intention or design so to make a will that property ostensibly described as endowed property, would nevertheless enure for the benefit of the family in perpetuity. Nor do we think there is any substance in the reasoning that because Payodhar did not act up to the terms of his father's will, his father never intended to make a genuine endowment. The facts of Payodhar might well be acts of a trustee or Manager *de son tort* in spite of the fact that he was the testator's son. Payodhar's acts cannot, therefore, be properly construed as indicating an intention of the testator to make a fictitious endowment.

[12] Another circumstance which the learned Judge has stressed is that the *namghar* itself was retained as the private property of the testator's sons. We do not think this circumstance has any bearing on the question as to whether the endowment made under the will was a genuine or fictitious endowment. The purpose of the endowment was not the *namghar* but the installation of a manuscript of the 10th Canto of the "Dashamskanda Bhagabat Gita" to be lodged in the *namghar*, that is to say, the *namghar* was merely intended to house the manuscript. It was no part of the endowed property. The manuscript had to be housed somewhere; it matters not if the manuscript was to be housed in private property which was to be called *namghar*. It is not disputed that the object or the purpose of the endowment was religious. If an endowment is created for the purpose of advancing a religious purpose, in this case the religious purpose being the installation of a manuscript of the 10th Canto of "Dashamskanda Bhagabat Gita," we can find no justification for the learned Judge's view that as the *namghar* was not a part of the trust property, the endowment was a fictitious endowment.

[13] The learned Judge then proceeded to infer a fictitious endowment from the fact that, whereas the income from the endowed property was Rs. 200 annually, the expenses in connection with the maintanance of the endowed property amounted to a sum of Rs. 50 only, the suggestion being that the balance was intended for the benefit of Payodhar.

[14] It may be that there is evidence that a sum of Rs. 50 only was necessary for the maintenance of the endowed property, but that does not mean that the testator, at the time of making the will, knew that only Rs. 50 would be sufficient for the purpose. Even assuming for the sake of argument that only Rs. 50 were required for the purpose, it does not follow that because a small portion of the income of the endowed property was used for the purposes of the endowment, the endowment was a fictitious one. Mr. Goswami for defendant 1 who alone is contesting the appeal, has not referred us to any provision of law by which an endowment is to be regarded as fictitious if only a portion of the income of endowed property is used for the purposes of the endowment.

[15] It is true that where a question arises as to whether an endowment is real or fictitious, the mode of dealing with it by its donor and successors is an important element for consideration. But where an endowment takes effect upon the death of the testator, and there is nothing to show that the testator had during his life time given oral or written directions contrary to the terms of the endowment created under the will, or where there is absence of facts or circumstances leading to the inference that the

endowment created under the will is fictitious one, the question of the testator's mode of dealing with the endowment does not really arise, and if the manager of the endowment deals with it in a manner contrary to the terms of the endowment, he can properly be regarded as a Manager *de son tort* whose wrong acts cannot be regarded as reflecting the intention of the testator so as to characterise the endowment which is to take take effect upon his death as fictitious.

[16] It is to be observed that there is no evidence in this case whatsoever that the testator had incurred debts during his life time; on the contrary, the evidence shows that it was not until some 20 years after the death of the testator that his son, defendant 4 mortgaged the endowed property for his personal debts. It would, we think, be quite improper even remotely to connect the personal debts of defendant 4 incurred many years after the death of his father, with his father's intention to create a fictitious endowment. There is nothing on the record to show that the testator intended to defeat the provisions of the ordinary law by descent or to restrain alienation and to retain the property in perpetuity in the family; on the contrary, the partition effected by the testator during his life time between his two sons, is evidence to the contrary.

[17] It is not disputed that an endowment is not to be regarded as fictitious merely because the members of the settler's family who are nominated as *shebaits* or *mohunts* to the endowed property, are to be remunerated out of its income. It is true that the remuneration must be resonable having regard to the income of the endowed property. But under the terms of the will in question no remuneration was allowed to defendant 4 for managing the endowed property. It may be that the income of the endowed property was Rs. 200 annually and expenses Rs. 50 only, but there is not evidence that the testator knew that the expenses would be Rs. 50 and that the balance of the income was to be appropriated, with the knowledge of the testator by defendant 4 for his own use. It may well be that the testator was a man of generous instincts and he fully intended that the entire income of Rs. 200 would be used for the purposes of the endowment. If the testator's generous instincts were frustrated by his son's greed or miserliness, no inference of a fictitious endowment can be drawn against the testator by reason of such greed or miserliness of his son.

[18] A solemn document such as a will, must be respected by Courts of law, and I think it would be an act of injustice to attribute to a dead man who has created an endowment to take effect on his death, an intention to create a fictitious endowment merely because the person in whom he reposed confidence has betrayed his confidence.

[19] We are satisfied that the reasons which the learned Judge has given for coming to the conclusion that the endowment in this case was a fictitious one cannot be sustained. In this view, the judgment and decree of the lower Appellate Court must be set aside.

[20] The result is that the appeal is allowed with costs of the first appeal and this appeal, except from respondents 3 and 3a. The suit is decreed with costs except from respondents 3 and 3a declaring that the attachment and sale of the property which were attached and sold by defendants 1, 2, 3 and 3 (ka) in execution of their decrees, were not binding on the endowed property set apart by the testator under his will, dated 4th April 1905.

[31] Mr. Medhi for respondent 3 (a) did not press the case on behalf of his client as he stated that the matter as between the appellant and his client had been settled out of Court.

Ram Labhaya J. —I agree.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Assam 157 *[C. N. 57.]*

THADANI C. J.

Saligram Rai Chunilal Bahadur and Co. — *Appellants* v. *Jajna Ch. Goswami and another*—*Respondents.*

R. A. Nos. 117 and 118 of 1949 and Revn. Nos. 111 (R) and 108 (R) of 1949 and Rule Nos. 6 (R) and 7 (R) of 1950, D/- 3-3-1950, against orders of Deputy Commissioner, Nowgong, D/- 20-9-1949 and 20-10-1949, respectively.

Assam Land and Revenue Regulation (I [1] of 1886), S. 147—Rules under Act, Rr. 2 and 66—Leases of waste land in town—Settlement by Deputy Commissioner subject to previous approval or confirmation of Government — Settlement whether by Deputy Commissioner or by Government.

Where the Deputy Commissioner acting on the advice of the District Land Settlement Advisory Board, decides to reject the application of *A* for settlement of waste land in town and offers settlement to *B*, the order of settlement is passed by the Deputy Commissioner and not by the Government of Assam. [Para 8]

The settlement of waste land in town is vested under the Regulation in the Deputy Commissioner only. The fact that the settlement by the Deputy Commissioner is subject under R. 66 to the confirmation by the Government or under R. 2, to the previous approval of the Government does not empower the Government to settle the land in the first instance. [Para 10]

The order, therefore, settling waste land in town on a person is an appealable order under S. 147 having been made by the Deputy Commissioner. [Para 11]

Syed Md., Saadullah, K. R. Barman and B. N. Chaudhuri—for Appellants. (in both Appeals).

S. K. Ghose, K. R. Barooah and B. C. Barua — for Respondents (in both Appeals).

Judgment.—These are two appeals under S. 147, Assam Land and Revenue Regulation, 1886, directed against two orders passed by the learned Deputy Commissioner of Nowgong, dated 20th September 1949 and 24th October 1949. The order, dated 24th October 1949 is not an independent order but a continuation of the order passed by the Deputy Commissioner on 20th September 1949.

[2] The facts material to the appeals are these: Saligram Rai Chunilal Bahadur & Co., of Haiborgaon, District Nowgong, purchased periodic dag No. 667 of Haiborgaon Town from Messrs. Askaran Surujmall alias Surajmall Meghraj in 1933, built a house on it and have been in occupation of it ever since. Dag No. 403 forms the frontage of dag No. 667.

[3] It is the case of the appellants that the land forming the frontage consisted of a deep pit, in filling which they spent considerable sums of money; dag No. 403 is contiguous to the Railway land upon which the B. O. C. petrol pump, depot, and kerosene oil depot are located; dags Nos. 403 and 667 were at one time outside the town area, but in 1919 or 1920, they became part of the town area and a portion of this area —some 12 to 50 feet—was reserved for the roadside. After the inclusion of this area within the municipal limits, the Deputy Commissioner served a notice upon the appellants to set apart 12, for the roadside and that if any houses had been constructed upon it, they must be demolished at their cost.

[4] On 21st May 1948, the appellants formally applied to the Deputy Commissioner, Nowgong, for a settlement of a peace of land from the frontage of dag No. 667, measuring some 16 lessas. In due course, their application was recommended by the then Deputy Commissioner. But in 1949, the Land Settlement Advisory Committee declined to recommend settlement with the appellants and the Deputy Commissioner thereupon rejected the appellants' petition on 20th September 1949; on 24th October 1949, the Deputy Commissioner settled the entire dag No. 403 with respondent 1 and put him in possession on 27th October 1949. It is against this order that the appellants have filed the present appeals.

[5] Mr. Ghose for the respondents has raised a preliminary objection, namely, that no appeal lies as the order from which the appeals have been preferred is not an order passed by the Deputy Commissioner, but an order passed by the State against which no provision for appeal has been made in the Regulation. It seems to me that this objection is based upon certain reports which have been submitted to this Court by the Deputy Commissioner. One of the reports is in these terms :

"Subject: Revenue Revision No. 111 (R) of 1949. Saligram Rai Chunilal Bahadur and Co, v. (1) J. C. Goswami, (2) The Province of Assam, in the matter of settlement of 16 lessas of land in dag No. 403 of Haiborgaon town.

Sir,

I have the honour to submit report on the subject, as below :

It is virtually a prayer for revision of the settlement order of Government of Assam in respect of the land in dag No. 403, settled with one J. C. Goswami, and not of my order, as will be evident from the following facts:

Messrs. Saligram Rai Chunilal had first applied for 16 lessas of land in dag No. 403, out of the total area of 2 kathas, 16 lessas contained in it— vide petition No. 4228/47-48 enclosed. A proposal was accordingly submitted to Government recommending settlement by the then officiating Deputy Commissioner, Syed Makibor Rahman. So long, there had been no other applicant for this dag and the appellant's was a solitary case: vide this office letter No. 5629/5/5 R, dated 7th October 1948, copy enclosed. Thereupon, Government enquired of the views of the District Land Advisory Board, which is a Board constituted by Government according to its present policy of Land settlement—vide Government letter No. RS. 182/48/27, dated 3rd December 1948, copy enclosed. Accordingly, the matter was placed before the Land Settlement Advisory Board's meeting, but the Board unanimously disagreed to the proposed settlement. The decision was communicated to Government under this office letter No. 1942 B, dated 11th May 1949, copy enclosed. Thereupon the Government dropped the matter, refusing settlement—vide Government letter No. RS. 182/48/32, dated 20th May 1949, copy enclosed. The matter ended there.

But, at the time of considering some application for land in the dag 403 later on, their case was once again taken up and placed before the Land Settlement Advisory Board along with the application of Nagarmal Agarwalla, about which a separate report is being submitted, as required, in the Revenue Appeal No. 118/49 of Nagarmal v. J. C. Goswami, vide this office letter No....., dated..... and that of the petition of J. C. Goswami. This time also, the Advisory Board did not agree to the settlement of any land in dag 403 with the appellant. Thereupon his petition was disposed of by me as empowered under rule 9 of the Settlement rules. Yet the appellant has been allowed to use a much larger area than what is necessary, as will be seen from my order on the petition. This path will not, however, be settled with any one in future according to Government order.

After receipt of Government order contained in their letter No. RS. 101/49/106, dated 19th October 1949, copy enclosed, sanctioning settlement of land in dag 403 with J. C. Goswami, the appellant had prayed for stopping settlement as sanctioned by Government—vide petition No. 1847/49-50. As the applicant did not file any appeal before the High Court, nor any directions from the appellate Court came down then, I could not but give effect of the Government order of settlement, and hence their petition could not be considered, which was received after I had passed order for delivery of possession etc., as usual, passed on the strength of the Government order. Besides, I had no power to act up contrary to Government orders unless there be some directions from it to this effect. The appellant had also filed another petition before the Government which was rejected by it — vide Government order with their Memo No. RS. 101/49/117, dated 4th November 1949."

[6] It is clear from the report of the Deputy Commissioner that at the time of the application made by the appellants for settlement, theirs was the only application for consideration. Shortly afterwards, the Government of Assam appointed a District Land Settlement Advisory Board in order to advise the Deputy Commissioner on questions relating to settlement of waste and town land. Upon a requisition made by the Government of Assam, the Deputy Commissioner placed the question of settlement of the land for consideration before the District Land Settlement Advisory Board. The Board declined to accept the proposal of the Deputy Commissioner who communicated to Government the view of the Board under his letter No. 1942 R, dated 11th May 1949. On receipt of this letter, Government decided not to settle the land with anybody.

[7] For some obscure reason, when some other applications for settlement of land in dag No. 403 were being considered, this case was re-opened and placed before the District Land Settlement Advisory Board, for consideration along with the application of J. C. Goswami, the respondent. The Advisory Board recommended settlement with the respondent. The Deputy Commissioner, in conformity with the views of the Advisory Board, recommended settlement of the land with the respondent. Against the proposal of the Deputy Commissioner recommending settlement with the respondent, the appellants preferred a petition to the Government of Assam, whereupon the Hon'ble Revenue Minister himself made a local enquiry and, after giving a hearing to the parties concerned, directed the Deputy Commissioner to take into consideration the petitions of the appellants and that of the respondent and to submit a report after consulting the District Land Settlement Advisory Board.

[8] Apparently, the appellant Nagarmall Agarwalla had been guilty of some unwarranted conduct in digging up earth in dag No. 404 and encroaching upon a portion of Sarkari dag No. 403, upon which he had constructed a temporary house. The Hon'ble Revenue Minister appears to have taken a serious view of this encroachment and the Deputy Commissioner, acting on the advice of the District Land Settlement Advisory Board, decided to reject the application of the appellants for settlement and offered settlement to the respondent, J. C. Goswami. I can see nothing from the reports submitted by the Deputy Commissioner that the orders appealed from were not passed by him but by the Government of Assam.

[9] Mr. Ghose next contended that assuming that the orders were passed by the Deputy Commissioner, they were passed in consequence of the previous approval of the Government of Assam given to the proposals made by the Deputy Commissioner, and that as the Deputy Commissioner was merely giving effect to the approval of the Government, the order must be regarded as orders of the Provincial Government. I do not think there is any substance in this contention. Rule 2 of the rules framed under the Regulation is in these terms:

"The disposal of waste land required for ordinary or special cultivation or for building purposes will, subject to the general or special orders of the Provincial Government, vest in the Deputy Commissioner who will dispose of such land by grant lease or otherwise in the manner and subject to the conditions set forth in the rules following provided that the Deputy Commissioner may expressly reserve any such land from settlement."

[10] Mr. Barua on behalf of the Government contends that as R. 2 provides that disposal of waste land is subject to the general or special orders of the Provincial Government, the order approving of the proposal of a Deputy Commissioner settling land upon a person, amounts to an order of the Provincial Government. I do not think that is a correct interpretation of R. 2, for it militates against the provision in R. 2 which says that the disposal of waste land is vested in the Deputy Commissioner. The words "subject to the general or special orders of the Provincial Government" cannot affect the power of disposal which vests only in the Deputy Commissioner under the Regulation. Moreover, I do not think R. 2, is properly applicable to the facts of this case. The appropriate rule governing this case is R. 66, which specifically deals with leases of waste land in towns. Rule 66 is in these terms:

"Waste land in town shall be settled by the Deputy Commissioner in accordance with Rr. 67-71 of these rules subject to confirmation by the Commissioner. In sub-divisions, the functions of the Deputy Commissioner shall be exercised by the Sub-divisional Officer, subject to the control of the Deputy Commissioner In this Section of the rules unless the contrary is apparent from the context, the expression 'Deputy Commissioner 'includes a Sub-divisional Officer."

It is plain that there is a substantial difference between the language of R. 2 and the language of R. 66. Under R. 66, the settlement of town land by the Deputy Commissioner is subject only to confirmation by the Commissioner which now means the Government of the State. The words "subject to confirmation" only mean that when a settlement is made by the Deputy Commissioner, the Government either confirms the settlement so made or refuses to confirm it. Rule 66 does not empower the Government to settle land in the first instance with an applicant; that power is vested

in the Deputy Commissionr only. Mr. Barua for the Government relied upon para. 2 of a copy of letter NO. RS. 195/47/39, dated 22nd August 1947, in which the words "previous approval of Government" are used. Here again, the words "previous approval" do not mean 'previous orders of the Government'; the words "previous approval" mean that when a proposal comes from the Deputy Commissioner to settle land with a person, the Deputy Commissioner is not empowered to pass a final order unless the Government has approved of the proposal. The Government may approve or may not approve of the proposal. In case it approves, the Deputy Commissioner will pass a formal order; in case it does not approve, the Deputy Commissioner will not pass a formal order. Under no circumstances, the words "previous approval" used in para. 2, can be regarded as amounting to a previous order of Government.

[11] The interpretation I have put upon Rr. 2 and 66 and Para. 2 of the letter to which I have referred, appears to be borne out by a letter of the Government, dated 14th July 1949, relating to the functions of the Land Settlement Advisory Committee in Assam. In the letter, it is stated:

"Inasmuch as the Committee will be advisory, the responsibilities of the Deputy Commissioners or the S. D. Os. will always remain as before. But when the Deputy Commissioner or Subdivisional Officer does not accept the advice of the Committee, he should report the reasons thereof to Government."

I am satisfied, therefore, that the orders in question are appealable orders having been made by the Deputy Commissioner after taking full responsibility in the matter.

[12] The question arises—whether on the merits of this case, the orders passed by the Deputy Commissioner on 20th September 1949 and 24th October 1949 should be set aside or affirmed.

[13] In disposing of this question, I propose to state only one reason why I do not think the orders of the Deputy Commissioner should be allowed to stand. In my opinion, when a matter involves an impartial adminstration of the Land and Revenue Regulation, justice must not only be done, but must appear to be done. I am glad to observe that the Government of Assam is not unaware of the importance of this maxim, for, I find the following statement in its letter, dated 18th July 1949 :

"It is further observed that Srijut Jajnachandra Goswami (respondent in this case) in his first application applied only for 15 or 16 lessas of land in dag No. 403, but Government find that some of the members of the Land Settlement Advisory Committee individually recommended that application for settlement, which is not desirable. It is advisable that the members of the Land Settlement Advisory Committee should keep their mind open and should not recommend individual application for settlement of land, so that they may be able to decide such matters after considering the rival claims of different applicants for the same plot of land. Therefore, you are instructed to request the members of the Land Settlement Advisory Committee not to recommend any application for settlement of land individually in future, so that other claimants may not have the impression that they will not get a fair and impartial decision from the members of the Land Settlement Advisory Committee."

[14] I regard this as a very commendable caution administered to the authorities concerned, but the value of the caution has been mitigated by limiting its exercise to cases which come up before them in the future. Apparently the learned Deputy Commissioner considered himself powerless to do anything in the present case. It was manifestly difficult for the members of the Advisory Board who had already recommended the respondent's application, to change their minds and decide the question of settlement on its merits.

[15] I believe the membership of the Advisory Board is not permanent; it can be changed at the pleasure of the Government. In order to give effect to their very commendable caution and to the maxim that justice should not only be done, but appear to be done, the Government of Assam might well have reconstituted the Board and placed this case for the consideration of a reconstituted Board. If for no other reasons than to enable the Government of Assam to place the matter again before an Advisory Board which has not committed itself to any particular view, I propose to set aside the orders of the learned Deputy Commissioner and direct that the applications of the parties should be considered on their merits by a Board whose members are not those who had previously endorsed the application of the respondent in favourable terms. Such a course would ensure an impartial consideration of the merits of the claims made by the parties.

[16] The result is that the appeals are allowed, with no order as to costs.

[17] As I have set aside the material orders of the learned Deputy Commissioner, it follows that there cannot be any question of interference by the respondent with the rights of the appellants. The appellants and the respondent will be in the same position in which they were before the orders in question were passed. The rules issued in these two appeals are discharged.

V.B.B. *Appeals allowed.*

A. I. R (37) 1950 Assam 161 *[C. N. 58.]*

THADANI C. J. AND RAM LABHAYA J.

Sjt. Jyotirindra Narayan Singh Chowdhury and others — *Appellants* v. *Purna Chandra Saha and others*—*Respondents.*

Second Misc. Appeal No. 4 of 1945, D/-22-12-1949, against order of District Judge, Assam Valley Districts, D/-5-8-1944.

(a) Debt Laws—Assam Money-lenders (Amendment) Act (VI [6] of 1943), Ss. 1 (2) and 9—Applicability—Act does not apply to pending execution proceedings and appeals arising therefrom—S. 1 (2) qualifies the provisions of S. 9. [Paras 8 & 12]

(b) Interpretation of Statutes — Retrospective operation—Larger retrospective power is not to be read into an Act or a provision contained in an enactment than what was clearly intended by the Legislature. [Para 12]

Annotation : ('50-Com.) Civil P. C., Pre. N. 3.

(c) Interpretation of Statutes—General and special provisions—Inconsistent provisions.

A general provision in an enactment ought to yield to a special provision providing for particular cases.

Apparently inconsistent provisions of the Act have to be reconciled with each other so far as possible by reading one as a qualification to the other. [Para 12]

Annotation : ('50-Com.) Civil P. C., Pre. N. 7.

S. K. Ghose with N. M. Dam—for Appellants.

S. C. Das (for Guardian-ad-litem)

—for Respondents.

Thadani C. J.—This is a second miscellaneous appeal against an order of the learned District Judge, Assam Valley Districts, dated 5th August 1944, by which he modified the order of the executing Court, the Court of the Subordinate Judge, Goalpara, dated 15th May 1944. The order of the executing Court is in these terms :

"The judgment-debtors file a petition stating that they are ready to clear up the dues provided that a portion of the claim is remitted. The judgment-debtor wants to pay Rs. 3000 in full satisfaction having already paid Rs. 3085 for an original debt of Rs. 3000. Heard decree-holder's pleader. This is allowed on equitable grounds. Case dismissed on full satisfaction."

[2] The learned District Judge framed the following points for his determination :

"(a) Does the Assam Money-lenders' Act, as amended by Assam Act VI [6] of 1943, apply to the case or not? (b) If not, was the order passed under S. 151, Civil P. C., (or under S. 47)? (c) Even if it did not apply to the case, is it open to this Court of appeal to apply it? (d) If so, does the order of the lower Court, dated 6th March 1944, affect the position, and what relief should this Court grant, if any?"

[3] The learned District Judge came to the conclusion that while it is true that the Assam Money-lenders Act, as amended by Assam Act VI [6] of 1943, did not apply to execution proceedings, but as it applies to appeals, and this being an appeal before him, he thought the judgment-debtors, were entitled to relief under the provisions of S. 9 of Act VI [6] of 1943, and in this view, he modified the order of the executing Court.

[4] The Assam Money-lenders (Amendment) Act of 1943 (Act VI [6] of 1943) came into force in 1943 some five years after the decree was passed in this case—the date of the decree being 30th November 1938. Sub-section (2) of S. 1 of Assam Act VI [6] of 1943 expressly states that it shall apply to pending suits and appeals. The question for our consideration is — whether it also applies to execution proceedings.

[5] This question came up before the learned Judges of the Calcutta High Court. Mitter J., delivering the judgment of the Division Bench reported in *Sylhet Loan and Banking Co., Ltd.* v. *Ahmed Majtoba*, 50 C. W. N. 417: (A.I.R. (33) 1946 Cal. 337), observed :

"The ordinary rule is that the rights of litigants are to be governed by the law in force when the action was commenced. The corollary from this is that a change in the substantive law, as opposed to adjective law, would not affect pending actions, unless the legislature had indicated otherwise either by express enactment or by necessary implication .....

The second general rule is that 'you should not give a larger retrospective power to a section, and even in an Act which is to some extent intended to be retrospective, than you can plainly see the legislature meant'. . . ."

[6] The Assam Money-lenders (Amendment) Act of 1943 (Act VI [6] of 1943) in our judgment must be interpreted in the light of these rules of construction. Mitter J., took the view that the Legislature did not intend to make S. 5 of the Amending Act applicable to pending execution proceedings. He pointed out that :

"In the first place the language of S. 1 (2) falls short, and in the second place, no provision is made in the Amending Act akin to that occurring in the Bengal Money-lenders' Act of 1940 empowering the Court to re-open decrees."

He declined, therefore, to give effect to the contention that the word 'suit' used in S. 1 (2) must be taken to include a proceeding in execution on the ground that proceedings in execution are to be regarded as continuation of the suit.

[7] It was, however, contended on behalf of the judgment-debtors that having regard to the terms of S. 9, Assam Money-lenders (Amendment) Act, VI [6] of 1943, notwithstanding the fact that sub-s. (2) of S. 1 refers to pending suits and appeals only, pending execution matters should be regarded as within the ambit of sub s. (2) of S. 1. Section 9 of Act VI [6] of 1943 is in these terms :

"No money-lender shall, in respect of any loan made before or after the commencement of this Act, recover, on account of interest and principal, whether through Court or otherwise or by way of usufruct of lands in usufructuary mortgages, a sum greater in aggregate than double the principal of the loan."

[8] It appears to us that the language of S. 9 is on the contrary against the contention of the respondent's advocate that sub-s. (2) of S. 1, Assam Act VI [6] of 1943 should be interpreted

so as to include pending execution proceedings. Questions relating to satisfaction of decrees are to be decided with reference to O. 21, Civil P. C., and R. 2 of O. 21 expressly provides that a Court will not take notice of payments made out of Court, unless they are notified to the Court which passed the decree within the prescribed period. If S. 9 of Assam Act VI [6] of 1943 were to be extended to execution proceedings, it will, in proper cases, come into conflict with the provisions of O. 21 relating to certification of payments made out of Court. The possible conflict is easily avoided if the operation of Assam Act VI of 1943 is not extended to execution proceedings.

[9] The learned District Judge has set out two accounts 'A' and 'B' which are not disputed by the parties. Account 'A' was made out by the learned District Judge on the supposition that the amended Money-lenders Act did not apply to the present proceedings. The balance due to the decree-holders, at the foot of the account 'A' is Rs. 3864-13.7 out of which, according to the judgment of the executing Court, a sum of Rs. 3000 was deposited in the treasury under Chalan No. 138, dated 15th May 1944. The balance, therefore, recoverable from the judgment-debtors is Rs. 864-13-7.

[10] We accordingly set aside the order of the executing Court and that of the learned District Judge passed on appeal. The executing Court will dispose of the execution application of the judgment-creditors in the light of the observations we have made.

[11] **Ram Labhaya J.**—I agree with my Lord the Chief Justice in the conclusion he has reached in this case. I wish to add a few words.

[12] Section 1, sub-s. (2), Assam Money-lenders (Amendment) Act, 1943, provides that the Act shall apply to pending suits and appeals. The extent to which retrospective effect can be given to this Act is clearly defined in this provision. The contention that S. 9 overrides S. 1, sub-s. (2) does not bear examination. Section 9 no doubt provides that no money-lender shall recover on account of interest and principal in respect of any loan made before or after the commencement of this Act through Court or otherwise or even by way of usufruct of lands in usufructuary mortgages a sum greater in aggregate than double the principal of the loan, and it may well be argued that recovery of an amount exceeding this limit by execution of a decree is barred. The language of the section does yield to this interpretation. If given effect to, it will conflict with the provisions contained in S. 1, sub-s. (2) as under that section the Court has not been given any authority to re-open a decree or to apply the provisions of the Act to pending execution proceedings. It is clear that the scope of the Act was defined in S. 1 and that other provisions of the Act have to be read subject to S. 1 when any question relating to its scope arises. If there is an apparent conflict between S. 1 on one side and any other provision of the Act, S. 1 will have overriding effect. It is a recognised rule of construction that larger retrospective power is not to be read into an Act or a provision contained in an enactment than what was clearly intended by the Legislature. If the Act had been intended to apply to pending execution proceedings, it would have clearly been provided in the Act. In view of the clear language used in S. 1 sub-s. (2) there can be no doubt that a decree which became final before the Act came into force, can be executed as it stands and the Act makes no provision for re-opening it or for going behind it. It merely applies to pending suits and appeals and its scope cannot be extended. A general provision in an enactment ought to yield to a special provision providing for particular cases. Besides apparently inconsistent provisions of the Act have to be reconciled with each other so far as possible by reading one as a qualification to the other. In this view of the matter also S. 1, sub-s. (2) should qualify the provisions of S. 9. The Act therefore cannot be applied to pending execution proceeding and appeals arising therefrom.

V.B.B. *Order accordingly.*

A. I. R. (37) 1950 Assam 162 *[C. N. 59.]*

THADANI C. J. AND RAM LABHAYA J.

Bhuturi Chutiani — Appellant v. *Mikira Chutia—Respondent.*

Second Appeal No. 86 of 1949, D/- 19th April 1950, from judgment and decree of Sub-Judge, U. A. D., D/- 26th April 1949.

Civil P. C. (1908), S. 11 — Absence of decree and judgment—Evidence Act (1872), Ss. 115 and 18.

In the absence of judgment and decree passed in the previous suit for maintenance, the admitted facts cannot take the place of estoppel by record and hence a subsequent suit for recovery of maintenance cannot be held barred by *res judicata*. [Para 5]

Annotation : ('50-Com.) Civil P. C., S. 11, N 2 and 16 ; ('46-Man) Evidence Act, S. 18, N. 1 ; S. 115, N. 1.

J. C. Sen — for Appellant.

Thadani C. J. — This is a second appeal from the judgment and decree of the learned Subordinate Judge, U. A. D., dated 26th April 1949, by which he set aside the judgment and decree of the trial Court which had decreed the plaintiff's suit with costs awarding her 36 puras of paddy every year or its value from 1944 for the duration of her life.

[2] The plaintiff, a widow of one Kero Chutia, originally brought a suit, being suit No.

410/26, against her step-son claiming maintenance out of the estate left by her deceased husband—in the possession of the defendant. That suit was decreed in her favour, the Court ordering 36 puras of paddy to be delivered to the plaintiff every year by the defendant out of the properties left by the deceased Kero. From time to time the plaintiff obtained satisfaction of her decree in Suit No. 410/26 through Court until 1943. From 1944 to 1947 the plaintiff failed to execute her decree and when she attempted to take out execution in March, 1947, the Court dismissed the execution application as time-barred. She then brought the present suit, being Suit No. 111/47, for the recovery of maintenance for the years 1944, 1945 and 1946. The suit was decreed by the trial Court, but dismissed by the lower appellate Court on the ground that the present suit was barred by the principles of *res judicata*. The trial Court had stated :

"The present suit is based on different causes of action and nothing has been shown how the present suit is barred by *res judicata*. When the present suit has been filed within 3 years since the annuity was stopped and there is nothing contrary to this from the defence side, I find no reason why the suit is barred by limitation. The two issues, namely, the issues as to *res judicata* and limitation, are accordingly decided in favour of the plaintiff."

[3] It was stated from the Bar before us that the records of Suit No. 410/26 have been destroyed.

[4] Mr. Sen for the appellant contends (1) that the decree in Suit No. 410/26 was merely a declaratory decree declaring the plaintiff's right to maintenance from the estate of her deceased husband in the possession of the defendant at the rate of 36 puras of paddy every year or its value, (2) that assuming that the decree passed in Suit No. 410/26 was a decree capable of execution, there was no bar to the plaintiff's bringing a suit for the recovery of the arrears of maintenance for the three years. In support of the second contention, he has relied upon a decision of the Madras High Court reported in *Sabhanatha* v. *Lakshmi*, 7 Mad. 80.

[5] It is unnecessary to decide whether the decision reported in *Sabanatha* v. *Laksmi*, 7 Mad. 80 governs the facts of this case, for, in the absence of the judgment and decree passed in Suit No. 410/26, it is not possible for us to say that the present suit is barred by *res judicata*. The lower appellate Court has apparently proceeded on the supposition that upon the admitted facts the provisions of S. 11, Civil P. C., applied. We do not think, in the absence of the judgment and decree passed in Suit No. 410/26, the admitted facts can take the place of estoppel by record—a plea which had to be established by the defendant by the production of the judgment and decree in Suit No. 410/26. In this view, we set aside the judgment and decree of the lower appellate Court and restore that of the trial Court.

[6] The lower appellate Court allowed the appeal with no order as to costs. Before us, the respondent did not appear. The question, therefore, of the costs of this appeal does not arise; nor do we propose to vary the order of the lower appellate Court as to costs of the appeal before that Court. The trial Court had decreed the suit with costs against the defendant, but the lower appellate Court ordered that the costs of the suit must be borne by the parties. As we have set aside the judgment and decree of the lower appellate Court and restored that of the trial Court, it follows that the plaintiff's suit will stand decreed with costs. But we make no order as to costs of the appeal in the lower appellate Court or this Court.

[7] The result is that the appeal is allowed, with no order as to costs in the lower appellate or this Court.

[8] **Ram Labhaya J.** — I agree.

D.H. *Appeal allowed.*

A. I. R. (37) 1950 Assam 163 *[C. N. 60.]*

THADANI C. J. AND RAM LABHAYA J.

Durgaprasad Agarwalla and another — *Appellants* v. *Harisankar Killa and others* — *Respondents.*

First Miso. Appeal No. 2 of 1949, D/- 19-4-50.

Civil P. C. (1908), S. 99 and O. 21, R. 5 — Non-compliance with O. 21, R. 5—Effect.

A decree passed by the Calcutta High Court on its original side was sent for execution to the District Court at *T* in Assam. There was no District Court at *T* but the Subordinate Court at *T* received the papers and proceeded to execute the decree on application by the decree-holder :

Held, that the Subordinate Court at *T* was not justified in receiving the papers which were sent to the District Court, though with a wrong address, and had no power to execute the decree. The irregularity was not curable as it affected its jurisdiction. [Para 7]

Annotation : ('50-Com.) C. P. C., S. 99, N. 5, O. 21, R. 5, N. 1.

B. C. Barua — for Appellants.

S. K. Ghose, J. N. Borah and A. K. Padmapati — for Respondents.

Ram Labhaya J.—This appeal arises out of execution proceedings. The decree in this case was passed by the Calcutta High Court in the exercise of its original jurisdiction. An authenticated copy of the decree of the High Court together with a certificate of non-satisfaction of decree was sent by the Registrar of the High Court of Judicature at Fort William in Bengal (Original Jurisdiction), to the District Judge of Tezpur with the request that the decree may be executed within the jurisdiction of his Court

under the provisions of the Code of Civil Procedure.

[2] There was no District Judge at Tezpur. The ex-officio Sub-Judge received the letter with its enclosures. The decree-holder also applied for execution in the Court of the ex-officio Sub-Judge at Tezpur.

[3] Tezpur is within the jurisdiction of the District Judge, Gauhati. The judgment-debtors objected to the initiation of proceedings on two grounds. They contended that the ex-officio Sub-Judge had no jurisdiction to entertain the execution application or to execute the decree. They also pleaded that the decree had become time barred. The learned ex-officio Sub Judge by his order dated 23rd March 1949 decided that the application for execution was within time. As regards the objection to his jurisdiction, he held that though the decree should have been transmitted to his Court through the District Judge, Gaubati, the defect was technical and was not fatal to the proceedings. Judgment-debtors have appealed to this Court.

[4] The first question is whether in the circumstances of this case the learned ex-officio Sub Judge had jurisdiction to execute the decree. Order 21, R. 5, Civil P. C., provides that :

"Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed."

[5] It is clear from the language of the rule that it was necessary that the decree should have been sent to the District Court of the district in which it was sought to be executed. Its execution admittedly was sought at Tezpur. It should have been sent to the District Court of Tezpur which was the Court of the District Judge at Gauhati. The decree was transferred to the District Judge though the address of the District Judge was not correctly stated on the letter sent by the Registrar of the Calcutta High Court. He addressed it to the District Judge at Tezpur. The District Judge was in fact at Gauhati. The learned ex officio Sub-Judge should not have received the papers meant for the District Judge of Tezpur. He, however, received the papers and the decree-holder also applied for execution in his Court. The procedure adopted was in contravention of R, 5 of O. 21, The learned ex-officio Sub-Judge thought that the irregularity was not material and that it did not effect his jurisdiction.

[6] We do not think that this view of the matter is correct. The learned counsel for the appellants has relied on *Kunja Behari Singh* v. *Tarupada Mitra*, A. I. R. (6) 1919 Pat. 324 : (4 Pat. L. J. 49) in support of his contention that if a decree is sent for execution to another district, it should be sent to the Court of the District Judge. The Subordinate Judge in that district has no jurisdiction to entertain an application for execution of a decree transferred to him direct by the trial Court until it is transferred to him by the District Court. According to this view, non-compliance with the requirements of R. 5 of O. 21, would affect jurisdiction. There are other authorities also in support of this view. The learned counsel for the respondent has not tried to support the view taken by the learned ex-officio Sub-Judge.

[7] We are of the view that the decree could not have been sent direct to the ex-officio Sub-Judge. If it had been sent to him direct, he would not have acquired necessary jurisdiction to execute the decree. In this case, however, the decree was not sent to him for execution. It was sent to the District Judge, though his address was incorrectly given. In these circumstances, the learned ex-officio Sub-Judge was not justified in receiving the papers which were not meant for him. His receiving the papers meant for the District Judge surely would not confer any jurisdiction on him to execute the decree. The irregularity, in these circumstances, is not curable as it affects jurisdiction.

[8] The learned counsel for the respondent has pointed out that the High Court of Judicature at Fort William in Bengal has got the power under its rules to send its decrees for execution to any Subordinate Court even outside Bengal. He has not been able to show us the rule on which his contention is based. Assuming that such powers exist in the Calcutta High Court, in this case these powers were obviously not exercised. The Calcutta High Court sent the decree to the District Judge and not to any Subordinate Court. There can be no doubt, therefore, that the learned Ex-officio Sub-Judge had no jurisdiction to execute the decree.

[9] In these circumstances his decision on the question of limitation also is without jurisdiction. He had no power to take any step in the execution proceedings. We, therefore, allow the appeal; reverse his order and send back the case to him with the direction that he shall return the application for execution to the decree-holder for presentation to the proper Court. Papers received by him directly from the Calcutta High Court shall be sent to the District Judge at Gauhati for necessary action. We make no order as to costs.

[10] **Thadani C. J.** — I agree.

K.S. *Appeal allowed.*

A. I. R. (37) 1950 Assam 165 *[C. N. 61.]*

RAM LABHAYA J.

Gobardhandas Khakalia — Petitioner v. *Chaturbhuj Khaklalia and another—Opposite Party.*

Criminal Revn. No. 30 of 1950, D/- 28-4-1950.

(a) Criminal P. C. (1898), Ss. 145 and 435—Revision of order under Chap. 12 — Direct petition to High Court.

The High Court should not ordinarily entertain petitions of revision of an order under Chap. 12, Criminal P. C., unless the lower Court has been moved in the first instance though it should not hesitate to do so if extraordinary and special circumstances are shown to exist which justify departure from the normal course. [Para 5]

Annotation : ('49 Com.) Criminal P. C., S. 145 N. 61, Pt. 3; S. 435 N. 5 Pt. 1.

(b) Criminal P. C. (1898), S. 147 (1)—"Is satisfied" —Dispute likely to cause breach of peace existing—Magistrate, if bound to take proceedings under section.

An order under cl. (1) of S. 147 requiring the parties in dispute to attend the Court, can only be made if the Magistrate is satisfied from police report or other information that a dispute regarding the alleged right of user of land or water likely to cause a breach of the peace exists. If there is no police report or other information, he may give the applicant a chance to satisfy him or he may ask for a report from the police. If from the material placed before him he is not satisfied about the existence of a dispute likely to cause a breach of the peace, there will be no justification for initiating proceedings under S. 147, Criminal P. C. On the other hand, even if a dispute likely to cause a breach of the peace exists, a Magistrate is not bound to proceed under S. 147. He is not bound to take proceedings under the section and may take action under S. 144 or S. 107, Criminal P. C. But ordinarily the proper course for a Magistrate would be to take action under this section rather than to make temporary orders under S. 144 or S. 107, Criminal P. C., without any inquiry into the respective claims of the parties. [Para 7]

Annotation : ('49-Com.) Criminal P. C., S. 147 N. 5.

(c) Criminal P. C. (1898), S. 147 (1) — No preliminary order passed — Findings on merits — Validity.

Where a petitioner put in a petition requiring formal proceedings to be drawn up under S. 147, but the Magistrate gave no opportunity to the petitioner to substantiate his allegations and instead of merely declining to draw up proceedings under S. 147 entered into the merits of the controversy without passing a preliminary order and came to certain findings on points which could have been considered only after the proceedings had been initiated and even warned the petitioner against doing anything which might lead to a breach of the peace :

***Held*, that the order was without jurisdiction.** [Para 10]

Annotation : ('49-Com.) Criminal P. C., S. 147 N. 9.

S. K. Ghose, P. Chaudhury and J. C. Sen — for Petitioner.

J. C. Medhi and J. C. Chaudhury — for Opposite Party.

Judgment. — This petition of revision is directed against an order of the Deputy Commissioner, Nowgong, by which the application of the petitioner, who was the 1st party in the Court of the learned District Magistrate, for initiation of proceedings under S. 147, Criminal P. C., was disallowed.

[2] The dispute leading to the proceeding from which the present revision petition arises relates to a small passage 17 inches wide between the house of the parties to the dispute. The 1st party, the petitioner, claimed the right of user over the disputed pathway. His case was that both the parties had agreed to reserve 8½" strip of their land for the purposes of a drain. The entire land was also to be used as a pathway. On 3rd January 1950, the petitioner applied for an order under S. 144, Criminal P. C., directing the 2nd party to remove the obstruction put up by him along the drain. His case was that he had for the last 30 years maintained an open lane by the south of his building for the drainage of water as also for passage of men, sweeper and for removing night soil, etc. The opposite party began constructing a house and tried to encroach on the said lane. The matter, however, was amicably settled on 10th February 1949. According to the arrangement then made a narrow lane about 17 inches wide was left open between the houses of the two parties. Each side surrendered 8½" from his land for the purpose of drainage and for use as a pathway by both the parties. Subsequently, the 2nd party tried to put up a temporary moveable obstruction along the drain. The petitioner objected to their placing the obstruction. He further stated that the opposite party threatened to have recourse to violence if the petitioner tried to remove the obstruction which blocked the pathway. The dispute, he pleaded, was likely to result in a breach of the peace. On this petition, the learned District Magistrate addressed an order to the officer in charge of the police station directing him to keep the path open. He further ordered that both the parties should appear before him on 9th January 1950. The police officer visited the place on 5th January 1950. The opposite party asked for time till 8th January 1950 for removing the obstruction. They also stated that they were aware of the order of the District Magistrate and would carry out the same. On 6th January 1950, the opposite party put in a statement repudiating the allegations made by the petitioner in his petition dated 3rd January 1950 and they protested against the order which was served on them on 5th January 1950. On this, the District Magistrate ordered the case to be put up on 9th January 1950. He also vacated his order passed on 3rd January 1950 and ordered that till then the obstruction placed by the opposite party was to remain. On 9th January 1950, he inspected the locality. After that without taking any evidence arguments

were heard on 13th and 21st January 1950. The petitioner put in another petition requesting formal proceedings to be drawn up under S. 147, Criminal P. C., if the order passed on 3rd January could not he made absolute under S. 144, Criminal P. C. In this petition it was also alleged that a breach of the peace was imminent by reason of the dispute relating to the pathway in question between the parties. The final order was passed on 20th February 1950. In this order the learned District Magistrate considered the question whether proceedings under S. 147, Criminal P. C., be drawn up or not. The finding arrived at by him was that the dispute was with respect to a narrow passage about 17″ wide between the houses of the parties. In his view, the passage could not have been put to any general use and was meant only for use of the sweeper. As a result of his spot inspection on the 9th, he also came to the conclusion that the opposite party had placed the obstruction and was not willing to give up his 8½″ strip of land unless a latrine, which the first party had constructed, was removed from its present site. His reasons for declining to proceed under S. 147, Criminal P. C., are given in one passage of the judgment, which is as follows :

"The question, however, is whether proceedings should be taken up under S. 147 or not. The latrine has just been constructed and was not in use when the second party raised the obstruction on their land. Can there be said to have been a danger to the peace at the time of the dispute ? I think not. There was no danger. There is none now unless the first party try to forcibly remove the obstruction; secondly, as the house was under construction for the last 9 or 10 months the path, if at all, was apparently not used for the previous three months, i. e., 147 (2) not attracted. I also think that S. 147 is a negative section, i.e., certain acts under certain circumstances may be ordered not to be done. Here the second party had already raised the obstruction on their land; its removal could not be ordered."

[3] In holding that the removal of the obstruction could not be ordered, the learned District Magistrate was influenced by a decision of their Lordships of the Calcutta High Court reported in *Hemchandra* v. *Abdul Rahman*, A. I. R. (29) 1942 Cal. 244 : (I. L. R. (1942) 2 Cal. 75 F.B.). He warned the petitioner not to take any action which may lead to a breach of the peace.

[4] Mr. Ghose has assailed the correctness of this order. He urges that the procedure adopted by the learned District Magistrate is opposed to the provisions contained in S. 147, Criminal P. C., as also to the principles of natural justice. He gave no opportunity to the petitioner to substantiate his allegations and instead of merely declining to draw up proceedings under S. 147 entered into the merits of the controversy without passing a preliminary order and came to certain findings on points which could have been considered only after the proceedings had been initiated. He even warned the petitioner against doing anything which may lead to a breach of the peace. The order, according to him, is not only illegal but in excess of jurisdiction.

[5] Before I proceed to consider the contentions raised on behalf of the petitioner, I propose to deal with a question of procedure raised by Mr. Medhi for the opposite party. This petition was filed in this Court directly. The Sessions Judge was not moved at all. He has concurrent jurisdiction with this Court to entertain a revision petition under S. 147, Criminal P. C. He, however, could not pass final orders on the petition. In spite of this the practice which is followed in the majority of the High Courts in India is that petitions of revision against orders under Chap. XII are not entertained if the Sessions Judge has not been moved in the first instance. This practice tends to administrative convenience and from a purely judicial view point also nothing can be said against it except that in certain cases of an exceptional nature speedy interference may be desirable in the interest of justice and resort to the High Court for redress may be justified. In these circumstances agreeing substantially with the view of Findlay O. J. C., expressed in *Bajirao* v. *Mt. Dadibai*, A. I. R. (13) 1926 Nag. 285 : (27 Cr. L. J. 71), I hold that the High Court should not ordinarily entertain petitions of revision like the present one under Chap. XII, Criminal P. C., unless the lower Court has been moved in the first instance though it should not hesitate to do so if extraordinary and special circumstances are shown to exist which justify departure from the normal course.

[6] In this case, the petition was admitted on the ground that there was no settled practice of the Court. There is no point in returning the petition for presentation to the Sessions Court at this stage and I shall, therefore, dispose it of on the merits, particularly in view of the fact that the order in question has been passed without any inquiry.

[7] On the merits, I am inclined to the view that the contention raised by Mr. Ghose should prevail substantially. Proceedings up to 13th January 1950 were under S. 144, Criminal P. C. On this date an application was put in by the petitioner by which it was prayed that the order of 3rd January be made absolute under S. 144, Criminal P. C., or in the alternative regular proceedings under S. 147, Criminal P. C., be drawn up. It appears from the final order of the learned District Magistrate that the petitioner did not press for action under S. 144, Criminal P. C., and therefore the only point considered in the order was whether proceedings under S. 147 should be initiated or not. The procedure to be

followed on an application under S. 147 is given in S. 147 of the Code. According to this section if a District Magistrate, Sub.divisional Magistrate or Magistrate of the First Class is satisfied, from a police report or other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water as explained in S. 145, sub-s. (2) (whether such right be claimed as an easement or otherwise), within the local limits of his jurisdiction, he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court in person or by pleader within a time to be fixed by such Magistrate and to put in written statements of their respective claims and shall thereafter inquire into the matter in the manner provided in S. 145. Section 145 (4) requires the Court to peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effects of such evidence, take such further evidence (if any) as he thinks necessary and then to decide whether the right claimed under S. 147 exists. If he finds that such a right exists, he may make an order prohibiting interference with the exercise of such right. An order under clause (1) of Section 147 requiring the parties in dispute to attend the Court can only be made if the Magistrate is satisfied from police report or other information that a dispute regarding the alleged right of user of land or water likely to cause a breach of the peace exists. If there is no police report or other information, he may give the applicant a chance to satisfy him or he may ask for a report from the police. If from the material placed before him he is not satisfied about the existence of a dispute likely to cause a breach of the peace, there will be no justification for initiating proceedings under S. 147, Criminal P. C. On the other hand, even if a dispute likely to cause a breach of the peace exists, a Magistrate is not bound to proceed under S. 147. He is not bound to take proceedings under the section and may take action under S. 144 or S. 107, Criminal P. C. But, ordinarily, the proper course for a Magistrate would be to take action under this section rather than to make temporary orders under S. 144 or S. 107, Criminal P. C., without any inquiry into the respective claims of the parties as held in *Inder Deo* v. *Durga Prasad*, A. I. R. (23) 1936 Pat. 59 : (37 Cr. L. J. 378).

[8] In this case the learned District Magistrate set out to decide the question whether proceedings should be taken under S. 147 or not. He had, therefore, first to address himself to the question whether there was a dispute between the parties relating to the alleged user of land or water likely to cause a breach of the peace. The learned District Magistrate appears to assume that the dispute does exist. As regards the question whether it was likely to cause a breach of the peace or not, he thought that there was no such danger and observed further that there was no such danger even on the date of his order unless the first party tried forcibly to remove the obstruction. To prevent this contingency he warned the petitioner not to take any action which may lead to a breach of the peace. The order read as a whole would indicate that the learned District Magistrate apprehended that there was likelihood of a breach of the peace also. This is clear from the fact that the learned Magistrate had to say that there would be no breach of the peace if the petitioner does not try forcibly to remove the obstruction. What he meant was that if the petitioner (1st party) tried to exercise his alleged right of user of the pathway, a breach of the peace would occur. This was exactly the petitioner's case. He had alleged that he had the right of user in the pathway which had been obstructed and that the exercise of his right would lead to a breach of the peace. The order does not, therefore, embody a finding that there is no dispute between the parties or that dispute between the parties is not likely to cause a breach of the peace. Assuming, however, that the Court thought that there was no such dispute between the parties which could lead to a breach of the peace, the order should have been that as there is no dispute likely to lead to a breach of the peace no proceedings are necessary under S. 147. The learned District Magistrate did not adopt this course. He proceeded to examine the question whether the petitioner had been exercising the alleged right within 3 months before the date of his petition as required by proviso to S. 147. On this point he found that the pathway had apparently not been used for the 'previous 3 months'. He had no jurisdiction to consider this matter. He could go into this question only after passing the preliminary order under cl. (1) of S. 147. After the preliminary order he ought to have considered the written statement of the parties, should have given them an opportunity to adduce evidence and then he could come to some decision on the point. Without taking any evidence he has gone into the question which he had no jurisdiction to decide. There was thus not only lack of jurisdiction but the manner of exercising the jurisdiction was also patently illegal. He even went further and considered the question whether the obstruction placed by the second party could have been removed or not. This question too would not arise if there was no basis for the initiation of the proceedings. The learned District Magis-

trate in relying on *Hemchandra* v. *Abdul Rahaman*, A. I. R. (29) 1942 Cal. 244 : (I. L. R. (1942) 2 Cal. 75 FB.) held that an order of the removal or obstruction could not be passed under S. 147, but he had no jurisdiction to decide this question also. It could be considered only if the Court had reached the stage when it is to consider what order may be passed in the proceedings. According to the Calcutta view, an order prohibiting interference with the exercise of the right claimed by the petitioner can be passed under S. 147. The authority, therefore, could not be utilised for throwing out the petition. The fact that the learned District Magistrate considered questions which could be considered only after passing of the preliminary order also indicates that the learned Magistrate felt that the petition could not be disallowed on the mere ground that there was no dispute about the user of land likely to lead to a breach of the peace. In fact, his last order under S. 144 would indicate that he felt the necessity for immediate action. The order, therefore, is easily assailable on grounds of illegality and excess of jurisdiction.

[9] The learned counsel for the opposite party has contended relying on *Manindra Chandra* v. *Barada Kanta*, 30 Cal. 112 : (6 C. W. N. 417) that a Magistrate may not be directed to proceed under S. 147 if he has declined to proceed even if he passed his order without examining the applicant or allowing him an opportunity to substantiate his allegations. This case is distinguishable. In this case a Magistrate instituted proceedings under S. 145 and passed an order under sub-s. (1) of S. 145. After that he received information which led him to believe that there was no longer any dispute likely to cause a breach of the peace. On receipt of this information he cancelled his previous order. The parties had not yet put in their written statements. The High Court declined to interfere on the ground that the Magistrate had not acted without jurisdiction.

[10] I do not see how this case can assist the opposite parties. If on any material the Court had come to the conclusion that there was no dispute likely to cause a breach of the peace, it could have been urged that the High Court should not interfere with a finding of fact arrived at by the Magistrate. But the position here is different. The learned Magistrate had declined to proceed under S. 147. In fact, while holding that it is not necessary to initiate proceedings under S. 147, he has actually gone into matters which arise only after the initiation of the proceedings. He has thus exercised jurisdiction for which there was no basis. He has actually arrived at findings on matters which he could not examine before passing a preliminary order. This order, so far as these matters are concerned, is without jurisdiction and the finding arrived at on these matters influenced his decision of the question whether proceedings under S. 147 should be initiated or not. This order, therefore, cannot stand and the case must go back for its proper disposal.

[11] The learned District Magistrate shall decide on the material that may be made available to him whether a dispute likely to cause a breach of the peace exists between the parties regarding the alleged user of any land or water. If such a dispute is found to exist, he shall exercise his judicial discretion in determining whether he should initiate proceedings under S. 147. If he decides to proceed under this section, a preliminary order as required by S. 147 (1) shall be passed. The subsequent inquiry shall follow the directions contained in S. 145 (4) so far as they may be applicable. It is only after the parties have been heard and their evidence taken as required by S. 145 (4) that the Court would proceed to determine whether the right claimed by the petitioner first party has been proved to exist. If the Court is satisfied about the existence of the right claimed, it shall pass an order prohibiting any interference with the existence of such right.

[12] The petition of revision is allowed and the case is sent back to the learned District Magistrate for disposal of the petition according to law and in the light of the directions contained in this order.

V.R.B. *Revision allowed.*

A. I. R. (37) 1950 Assam 168 *[C. N. 62.]*

THADANI C. J. AND RAM LABHAYA J.

Maskandar Ali and others — Appellants v. *Rashid Ali and others — Respondents.*

S. M. A. No. 7 of 1949, D/- 16-5 1950, from order of Sub Judge, Cachar, D/- 10-5-1949.

(a) Tenancy Laws—Sylhet Tenancy Act (XI [11] of 1936), Ss. 33 and 147 (1)(e)—"Incident of tenancy" —Dispute covered by S. 33, if relates to incident of tenancy.

Section 33 deals with the pre-emptive right of a landlord. That right can be exercised against a transferee. The disputes directly covered by S. 33 would not normally relate to any incident of the tenancy. It is however possible that in cases covered by S. 33 some question as to the incident of a tenancy may crop up incidentally. Even that need not necessarily convert the entire dispute into a matter which sub-cl. (e) of cl. (1) of S. 147 would cover. [Para 4]

(b) Tenancy Laws—Sylhet Tenancy Act (XI [11] of 1936), S. 147—Second appeal.

Obiter. — No second appeal can be competent when the order not being a decree within the meaning of S. 147 is not appealable at all. [Para 6]

K. P. Bhattacharjya — for Appellants.
S. K. Ghose and N. M. Dam — for Respondents.
D. K. Sarma — for Guardian ad litem.

Ram Labhaya J. — This is an appeal from the order of the Sub-Judge, Cachar, dated 10th May 1949 dismissing an appeal from the order of the Munsiff of Karimganj dated 30th August 1948 in Misc. Case No. 116 of 1947.

[2] The appeal arises out of miscellaneous proceedings under S. 33, Sylhet Tenancy Act. The appeal was dismissed on the ground that the order of the learned Munsiff was not appealable. In coming to this conclusion, the learned Sub-Judge relied on *Narendra Lal* v. *Rabindra Lal*, 51 Cal. W. N. 673. The correctness of the view of the law that has prevailed with the learned Sub-Judge is assailed before us.

[3] Section 33, Sylhet Tenancy Act, prescribes the procedure for an immediate landlord for the exercise of his pre-emptive right if a notice is served on him under S. 30 or S. 32. Orders passed on an application under S. 33 have not been made expressly appealable. Section 147 of Chap. 10 of the Act, which deals with judicial procedure, provides for appeals in certain cases. It lays down that :

"Subject to the provisions of S. 132, the Court having jurisdiction to determine a suit for possession of land may, on the application either of the landlord or the tenant of the land, determine all or any of the following matters."

Then follows a list of matters which may be determined at the instance of the landlord or the tenant under this section. It is claimed that sub-cl. (e) of S. 147, cl. (1) covers the matter now before us and therefore the order was appelable. Sub-cl. (e) deals with "any other incident of the tenancy," viz., incident not specifically mentioned in the preceding sub-clauses.

[4] We do not find any force in this contention. Section 33 deals with the pre-emptive right of a landlord. That right can be exercised against a transferee. The disputes directly covered by S. 33 would not normally relate to any incident of the tenancy. It is however possible that in cases covered by S. 33 some question as to the incident of a tenancy may crop up incidentally. Even that need not necessarily convert the entire dispute into a matter which sub-cl. (e) of cl. (1) of S. 147, Sylhet Tenancy Act, would cover. But in this case that difficulty does not arise. No incident of tenancy was in dispute in the trial Court. The learned Sub Judge, therefore, was perfectly right in holding that the matter was not covered by S. 147 and that it was otherwise not appealable. The view that found favour with the learned Sub Judge is supported by *Narendra Lal* v. *Rabindra Lal*, 51 C. W. N. 673. In that case Akram J. held that :

"A decision as to the nature of a tenancy for the purposes of an application under S. 33, Sylhet Tenancy Act, cannot be deemed to be an order under S. 147."

In his view it was necessary before a party could avail of the provisions of S. 147, cl. 3, that there must be a substantive application or an order under that section. Incidental determination of matters enumerated in sub-cls. (a) to (e) of S. 147 (1) in proceedings under S. 33 would not bring the matters within the ambit of S. 147.

[5] It is not necessary for us in this case to go to that extent. Here there has been no determination of any matter which could be regarded as an "incident of the tenancy.' In fact, the tenants did not appear at all in the proceedings before the trial Court. They appealed from the decision and contested the claim for the first time in appeal. The view that the order of the learned Munsif was not covered by S. 147 (3) is perfectly correct and this appeal, therefore, must fail on the merits.

[6] Mr. Ghose raised a preliminary objection to the competency of the second appeal. The basis of his objection was that orders under S. 33 are not appealable. The appeal itself was dismissed as incompetent. We have come to the conclusion that the view of the learned Sub-Judge is correct, and that there are no grounds for interference with the order on its merits. It is not necessary in these circumstances to give a decision on the preliminary objection though it is clear from the view of the law that we have taken that no second appeal can be competent when the order not being a decree within the meaning of S. 147 is not appealable at all.

[7] The learned counsel for the appellants has requested that the appeal be treated as a revision. No purpose can be served by treating the appeal as a revision as we have found that on the merits the order of the learned Sub-Judge is correct.

[8] The appeal is dismissed with costs.

[9] **Thadani C. J.** — I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 169 *[C. N. 63.]*

THADANI C. J. AND RAM LABHAYA J.

The Gauhati Bank Ltd. — *Appellant* v. *Baliram Dutta and others* — *Respondents.*

F. A. No. 3 of 1949, D/- 17-5-1950.

(a) Civil P. C. (1908), O. 17, R. 1 (1) and (2) — Court's power to grant adjournment conditional on payment of costs.

The powers of the Court to adjourn the hearing of the suit from time to time under O. 17, R. 1 are very wide. It may grant adjournment on any terms that it considers fit. It is, therefore, within the competence of the Court to grant an adjournment on the condition that costs are paid on a particular date, failing which the suit shall be dismissed or defence struck off, as the case may be. Such a condition if imposed could also

be enforced in the event of non-compliance of the order. [Para 9]

Annotation: ('44-Com.) Civil P. C., O. 17, R. 1, N. 5, Pts. 1 and 8.

(b) Civil P. C. (1908), O. 17, Rr. 1 and 3 — Order whether under R. 1 or R. 3—Determination of.

Where the Court does not indicate in express terms that it was proceeding under O. 17, R. 1, the determination of the question whether it proceeded under O. 17, R. 1 or under O. 17, R. 3 would depend on the circumstances of the case. [Para 18]

Annotation: ('44-Com.) Civil P. C., O. 17, R. 1, N. 1; O. 17 R. 3, N. 1.

(c) Civil P. C. (1908), S. 11—Dismissal of suit on default to deposit adjournment costs—Fresh suit, if barred—Civil P. C. (1908), O. 17, R. 1.

The dismissal of the suit on plaintiff's default to deposit costs, not being a dismissal on the merits, would not create any bar to the institution of a fresh suit under S. 11. [Para 20]

Annotation : ('44-Com.) Civil P. C., S. 11, N. 106, Pt. 6; O. 17, R. 1, N. 5.

(d) Civil P. C. (1908), Ss. 2 (2) (b), 96 and 115 — "Default" — Dismissal of suit for non-payment of adjournment costs—Appeal—Revision—Civil P. C. (1908), O. 17, R. 2.

The word 'default' in S. 2 (2) (b) is not limited in its operation nor has it been qualified in any way. The default in the definition does not refer merely to cases of default specifically dealt with in the Code, but covers an order dismissing a suit for non-payment of adjournment costs. Further, an order dismissing a suit for want of prosecution would not be treated as a judicial determination of the matters in controversy : A. I. R. (30) 1943 Nag. 149, *Dissent.* [Paras 22 and 24]

Therefore, an order dismissing a suit for non-payment of adjournment costs is not appealable either as a decree or as an order. A petition of revision against such an order would however lie and it would be open to the High Court to set aside the order where in the exercise of its revisional jurisdiction it finds that interference is called for or justified. [Para 32]

Annotation : ('44-Com.) Civil P. C., S. 2 (2) N. 16 Pts. 4 to 8; S. 115, N. 19 Pt. 1; O. 17, R. 2, N. 9 Pts. 1 and 3.

(e) Civil P. C. (1908), O. 17, Rr. 1 and 2—Plaintiff ordered to pay adjournment costs— Costs not paid —Suit dismissed for non-payment of costs in absence of plaintiff—Plaintiff held ought to have been given opportunity to show if there was any good reason for non-compliance—Procedure adopted by Court held was materially irregular causing failure of justice. [Para 37]

Annotation: ('44-Com) Civil P. C., O. 17, R. 1, N. 5; O. 17, R. 2, N. 7.

D. N. Medhi — for Appellant.

J. C. Sen and P. C. Dutta; and B. N. Deka — for Respondents 1 and 2, respectively.

Ram Labhaya J. — This is an appeal from the decree and order of the ex-officio Sub. Judge, Tezpur, by which plaintiff's suit was dismissed for non-payment of adjournment costs on 19th May 1948. The decree was signed on 11th February 1949.

[2] The appeal was presented on behalf of the plaintiff (the Gauhati Bank). The suit was for recovery of Rs. 56,889/9/3. A decree for the amount claimed was prayed for against defendants 1 and 2. It was further prayed that the decree should provide that if the entire decretal amount with interest and costs was not realised from defendants 1 and 2, the unrealised amount of the decree would be recoverable from defendant 3 with consequential costs.

[3] The suit was dismissed in the following circumstances. On 6th August 1947, defendant 3 applied for production of certain documents by plaintiff for inspection. The Court ordered the production of the documents asked for. On the next date viz., 1st October 1947, defendant applied for the dismissal of the suit on the ground of the failure of the plaintiff to produce the documents asked for. Plaintiff applied for more time for the purpose and time was allowed till 26th November 1947. The case again came up for hearing on 28th January 1948. The documents asked for had not been produced by the plaintiff till then. The Court ordered that the application of defendant 3 dated 1st October 1947 asking for the dismissal of plaintiff's suit on account of non-compliance with the order of the Court be put up for hearing. This petition was heard on 7th April 1948. The learned Sub-Judge found that the plaintiff was not in a position to produce all the documents asked for, and in point of fact both the parties were blameworthy. He, therefore, did not dismiss the suit, but ordered that plaintiff should produce certain specified documents and if the plaintiff Bank was not able to produce any of these documents it should make an avernment to that effect in Court. It was further provided in the order that in the event of its non-compliance, the suit shall be dismissed. The case was fixed for 21st April 1948.

[4] The plaintiff did not comply with the order even by this date and asked again for extension of time for compliance. On 21st April 1948, when the came up for hearing, the Court refused to grant any more time and fixed 28th April 1948 for considering the consequences of default on plaintiff's part. On 28th April 1948, considering that the claim was for a sum of Rs. 56,889-9-3, the Court reviewed its previous order on the condition that the plaintiff paid Rs. 25 to defendant 3 as adjournment costs. The time for producing the documents was extended till 19th May. On 19th May plaintiff produced some documents and put in an affidavit explaining the non-production of some others.

[5] The sum of Rs. 25 payable to defendant 3 as adjournment costs was not deposited. The result was that there was only a partial compliance with the order of the Court dated 28th April 1948. The learned Sub-Judge then passed the following order:

"Plaintiff files certain documents and files an affidavit regarding other documents called for. Adjourn-

ment cost not paid—the suit is dismissed in terms of my above order for non-payment of adjournment costs (which the plaintiff appears unwilling to pay)."

[6] This appeal is directed against this order. It is contended that the amount due by way of cost to defendant 3 was not deposited on the request by his counsel in conformity with a common practice by which costs are paid to the counsel for the party in whose favour the order for costs is made. It is urged further that the case was not called on 19th May 1948 and plaintiff's counsel had no opportunity to explain why the amount had not been deposited. The suit was dismissed in the absence of plaintiff's counsel, who learned about it next day. There is an affidavit from the pleader of the plaintiff Bank in support of the above statement of facts. This affidavit has not been contradicted.

[7] Defendant 3 in whose favour the order of costs was made is not before the Court. The appeal is being heard *ex parte* against him. Defendants 1 and 2 have resisted the appeal.

[8] The learned counsel for defendants 1 and 2 urges that this appeal is not competent. His contention is that the order of the Court dismissing the suit merely for non-payment of costs does not amount to a decree and that no appeal lies from the order notwithstanding that a decree sheet was later on prepared. His case was that the order was passed under O. 17, R. 1.

[9] There is considerable force in this contention. Order 17, R. 1, Civil P. C., gives the Court the power to adjourn the hearing of the suit from time to time. The powers of the Court in this matter are very wide. It may grant adjournment on any terms that it considers fit. It is, therefore, within the competence of the Court to grant an adjournment on the condition that costs are paid on a particular date, failing which the suit shall be dismissed or defence struck off as the case may be. Such a condition if imposed could also be enforced in the event of non-compliance of the order. This proposition appears to be concluded by authority.

[10] In *Sewratan* v. *Kristo Mohan*, A. I. R. (9) 1922 Cal. 320 : (48 Cal. 902), the order was to the following effect:

"If the money is not paid by 1st June, the suit will be dismissed with costs)."

[11] It was held that

"a further order was necessary by the Court before the suit was dismissed, but the Court would not be bound to pass the order of dismissal."

[12] It is clear from this decision that it was recognised that the Court had the power to dismiss the suit if the order as to the payment of costs was not complied with.

[13] In *E. I. Rly. Co.* v. *Jitmal Kallomal*, A. I. R. (12) 1925 ALL. 280 : (47 ALL. 538), it was laid down that if payment of costs is made a condition precendent to the adjournment granted to the defendants and the order provides that if costs are not paid, the defence will be struck off, it is open to the Court to strike off the defence and proceed *ex parte* when the costs are not paid as directed.

[14] In *Raju Chettiar* v. *Ramakkal*, A. I. R. (28) 1941 Mad. 437 : (199 I. C. 790), the learned Judge referring to cl. (2) of O. 17, R. 1, observed as follows:

"It is clear from sub-r. (2) that the Court is given ample discretion as regards the conditions subject to which it may adjorun the hearing of the suit in so far as the costs occasioned by the adjournment are concerned. I am not prepared to say that when the Court finds a plaintiff constantly defaulting in being ready for the trial, it will not be justified in directing the payment of the day costs as a condition precedent to the further hearing of the suit. When such a condition is inserted in the order it is valid and could be enforced by the dismissal of the suit."

[15] The same view was taken in *Mt. Jani* v. *Mt. Soni*, A. I. R. (27) 1940 Nag. 158 : (186 I. C. 473) where the learned Judge followed *E. I. Rly. Co.* v. *Jit Mal Kallo Mal*, A. I. R. (12) 1925 ALL. 280 : (47 ALL. 538).

[16] The learned counsel for the appellant has not cited any authority against this view. It is obvious that in these circumstances the Court was fully competent to order as it did on 28th April 1948 that the suit will be dismissed if the plaintiff did not pay Rs. 25 as adjournment costs to defendant 3. It could also enforce this condition by dismissal of the suit as it later on did on 19th May 1948.

[17] The learned counsel for the plaintiff-appellant has contended that the order of 19th May 1948 dismissing the suit for plaintiffs default is covered by O. 17, R. 3, Civil P. C.

[18] I find myself unable to accept this contention. The two orders dated 28th April and 19th May 1948 read together leave no room for doubt that the Court was not proceeding under O. 17, R. 3. Assuming that the circumstances of the case also attracted the applicability of O. 17, R. 3, there can be no doubt that the Court was not bound to take action under O. 17, R. 3. It could adopt any alternative course that was open to it. In these circumstances to dismiss the suit only for default on the part of the plaintiff-appellant was possible. The Court had the power to pursue this course. But the Court has not indicated in express terms that it was proceeding under O. 17, R. 1. In these circumstances the determination of the question whether it proceeded under O. 17, R. 1 or under O. 17, R. 3, would depend on the circumstances of the case. These circumstances have been stated above. They do not even remotely suggest that the Court had O. 17, R. 3 in mind. It dismissed the suit merely on the ground of

plaintiff's default in the payment of the cost. This fact was emphasised in the order. There is absolutely nothing in the order to indicate that the Court proceeded to decide the suit on the merits. If the Court had intended to dispose of the suit on its merits, there would have been at least this statement that the suit is dismissed for want of evidence. Again, defendant 3 had claimed compensation from the plaintiff on the ground that the suit against him was passed on false and vexatious grounds. The point was in issue. He would have had an opportunity of substantiating his claim if the Court had proceeded on the merits.

[19] There is also another significant fact. Plaintiff's pleader was not present on 19th May 1948 when the suit was dismissed. The documents called for along with an affidavit were produced that day. But the suit was not dismissed at that time. It was apparently put up later. The affidavit from the pleader of the plaintiff is to the effect that the case was not called and it was dismissed in his absence. The affidavit remains uncontradicted. The order also does not indicate that any of the defendants was present. This circumstance also points to the conclusion that the Court did not proceed under O. 17, R. 3 as suggested by the learned counsel for the plaintiff-appellant. In fact, there is nothing in the circumstances of this case to show that the dismissal of the suit was ordered by the Court after proceeding on the merits under O. 17, R. 3.

[20] The dismissal of the suit on plaintiff's default to deposit costs not being a dismissal on the merits, would not create any bar to the institution of a fresh suit under S. 11, Civil P. C. This view finds support from *Shaik Sahib* v. *Mahomed*, 13 Mad. 510, wherein it was held that an order dismissing a plaintiff's suit for non-payment of a fee for Commissioner was not a decision on the merits and therefore did not bar a fresh suit on the same cause of action under S. 13 (now S. 11) of the Code. This view prevailed in *Hari Ram* v. *Lalbai*, 26 Bom. 637 : (4 Bom. L. R. 262) also. In this case, the suit was dismissed for failure to give security for costs of the suit. The order now before us, therefore, is not covered by the definition of the decree as given in S. 2 (2), Civil P. C. The learned counsel for the appellant has not even contended that the order would be covered by the definition of the decree and has not cited any authority in support of it. His case only was that the order should be taken to have been passed under O. 17, R. 3 and this aspect of the matter has been dealt with above.

[21] In *Mt. Radhabai* v. *Mt. Purnibai* A.I.R. (30) 1943 Nag. 149 : (I.L.R. (1943) Nag. 613), however, a decision not cited at the Bar, Digby J., held that the order dismissing a suit for non-payment of adjournment costs was covered by the definition of the decree as contained in S. 2 (2), Civil P. C., and that an appeal was competent from such an order. In that case the suit was dismissed in the presence of the parties on the ground that plaintiff was unable to pay the costs of adjournment. The payment was a condition precedent to the suit proceeding. An application for restoration of the suit was put in by the plaintiff. On this the Court ordered that its order dismissing the suit was an order under O. 17, R. 1, and agreed to restore the suit on payment of Rs. 22 as costs to the other side. The sum of Rs. 22 was offered to the defendant's counsel in pursuance of this order, but he refused to accept it. He presented a petition of revision against the order of the learned Judge agreeing to restore the suit on payment of the adjournment costs. The question raised in the revision petition was that an appeal should have been preferred from the order of dismissal which was treated as analogous to an order of dismissal resulting from the application of O. 17, R. 3. From the respondent's side the contention put forward was that no appeal was competent and an application for restoration under S. 151 was the only remedy. The learned Judge noticed that the definition of the decree given in the Civil Procedure Code excluded the dismissal of a suit for default from its scope. He interpreted the word 'default' in this definition as limited to such defaults which were specifically dealt with by the Code. He had no authority in support of the view he took and he could refer only to *Sewratan* v. *Kristo Mohan*, A.I.R. (9) 1922 Cal. 320 : (48 Cal. 902) in which it was assumed that if adjournment costs were not paid by a certain date as ordered, and the suit was dismissed for default an appeal would lie.

[22] With great respect, I am unable to agree with the view taken by the learned Judge in this case. The definition of the decree expressly excludes any order of dismissal for default. The word 'default' in this definition is not limited in its operation nor has it been qualified in any way. If it is held that the default in the definition refers to cases of default specifically dealt with in the Code, it would be reading something into the definition which is not contained therein. Besides, even if we assume that an order of dismissal for default of a kind not specifically dealt with by the Code was not meant to be excluded under S. 2 (2) (b), before such an order could be characterised as a decree, it is necessary that it should amount to a formal expression of an adjudication which so far as the Court expressing it conclusively determines

the rights of the parties with regard to all or any of the matters in controversy in the suit. The learned Judge of the Nagpur High Court did not consider whether an order dismissing a suit for default for non-payment of adjournment costs could be treated as an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. He merely found that a default in the payment of costs was not excluded from the definition of the decree. He did not consider whether the positive qualifications of a decree are present in such an order. In my opinion these qualifications are completely lacking. A plaintiff institutes a suit. He is ordered to do a certain thing, viz., payment of costs. The payment of costs is made a condition precedent to the further prosecution of the suit. He fails to pay the costs and the suit is dismissed. There is no judicial determination of the matters which were in controversy in the suit. The plaintiff in such a case is not permitted to prosecute the suit. His position would be that of a person who has not instituted a suit at all. The suit, though dismissed, has not been disposed of on the merits. This view finds support from *Abdulla Asghar Ali* v. *Ganesh Das*, A. I. R. (20) 1933 P. C 68 : (60 Cal. 662).

[23] In this case *Abdulla Asghar Ali* v. *Ganesh Das*, A.I R. (20) 1933 P. C. 68 : (60 Cal. 662), their Lordships distinguished an earlier decision of the Privy Council reported in *Chandri Abdul Majid* v. *Jawahir Lal*, A. I. R. (1) 1914 P. C. 66 : (36 ALL. 350). They quoted a passage from the judgment in that case which was delivered by Lord Moulton. The passage is as follows:

"The chief matter of argument before this Board was a contention that the decree which it is sought to enforce had been constructively turned into a decree of His Majesty in Council and assigned to the date of 13th May 1901, by virtue of the dismissal of the appeal for want of prosecution on that date, and that therefore the period of limitation was 12 years from 13th May 1901, by virtue of Art. 180, Limitation Act, 1872. (Under Art. 180, 12 years was allowed for the execution of an order of His Majesty in Council.) Their Lordships see no foundation for this contention which appears to have been the basis of the decision of the Courts below. The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit, and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him and that therefore he was in the same position as if he had not appealed at all."

[24] The correctness of the view enunciated in this passage was not questioned. It follows that an order dismissing a suit for want of prosecution would not be treated as a judicial determination of the matters in controversy.

[25] *In re Kayambu Pillai*, A. I. R. (28) 1941 Mad. 836 : (I.L.R. (1941) Mad. 954 (F.B.)), a Full Bench decision, it was held by their Lordships that the word 'default' in S. 2 (2) was not confined to default in appearance alone. It included other defaults as well.

[26] The same view was taken in *Jagdish Kumar Singh* v. *Hari Krishen Das* A. I. R. (29) 1942 Oudh 362 : (199 I. C. 835) and it was held that the word 'default' in the definition of the decree covered default of prosecution. I am in respectful agreement with the view taken in the above two cases for the reasons given above by me. An order of dismissal for non-prosecution according to this view does not amount to a decree even though a decree is prepared in pursuance of the order.

[27] The authorities bearing on the interpretation of the word 'default' as used in the definition of the expression 'decree' are not, however, uniform.

[28] The contrary view was taken in *Mohammadi Husain* v. *Mt. Chandro*, A. I. R. (24) 1937 ALL. 284 : (168 I. C. 1001) and *Abdul Majid* v. *Amina Khatun* A.I.R. (29) 1942 Cal. 539 : (I.L.R. (1942) 2 Cal. 253). In *Mohammadi Husain* v. *Mt. Chandro*, A. I. R. (24) 1937 ALL. 284 : (168 I. C. 1001), it was held that the expression 'dismissal for default' meant dismissal for non-appearance and did not cover a dismissal where the appellant's pleader was present and expressed his inability to argue the appeal which was dismissed for non-prosecution.

[29] In *Abdul Majid* v. *Amiya Khatun*, A. I. R. (29) 1942 Cal. 539 : (I. L. R. (1942) 2 Cal. 253), the learned Judges held that the expression in question did not include a dismissal for non payment of deficit court-fee. In a sense the Allahabad decision is distinguishable. In that the real question was whether the physical presence of a pleader who was unable to argue the appeal was appearance or not. The learned Judges appeared to have treated that appearance as appearance in law. This question does not arise in the present case and it is not necessary for us to decide as to whether in the circumstances of the Allahabad case the appearance of the pleader was an appearance in the eye of law or not.

[30] In the Calcutta case it was held that an order dismissing a suit or appeal for non-payment of additional court-fees is not an order of dismissal of the suit under S. 2 (2) (b) but that it was a decision under the Court-fees Act and was appealable as a decree. On facts this case is also distinguishable. But so far as the two decisions considered above lay down that the expression 'dismissal for default' in cl. (b) of S. 2 (2), Civil P. C., was meant to apply only to

defaults as were specifically dealt with by the statute as in O. 9, with great respect to the learned Judges I find myself unable to agree with them.

[31] In *Sewratan* v. *Kristo Mohan*, A.I.R. (9) 1922 Cal. 320 : (48 Cal. 902), it was assumed that a conditional order that in default (of payment of money) the suit shall stand dismissed could not be revived in the absence of an appeal. Similarly, in *Rajachettiar* v. *Ramakkal*, A.I.R. (28) 1941 Mad. 437 : (199 I.C. 790), an appeal was heard and disposed of against an order dismissing a suit for payment of costs. No objection was raised to the competency of the appeal. On the other hand, in *E. I. Rly. Co.* v. *Jitmal Kallomal*, A.I.R. (12) 1925 ALL. 280 : (47 ALL. 538) and *Mt. Jani* v. *Mt. Soni*, A.I.R. (27) 1940 Nag. 158 : (186 I. C. 473), revision petitions were entertained against orders dismissing suits for default in the payment of adjournment costs. In these also no objection was taken to the competency of the petitions. These cases are of no great assistance one way or the other as the point now before us was not in question in these cases and no considered decision on it can be said to have been given..

[32] The review of the authorities considered above seems to justify the conclusion that the weight of authority like that of reason is on the side of the view that an order dismissing a suit for non-payment of adjournment costs is not appealable either as a decree or as an order. A petition of revision against such an order would however lie and it would be open to the High Court to set aside the order where in the exercise of its revisional jurisdiction it finds that interference is called for or justified.

[33] The order dismissing the suit was passed on 19th May 1948. The appeal in this case was filed on 19th March 1948. The decree sheet was signed on 11th February 1949. The appeal was within time according to the view that still obtains in the Calcutta High Court, *vide Sudhansu Bhusan* v. *Majho Bibi*, A. I. R. (24) 1937 Cal. 732 : (176 I. C. 361) and *Sarat Chandra* v. *Rati Kanta*, A. I. R. (26) 1939 Cal. 711 : (186 I. C. 58). This view was not followed by us in Civil Appeal No. 31 of 1947 *(The Governor-General of India in Council* v. *Messrs. Jesraj Tilakchand Labhchand)* : (A. I. R. (37) 1950 Assam 83). But we extended the period of limitation in that appeal under S. 5 on the ground that the appellant was misled by the view prevailing In the Calcutta High Court. If the present appeal had been competent, we would have followed the same course, as this appeal was also filed before our decision in Appeal No. 31 of 1947 : (A. I. R. (37) 1950 Assam 83). The appeal would have been heard on the merits. But we have come to the conclusion that the appeal is not competent. The learned counsel for the appellant has requested that if the appeal is held to be not competent, it may be treated as a revision. In view of the uncertain state of the law on the point as to whether an appeal was competent or not, we think the request may not be refused. We, therefore, decide to treat the appeal as a petition for revision.

[36] The learned counsel for the respondent has pointed out that even if the appeal is treated as a petition of revision, it would still be barred by time. The Statute does not prescribe any period of limitation for petitions of revision. The grounds on which the period of limitation would have been extended if the appeal had been competent, amply justify the condonation of delay now that the appeal has been treated as a petition of revision. The High Court has also the power to interfere on its own motion in the exercise of its discretionary powers under S. 115, Civil P. C. at any time in cases where facts justify interference. This, in my opinion, is a fit case for the exercise of the revisional jurisdiction.

[37] On the merits the order dismissing the suit ought not to be allowed to stand. The learned Sub Judge had the jurisdiction to pass the order that if costs were not paid on the due date, the suit shall be dismissed. He could also enforce this condition. But in this case he dismissed the suit in the absence of the plaintiff. The case was not called at all. This is proved by the affidavit filed on behalf of the plaintiff which remains uncontradicted. The bank, therefore, had no opportunity to explain its conduct. At a previous stage of this case when a similar default had occurred, the learned Sub-Judge gave an opportunity to the plaintiff to show if there was any good cause for non-compliance. The same procedure should have been followed on this occasion. If plaintiff was bound to appear on 19th May and failed to appear the more appropriate course would have been to dismiss the suit for default of appearance. If appearance was not obligatory on that date, the crushing penalty of the dismissal of the suit for Rs. 56,889-9 3 should not have been imposed without giving the plaintiff a chance to satisfy the Court that he had good reasons for non-compliance. If such an opportunity had been given, the Court would have been made aware of the request from the counsel for defendant 3 for payment of costs. The Court would not have been bound to accept this arrangement and may have insisted on payment of the costs forthwith. The plaintiff could then have paid the costs. It would have also been open to the Court to accept the arrangement. The drastic

step taken would have been avoided. The procedure adopted by the Court below was materially irregular and it has caused a failure of justice.

[38] The order for payment of costs was in favour of defendant 3. The default affected him alone. There was no need for the dismissal of the entire suit even against defendants 1 and 2. In this respect also, there has been no proper or judicial exercise of discretion by the learned Sub Judge. Defendant 3, the person aggrieved by plaintiff's default, is not now before us. He is not contesting and he is being proceeded against *ex parte*.

[39] The petition is therefore allowed. The order of the learned Sub-Judge dated 19th May 1948 is set aside. The suit is restored. The case shall be remanded to the Court of the learned ex-officio Sub-Judge., Tezpur, for disposal on the merits.

[40] Petitioner (Bank) shall pay Rs. 100 as costs to defendants 1 and 2.

[41] **Thadani C. J.**—I agree, but would add a few words.

[42] I am content to rest my decision on the undisputed fact that the plaintiff's advocate was not present in Court on 19th May 1948, the date on which the suit was dismissed for non-payment of the adjournment costs. Apparently the plaintiff was also absent on that date. The learned Judge then had the option of proceeding to dispose of the suit either under O. 17, R. 2 or O. 17, R. 3, Civil P. C. I think it is reasonable to say, on the facts of this case, that the learned Judge disposed of the suit under O. 17, R. 2, and not under O. 17, R. 3.

[42] I am also content not to express any view, one way or the other with reference to the interpretation as put by Digby J., in the case reported in *Mt. Radhabai* v. *Mt. Purnibai*, A. I. R. (30) 1943 Nag. 149 : (I. L. R. (1943) Nag. 613), on the word 'default' occurring in S. 2 (2), Civil P. C., as it is not necessary for the purposes of our decision.

V.R.B. *Revision allowed.*

A. I. R. (37) 1950 Assam 175 *[C. N. 64.]*

THADANI C. J. AND RAM LABHAYA J.

The Governor-General of India in Council —***Appellant*** v. ***Jesraj Tilokchand Labhchand and others***—***Respondents.***

First Appeal No. 31 of 1947, D/- 15-5-1950, from judgment and decree of Addl. Sub-Judge, A. V. D., D/- 29-3-1946.

(a) Railways Act (1890), S. 72—Risk Note B—Proviso — Misconduct — Evidence — Failure of Railway Administration to discharge its obligation as bailee and also under proviso to Risk Note—Presumption—Evidence Act (1872), Ss. 106 and 114 (g)—Contract Act (1872), Ss. 151 and 152.

The plaintiffs brought a suit for compensation against a State Railway for the loss sustained by them by reason of the non-delivery of certain goods carried by the defendant under Risk Notes *A* and *B*. Some five months before the litigation commenced, the plaintiffs called upon the Railway Administration to make an enquiry into the matter of the loss of the consignment, and sent a reminder to the Railway Administration 3 weeks later. In the two letters, there was no specific request made by the plaintiffs for a disclosure by the Railway Administration as to the manner in which it had dealt with the consignment in transit, but it was plain from the endorsement of the Chief Commercial Manager forwarding a copy of the letter to the Station Master concerned that he understood the implication of the request made by the plaintiffs in the matter of the enquiry into the non-delivery of the consignment. However, the Railway Administration failed, before the litigation commenced, to furnish to the plaintiffs particulars of the manner in which the consignment was dealt with in transit. Even after a pleader's notice was served upon the Railway Administration, the Deputy Director, Railway Board, merely replied that the pleader's notice had been forwarded for disposal to the General Manager. No communication, however, was received by the plaintiffs from the General Manager. When the dispute came to the stage of litigation, the Railway Administration again did not lead any evidence in discharge of its obligation under the proviso contained in Risk Note B:

Held (1) that there was no obligation on the plaintiffs to call upon the Railway Administration to give evidence at the trial in discharge of its obligation under the proviso contained in Risk Note B, the obligation of the Railway Administration being unconditional; [Para 12]

(2) that the terms of cl. (g) of S. 114, Evidence Act, were clearly attracted, the presumption being that if the Railway Administration had produced the reports and led evidence as to the manner in which the consignment was dealt with in transit, the reports and the evidence would have gone against the Railway Administration, and given rise to an inference of misconduct on the part of the Administration or its servants; [Para 13]

(3) that even as a bailee, the Railway Administration had to give evidence to satisfy the Court that it had discharged its obligation under the Contract Act, and that the only way in which it could have discharged its obligation as a bailee was by giving evidence as to the manner in which the consignment was dealt with in transit, quite apart from its obligation under the proviso contained in the Risk Note B having regard to the provisions of S. 106 of the Evidence Act; [Para 14]

(4) that, therefore, the Railway Administration was responsible for the loss of the consignment. [Para 20]

Annotation: ('46-Man) Railways Act, S. 72, Notes 5, 17 and 25; Evidence Act, S. 106 N. 6; S. 114 N. 11; Contract Act, Ss. 151 and 152 N. 8.

(b) Railways Act (1890), S. 72—Risk Note B—Proviso — Misconduct — Pleading — Civil P. C. (1908), O. 6, R. 4.

Before any question relating to the discharge of the obligation imposed on the Railway Administration by the proviso contained in the Risk Note B arises, the plaintiff is not bound to state that the loss of the consignment was due to the misconduct of the Railway Administration or its servants. [Para 10]

Annotation: ('46-Man) Railways Act, S. 72, N. 17. ('44-Com.) Civil P. C. O. 6 R. 4 N. 12.

(c) Civil P. C. (1908), O. 41, R. 1—Suit against Railway Administration—Plea that plaintiff without alleging and proving misconduct could not claim compensation not raised in written statement—Plea, if can be allowed to be raised in appeal—Railways Act (1890), S. 72.

Per *Ram Labhaya J.*—Where the defendant admits a material fact in no mistake or misapprehension in his written statement, he cannot be allowed to convert his admission into a denial for the first time in appeal. Thus, where there is an omission in the written statement to raise the plea that as the consignment was admittedly booked under Risk Notes *A* and *B*, the plaintiffs could not claim compensation without alleging and proving misconduct on the part of the Administration or its servants and the liability to pay compensation is admitted, the plea cannot be allowed to be raised in appeal for the first time as it involves a total denial of liability to pay compensation.

[Paras 33 and 34]

Annotation: ('44-Com.) Civil P. C., O. 41 R. 1 N. 12; ('46-Man.) Railways Act, S. 72 N. 17.

(d) Railways Act (1890), S. 72—Compensation—Determination of.

Per *Ram Labhaya J*:—In case of non-delivery of consignment, the Railway Administration is responsible only to the consignee. The subsequent or the ultimate transferee stands in the shoes of the consignee so far as the loss is concerned. The price that he pays cannot afford any criterion for assessing compensation, for it is the loss to the consignee which the Administration has to make good. [Para 49]

Annotation: ('46-Man.) Railways Act, S. 72 N. 35.

D. N. Medhi—for Appellant.

A. N. Bose, M. N. Roy and J. C. Sen.—for Respondents.

Thadani C. J. — This is an appeal from the judgment and decree of the Additional Subordinate Judge, A. V. D. dated 29th March 1946, by which he decreed the plaintiffs' suit for a sum of Rs. 20,073-7-0 with costs against defendant 1 and 2 and awarded interest at the rate of 6 p. c. p. a. from the date of the decree till realisation.

[2] The plaintiffs Messrs. Jesraj Tilakchand Labhchard, brought a suit for the recovery of a sum of Rs. 20,073-7-0 as compensation from defendants 1 and 2 for the loss sustained by them by reason of the non-delivery of certain goods carried by defendant 2 a State Railway, controlled by defendant 1.

[3] On 17th June 1944, Messrs. Jaswant Ray & Bros., of Calcutta, who were impleaded as defendant 3, consigned 54 casks of cocoanut oil, weighing some 270 maunds, at the Budge Budge Railway Station to be delivered at the Amingaon Railway Station of the B. & A. Railway. The consignment was to be delivered to Messrs. Bhurmal Sohanlal of Fancy Bazar, Gauhati, Assam, who were impleaded as defendant 4. Defendant 4 assigned the railway receipt covering the goods in suit, for consideration, to Messrs. Meghraj Begwani of Fancy Bazar, Gauhati, impleaded as defendant 5. Defendant 5, in turn, assigned the Railway Receipt, for consideration, in the sum of Rs. 19,027-7-0 to the plaintiff Firm on 26th June 1944. The consignment in question did not reach its destination; and the plaintiff Firm wrote a letter to the Chief Commercial Manager of the B. & A. Railway on 14th August 1944 drawing his attention to the non-delivery of the consignment, requesting him to make an enquiry into the matter. The Chief Commercial Manager of the B. & A. Railway apparently forwarded a copy of this letter to the Station Master, B. & A. Railway, Santahar, enquiring from him whether the consignment had been received at that station and whether it had been despatched to its destination. A copy of this letter was also sent to the D. I., B. & A. Railway, Lalmonirhat, asking him to trace the consignment and let him know where it was. The plaintiff waited for 3 weeks and as he received no reply from the Chief Commercial Manager, B. & A. Railway, he sent him a reminder. On 4th October 1944, a reply was received from the Chief Commereial Manager stating that the matter was under inquiry. On 12th October 1944, the plaintiff sent a pleader's notice to the Secretary to the Govt. of India in the Department of Railway, New Delhi, and to the General Manager, B. & A. Railway, Calcutta, under S. 77, Railways Act, and under S. 80, Civil P. C., and in due course brought the present suit on 2nd January 1945.

[4] A joint written statement was filed by defendants 1 and 2, in which they contended that the plaintiffs had no cause of action, and denied the averments made in para 1 of the plaint, and disputed the plaintiffs' title to the consignment. They also contended that as the plaintiff firm was not registered under the Indian Partnership Act, the suit was liable to be dismissed, and disputed the validity of the notice served upon them under S. 77, Railways Act, and S. 80, Civil P. C.; in any case, they contended that the claim was highly exaggerated, and put the plaintiffs to proof.

[5] On the pleadings the trial Court framed the following issues:

1. Whether legally valid notices under S. 77, I. R. A. and under S. 80, Civil P. C., were served on the principal defendants?
2. Whether the plaintiff Firm acquired any right to the consignment in question by the alleged sale thereof to them by the consignee, and whether the alleged transfer or ownership of the consignment is binding on the contesting defendants? If not, whether the plaintiff can maintain this suit?
3. Whether the plaintiff's claim is excessive, as alleged in W. S.?
4. To what relief, if any, is the plaintiff entitled?

[6] The only questions argued before us are (1) the liability of the Railway for the non-delivery of the consignment, (2) the amount if any properly payable as compensation to the plaintiffs, (3) interest.

[7] We think the learned Judge has omitted to frame the most important issue bearing upon the responsibility of a Railway Administration for the loss of the consignment delivered to the Administration. The responsibility of a Railway Administration, subject to the other provisions of the Indian Railways Act, is that of a bailee under Ss. 151, 152 and 161, Contract Act, 1872, but it is open to the Railway Administration to limit its responsibility in the manner stated in S. 72 (1), Railways Act by an agreement in writing signed by or on behalf of the person sending or delivering to the Railway Administration the animals or goods, and otherwise in a form approved by the Federal Railway Authority. The failure, however, of the learned Judge to frame an issue in this behalf, does not affect the decision of the case, for the reasons which we will now proceed to give.

[8] In para 3 of the plaint, the plaintiff firm had clearly stated that the consignment in question was carried by the Railway Administration under Risk Notes A and B, thereby admitting that the Railway Administration had limited its responsibility in terms of the two Risk Notes. Risk Note B which alone is applicable to the facts before us is in these terms:

"In consideration of such lower charge, the consignor agrees and undertakes to hold the Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration of or damage to, the consignment from any cause whatsoever, except upon proof that such loss, destruction, deterioration or damage arose from the misconduct on the part of the Railway Administration or its servants, provided that in the following cases:

(a) non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment packed in accordance with the instructions laid down in the tariff or, where there are no such instructions, protected otherwise than by paper or other packing readily removable by hand and fully addressed, where such non-delivery is not due to accidents to trains or to fire;

(b) pilferage from a package or packages forming part of the said consignment properly packed as in (a) when such pilferage is pointed out to the servants of the Railway Administration on or before delivery;

the Railway administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor."

[9] Mr. Medhi for the appellant, the Governor-General of India-in-Council, has contended that, in view of the failure of the plaintiff firm to plead that the loss of the consignment arose from misconduct on the part of the Railway Administration or its servants, there was no obligation in terms of the proviso contained in the Risk Note B. It may be conceded that it would have been better if the plaintiffs had alleged misconduct on the part of the Railway Administration or its servants in the matter of the loss of the consignment, but we do not think, having regard to the facts of this case, the omission to make this particular averment in the plaint affects the decision arrived at by the trial Court. The decision of the case turns upon the correct interpretation of the observations made by their Lordships of the Privy Council in the case reported in *Surat Cotton Spinning and Weaving Mills Ltd.* v. *Secy of State*, 41 C. W.N. 837 : (A. I. R. (24) 1937 P. C. 152). The head-note to the decision is in these terms:

"In a dispute arising in a case coming under the proviso to Risk Note B, the procedure is the following:

On the occurrence of either of the cases (a) or (b) the obligation on the part of the Railway to disclose the nature of their dealings with the consignment, while under their control, arises immediately, and is not postponed to the stage of litigation. If the consignor is not satisfied, recourse to a Court of law is contemplated, and the Railway should submit their evidence first at the trial. If the consignor be not even then satisfied with the disclosure made, he should say so and the Court will decide whether the consignor's demands go beyond the obligation of the Railway. The Railway should then have an opportunity of meeting the demands of the consignor, so far as endorsed by the Court, before their case is closed; but if they fail to take this opportunity, they will be in breach of their contractual obligation of disclosure.

The question that next arises is whether misconduct may fairly be inferred from the evidence of the Railway; if so, the consignor is absolved from his original burden of proof. But in this case, the decision of the Court may be given after both sides have closed their evidence.

It is for the Railway to decide whether they have adduced all the evidence they consider desirable in avoidance of a fair inference of misconduct. If they withhold any material evidence, they may either be in breach of the contractual obligation of disclosure, or on the next question of a fair inference, may expose themselves to the presumption under S. 114 (*g*), Evidence Act. If the obligation of disclosure has been discharged and the evidence given by the Railway does not lead to a fair inference of misconduct, the proviso will cease to operate and the consignor will be relegated to his original burden of proof of misconduct."

[10] It is to be remarked that the procedure laid down by their Lordships of the Privy Council makes no reference to pleadings, and we think, for the plain reason that the procedure stated by them is independent of the pleadings. The procedure as laid down by their Lordships of the Privy Council is to be followed because of the particular obligation imposed by the proviso contained in the Risk Note B, and has nothing to do with the question of pleadings. In this view, we are unable to accept the contention of Mr. Medhi that before any question

relating to the discharge of any obligation arose, the plaintiffs were bound to state that the loss of the consignment was due to the misconduct of the Railway Administration or its servants.

[11] Some 5 months before this litigation commenced, the plaintiffs called upon the Railway Administration to make an enquiry into the matter of the loss of the consignment, and sent a reminder to the Railway Administration 3 weeks later on 9th September 1944. It is true that in the 2 letters, there is no specific request made by the plaintiffs for a disclosure by the Railway Administration as to the manner in which it had dealt with the consignment in transit, but it is plain from the endorsement of the Chief Commercial Manager forwarding a copy of the letter to the Station Master B. & A. Railway, Santahar, and D. I., B. & A. Railway, Lalmonirhat, that he understood the implication of the request made by the plaintiffs in the matter of the enquiry into the non-delivery of the consignment and we think it was the duty of the B. & A. Railway Administration then before the litigation commenced to furnish to the plaintiffs particulars of the manner in which the consignment was dealt with in transit. Even after a pleader's notice was served upon the Railway Administration, the Deputy Director, Railway Board, merely replied that the pleader's notice, dated 12th October 1944, had been forwarded for disposal to the General Manager, B. & A. Railway, Calcutta. No communication, however, was received by the plaintiffs from the General Manager, B. & A. Railway. It is clear then that before the litigation commenced, the Railway Administration had failed to discharge its obligation under the proviso contained in Risk Note B, and when the dispute came to the stage of litigation, the Railway Administration again did not lead any evidence in discharge of its obligation under the proviso contained in Risk Note B.

[12] Mr. Medhi for the appellants contends that when the plaintiffs found that the Railway Administration had not led any evidence in the matter of discharging its obligation under the proviso to Risk Note B, it was their duty to call upon the Railway Administration to give such evidence. We do not think there was any obligation on the plaintiffs to call upon the Railway Administration to give evidence at the trial in this behalf, the obligation of the Railway Administration was unconditional. The question then arises—what is the effect of the failure of the Railway Administration to lead evidence in the matter of discharging its obligation under the proviso contained in Risk Note B? The answer has been given by their Lordships of the Privy Council, in these words:

> "It is for the Railway to decide whether they have adduced all the evidence they consider desirable in avoidance of a fair inference of misconduct. If they withhold any material evidence, they may either be in breach of the contractual obligation of disclosure or on the next question of a fair inference, may expose themselves to the presumption under S 114 (g) Evidence Act."

[13] These observations of their Lordships of the Privy Council apply with greater force in a case where the Railway Administration has elected not to lead evidence at all in the matter of discharging its obligation. We think, in this case, there is the clearest justification for raising a presumption against the Railway Administration under S. 114 (g), Evidence Act, for we cannot believe that, when the Chief Commercial Manager of the B. and A. Railway, forwarded a copy to the Station Master, B. & A. Railway, Santahar, and the D. I., B. & A. Railway, Lalmonirhat, asking them to let him know what had happened to the consignment, the Station Master and the D. I, failed to make any report at all. It is reasonable to suppose that they did make a report, but that it has been withheld. The terms of cl. (g) of S. 114, Evidence Act, are there clearly attracted, the presumption being that if the Railway Administration had produced the reports and led evidence as to the manner in which the consignment was dealt with in transit, the reports and the evidence would have gone against the Railway Administration, and given rise to an inference of misconduct on the part of the Administration or its servants. It is not inconceivable that the Station Master and the D. I. reported that the consignment was lost owing to theft committed by the servants of the Railway, in which case, it is plain that the Railway Administration could not claim freedom from responsibility for the loss of the consignment, whether upon the basis of its responsibility as a bailee or its responsibility as limited by the terms of Risk Note B.

[14] Mr. Bose who argued the respondents' case with considerable ability, has quite properly invited us to hold that in any view of the case, bearing in mind the provisions of S. 72, Railways Act, the respondents were entitled to a decree. Taking first the responsibility of the Railway Administration as a bailee, Mr. Bose argued that even as a bailee it had to give evidence to satisfy the Court that it had discharged its obligation under the Contract Act, and that the only way in which it could have discharged its obligation as a bailee was by giving evidence as to the manner in which the consignment was dealt with in transit, quite apart from its obligation under the proviso contained in the Risk Note B, having regard to the provisions of S. 106 Evidence Act. In support of his contention, Mr. Bose referred us to a decision of the Chief

Court of Sind reported in *National Swadeshi Stores* v. *Governor-General in Council*, A. I. R. (35) 1948 Sind 26 : (I.L.R. (1947) Kar. 144). We think the contention is well-founded.

[15] Viewed in either light—whether in the light of the observations made by their Lordships of the Privy Council with reference to the proviso contained in the Risk Note B, or in the light of the provisions of S. 72, Railways Act, laying down that the responsibility of the Railway Administration is that of a bailee—the result is the same, where the Railway Administration elects not to give any evidence at all in the course of the litigation.

[16] Ray J. in a case reported in *Governor-General in Council* v. *Visheshwar Lal*, A. I. R. (34) 1947 Pat. 84 : (230 I. C. 288), had occasion to deal with the dual aspect of the responsibility of the Railway Administration as a bailee and as limited by the execution of Risk Notes A and B. In Para. 7 of the report, he observed :

"A long series of decisions have clustered round the various problems that arise out of cases of loss or non-delivery where the cases are covered by Risk Notes A and B. The result of those Judicial decisions makes, however, one thing certain beyond any possibility of doubt that where the Railway Administration fails to make a full disclosure of how the consignment was dealt with during the time it was in its possession or control, the consignor is entitled to an inference in his favour and adverse to the Administration that if the materials withheld would have been produced, they would have supported the case of misconduct. This principle is based upon S. 114 (g), Evidence Act."

With respect, we agree with this principle which applies in all its implications to the facts of the case before us.

[17] In a case reported in *Governor-General in Council* v. *Ranglal Nandlal*, A. I. R. (35) 1948 Pat. 237, a case covered by Risk Note Z, Agarwalla Ag. C. J. and Meredith J. observed:

"Here too the defendant (Railway Administration), in order to avoid an inference adverse to him, for non-examination of the Watch and Ward staff at Karamnasa, and for the non-production of the reports, should have examined the men who were on duty. The mere fact that the plaintiff did not call upon the defendant to produce this evidence, was no reason why the Court below should not have drawn an adverse inference against the defendant on the ground of the non-production of this evidence."

We think these observations apply equally to a case where the responsibility of the Railway Administration is that of a bailee, or where it is limited by the execution of Risk Note B.

[18] Mr. Bose next referred us to two cases reported in *Manchester Sheffield and Lincolnshire Rly. Co.* v. *H. W. Brown*, (1883) 8 A. C. 703 : (53 L. J. Q. B. 124) and *Duckham Brothers* v. *G. W. Rly. Co.*, (1899) 80 L. T. 774 : (15 T. L. R. 328) but we do not think it is necessary to consider them in the view we have taken of the responsibility of the Railway Administration in the matter of discharging its obligation as a bailee and its obligation under the proviso to Risk Note B.

[19] Mr. Medhi for the appellant, on the other hand, has relied on *Ganesh Das Bisheshwar Lal* v. *E. I. Rly. Co.*, 6 Pat. 189 : (A. I. R. (14) 1927 Pat. 193), in which it is stated that the Railway Administration must first admit loss in its pleadings and the onus will then be on the plaintiff to prove that the loss was due to wilful neglect of the Company or its servants. Mr. Medhi has argued that as the Railway Administration did not admit the loss in its pleadings, it could be held responsible only upon proof of misconduct of the Railway Administration or its servants, and as no such proof was given by the plaintiff, the Railway Administration was free from all responsibility in the matter of the loss of the consignment. We do not think *Ganesh Das Bisheshwar Lal* v. *E. I. Rly. Co.*, 6 Pat. 189 : (A. I. R. (14) 1927 Pat. 193) goes as far as that, but if it does, it goes counter to the observations of their Lordships of the Privy Council, to which we have referred. Two other cases reported in *Ralliaram Dingra* v. *Governor-General in Council*, A. I. R. (33) 1946 Cal. 249 : (I. L. R. (1944) 2 Cal. 487) and *Governor-General in Council* v. *Kishengopal Bhartia*, A. I. R. (35) 1948 Cal. 300, upon which Mr. Medhi relied, have no application to the facts before us.

[20] Our conclusion then is that the Railway Administration, in electing not to give any evidence at all, failed to discharge its obligation not only as a bailee but also its obligation under the proviso to Risk Note B, and its failure in this behalf makes it responsible for the loss of the consignment, by reason of the presumption as to misconduct which can fairly be drawn under the provisions of S. 114 (g), Evidence Act.

[21] It was next argued by Mr. Medhi that assuming that the Railway Administration was responsible for the loss, the amount claimed by the plaintiff is in excess of the amount to which they are entitled. Mr. Medhi's argument is that the plaintiffs cannot claim the price paid by them, namely a sum of Rs. 19,000 odd, in view of the fact that the price of cocoanut oil was controlled under the provisions of the Prevention of Hoarding and Profiteering Ordinance No. XXXV [35] of 1943. Whether, however, the price of cocoanut oil was controlled in Assam, was a question of fact, and the Railway Administration should have pleaded it in its written statement. In spite of the fact that this defence was not specifically taken in the written statement the learned trial Judge thought fit to deal with it in his judgment. It appears that 2 witnesses—one Mr. Baker and another Mr. Osman—were exa-

mined by the Railway Administration on the question of the price of cocoanut oil having been controlled. But Mr. Baker was unable to say that cocoanut oil was controlled in Assam. Mr. Osman was more definite on the point. He stated :

"So far as my information goes, there is no control on the price of cocoanut oil in Assam."

Assuming now that S. 6 of the Ordinance can be invoked, there is no evidence on the record bearing on the question of the landed cost of cocoanut oil or the cost of its production. The only evidence we have before us is that the wholesale price of this oil in Calcutta and its suburbs was Rs. 42 a *maund*, and retail price Re. 1-1-0 per seer. Mr. Medhi's contention is that the plaintiff would be entitled at the most to a sum calculated by the addition of 20 per cent. to the wholesale price of Rs. 42 a *maund* prevailing in Calcutta and its suburbs. But admittedly Dum Dum is not a suburb of Calcutta. Moreover, S. 6 of the Ordinance does not refer only to landed cost, it also refers to cost of production. It is a common experience in India that cost of production in some cases exceeds the landed cost of the same article. It is impossible then to fix with any degree of certainty the price of cocoanut oil prevailing on the due date in this case by the addition of 20 per cent. to the wholesale price prevailing in Calcutta and its suburbs. In my opinion an addition of 33 per cent. to a sum of Rs. 8572 8-0 being the price of cocoanut oil calculated at the rate of Rs. 42 the control rate prevailing in Calcutta. (*sic*)

[22] On the question of interest also, we think the decision of the learned Judge cannot be sustained. Payment of interest is governed by the provisions of the Interest Act, and we can see nothing in the facts of this case which warrants the awarding of interest. To this extent, we propose to modify the decree of the trial Court by disallowing a sum of Rs. 1000 odd, claimed by the plaintiffs as interest.

[23] The result is that there will be a decree for the plaintiffs for Rs. 15,936 1-0 and costs thereon, and interest at 6 per cent. p. a. from the date of the decree till realisation. The plaintiffs have not claimed interest from the date of the suit till the date of the decree.

[24] **Ram Labhaya J.**—I have had the advantage of reading the judgment of my Lord the Chief Justice. I entirely agree with him in the conclusions reached by him. I am adding a few words in view of the importance of the main question involved in the case. (His Lordship stated the facts and proceeded) :

[25-27] The plaintiffs claimed to be a registered firm. In Para. 3 of the plaint, they, when alleging that the consignment was booked at Budge-Budge, admitted that the consignment was booked under Risk notes forms A and B. They further described the transactions as a result of which they became entitled to the consignment. In Para. 5 of the plaint they averred in clear terms that the consignment never reached its destination, was lost in transit and defendants 1 and 2 (the Governor-General in Council and B. A. Railway) were liable to compensate them for the loss. In the heading of the plaint also, the claim was described as one for compensation for damage caused by non-delivery and loss of goods. The copy of the plaint sent with the notices to the defendants contained identical statements both in the heading and Para. 5. It is clear that the claim was for loss and non-delivery of the consignment and in spite of the admission that the consignment was booked under Risk Notes A and B, the plaint does not contain any allegation of misconduct on the part of the Administration or its servants.

[28] The written statement is a brief document couched in language which is clear and unambiguous. The pleas raised were as follows : 1. That plaintiffs had no cause of action against the defendants and they had no right to sue. The statements in Paras. 1 and 3 of the plaint regarding plaintiffs' title to the consignment in question were not admitted. Plaintiffs were put on proof of (1) that they were a registered firm and (2) that they had acquired a valid title to the consignment before suit. 2. That the suit was not maintainable in its present form. 3. That the suit was bad as notices sent were not sufficient and valid in law. 4. That the claim had been highly exaggerated. The plaintiffs were put to strict proof of the allegations made in this respect. The price at which it was alleged that the plaintiffs had purchased the consignment, was not admitted. 5. Liability to pay interest was denied.

[29] The first three paras of the written statement embody the first three defences reproduced above. In para. 4, the defendants gave their answer to the claim for compensation. This para does not refer in express terms to Para. 5 of the plaint but from its contents it is clear that it embodied an answer to Para. 5 of the plaint. In Para. 5 compensation for loss and non-delivery of the consignment was claimed. The whole answer to the claim as put in Para. 5 of the plaint was that the claim had been highly exaggerated. Paragraph 4 of the written statement is as follows :

"That without prejudice to any of the foregoing pleas, the defendant submits that the claim has been highly exaggerated and unduly inflated and puts the plaintiffs to the strictest proof of the same. The defendant does not admit the price of the consignment

given in the plaint and denies that the plaintiffs are entitled to interest at 12 per cent. from 26th April 1944 or any interest at all.

[30] It is important to note that the Administration was conscious that the plea that the claim was inflated, involved by necessary implication the admission of liability to compensate the true owner of the consignment. It was for this reason that it was stated expressly that the plea was not to prejudice defences raised in the foregoing paras of the written statement. The allegations of loss and non-delivery of the consignment were not denied. They shall be deemed to be admitted under O. 8, R. 5, Civil P. C. The liability to pay compensation was also admitted, if not expressly at least by necessary implication. The amount of compensation alone was disputed. In these circumstances, the learned Additional Sub-Judge framed the following issues :

1. Whether legally valid notices under S. 77, Railways Act and under S. 80, Civil P. C. were served on the principal defendants ?

2. Whether the plaintiff firm acquired any right to the consignment in question by the alleged sale thereof to them by the consignee and whether the alleged transfer of ownership of the consignment is binding on the contesting defendants ? If not, whether the plaintiffs can maintain this suit ?

3. Whether the plaintiffs claim is excessive as alleged in the written statement ?

4. To what relief, if any, is the plaintiff entitled ?

[31] These issues embrace questions regarding the *locus standi* of the plaintiffs, their right to sue as a firm, the validity of notices and the reasonable character of the amount claimed. No issue was framed as to whether the suit was maintainable in the form it was laid and the appellants are not making any grievance of it. It appears that this particular defence was abandoned at that very stage. All other points arising from the pleadings were put in issue. The defendants never claimed in the trial Court that they disputed their liability to compensate the original owner by reason of Risk Notes A and B, and at no stage asked for any issue or adjudication on that point.

[32] The trial Judge found all the issues in favour of the plaintiffs. He also allowed interest at 12 per cent. and granted them a decree for the sum claimed, viz., Rs. 20,073-7-0 with full costs. The amount decreed was to carry interest at 6 per cent. per annum from the date of the decree till realisation.

[33] The appeal is on behalf of the Governor-General in Council. The first contention raised was that as the consignment was admittedly booked under risk Notes A and B, the plaintiffs could not claim compensation without alleging and proving misconduct on the part of the Administration or its servants. This plea, whatever its nature, cannot be allowed to be raised at this stage for the first time. The plea involves a total denial of liability to pay compensation to the true owner of the consignment. It could be raised in the trial Court. Not only was there an omission to raise this plea, the liability to pay compensation was admitted though the extent of this liability in terms of money was in question. It has been shown above that without alleging misconduct of any kind, plaintiffs in Para. 5 of the plaint claimed compensation for the loss and non-delivery of the consignment. The defendants had the risk notes in their possession. They did not even remotely suggest that the agreement embodied in the risk notes restricted the liability of the Administration. The risk notes were not produced at any stage of the litigation. They are not on the record. There is no suggestion that the Administration and its legal advisers were not aware of their rights under the risk notes. In these circumstances and particularly in view of the language used in para. 4 of the written statement, the omission to dispute the liability to compensate the true owner of the consignment cannot even be attributed to inadvertance. It appears to be a conscious act and there ought to be some good reasons for the adoption of this course. The admission of liability necessarily implied in the written statement was subject to defences expressly raised in the first three paras of the written statement.

[34] If the plea is allowed to be raised now, it would amount to permitting withdrawal of an important admission made in plaintiffs' favour. It will also involve allowing the defendant to put forward a case different from and diametrically opposed to the case they set up in the Court below. This, in my view, is not permissible. The defendants cannot be allowed to convert their admission into a denial of liability for the first time in appeal. They admitted a material fact in no mistake or misapprehension in their written statement. They cannot be allowed at a later stage to change their front and make out a new case by denying that fact.

[35] Ground No. 9 of the memo of appeal is to the effect that the learned Additional Sub-Judge ought to have held on a proper interpretation of the Risk Notes executed in the present case that 'plaintiffs were not entitled to compensation or at any rate as claimed.' It is urged that the allegation and proof of misconduct on the part of the Administration or its servants must be there, before any liability for compensation can be fastened on the Administration. Assuming for a moment that this is the correct interpretation of the risk notes, which are not on the record, and assuming that the proof of misconduct is a necessary pre-requisite to a decree for compensation for loss and non-delivery of con-

signment booked under Risk Notes A and B, can the defendants who admitted liability consciously and thus restricted the scope of controversy to the quantum of compensation, be permitted to resile from this position without any valid reason? The statement of the plaintiffs in para 3 of the plaint was that the consignment was booked under Risk Notes. What was conceded was that the Risk Notes were executed. If, therefore, the Administration wanted to rely on the terms and the conditions of the Risk Notes it had to say so. The plea of denial of liability found on the risk notes should have been raised. Risk notes should have been produced. Instead of doing all these, the existence of liability as distinguished from its extent was conceded. Even if, therefore, the interpretation which Mr. Medhi, advocate for the appellants, seeks to put on the risk notes is accepted as correct for purposes of argument, the plea in my humble opinion cannot be permitted to be raised at this stage in the circumstances of this case. It was not pressed at any stage of the litigation in the trial Court. The judgment of the trial Court assumes the existence of liability on the part of the Administration to compensate the true owner, without any objection from the defendants. It has dealt with the disputed question of the quantum of liability after disposing of the questions covered by the first two issues.

[36] In this view of the matter, it is not necessary to consider whether in view of the fact that Risk Notes A and B were duly executed, the failure on the part of the plaintiffs to plead misconduct in the plaint was fatal to the suit. But as the question was discussed at great length and the learned Chief Justice has based his judgment on the interpretation of Risk Note B, I propose to deal with the question briefly.

[37] At the outset, it may be stated that in this case, the loss of consignment and its non-delivery are admitted. Risk Note A has no application to the case and Mr. Medhi has not relied on it. The rights and obligations of the parties have to be determined in relation to Risk Note B alone. Under S. 72 (1), Railways Act, the responsibility of a Railway Administration for the loss, destruction or deterioration of animals or goods delivered to the Administration to be carried by railway is subject to the other provisions of the Act, that of a bailee under Ss. 151, 152, 161, Contract Act 1872. Under cl. (2) of S. 72, a Railway Administration may limit its responsibility by an agreement in a form approved by the Central Government and signed by or on behalf of the person sending or delivering to the Railway Adminstration the animals or goods. Risk note B is in a form approved by the Government. It is utilised when in consideration of a lower charge the consignor is prepared to allow the Administration to restrict its ordinary responsibility of a bailee to the extent the use of this Risk notes makes possible. When Risk note B is executed, a consignor agrees in consideration of the lower charge to hold the Administration harmless and free from all responsibility for any loss, destruction or damage to the consignment from any cause whatsover except on proof that such loss, destruction, deterioration or damage arose from the misconduct on the part of the railway Administration or its servants. The agreement is further qualified by a proviso which in certain cases mentioned below casts on the Administration a duty to disclose to the consignor as to how the consignment was dealt with throughout the time that it was in its possession or control and if necessary to give evidence thereof before the consignor is called upon to prove misconduct. It is only when misconduct on the part of the Railway Administration or its servants cannot be properly inferred from the evidence given by the Administration that the burden of proving this misconduct lies on the consignor. The cases in which the duty of disclosure and proof, if necessary, as to how the consignment was dealt with whilst in the control of the Administration is cast on the Administration are:

(a) Non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment packed in accordance with the instructions laid down in the tariff or, where there are no such instructions, protected otherwise than by paper or other paking readily removable by hand and fully addressed, where such non-delivery is not due to accidents to trains or to fire;

(b) Pilferage from a package or packages forming part of the said consignment properly packed as in (a) when such pilferage is pointed out to the servants of the Railway Administration on or before delivery.

[38] In this case the entire consignment was lost. It consisted of 54 casks. There is no suggestion that the consignment was not properly addressed; nor was there any allegation of accident to the train or fire. The case was admittedly covered by cl. (a) of the proviso. The Administration was, therefore, bound to disclose and if necessary to prove to the consignor how the consignment was dealt with throughout the time it was in its possession or control before the consignor could be called upon to prove misconduct. When an entire consignment or package is lost during transit even though properly addressed, the circumstances attending the loss would be within the knowledge of the Administration. It is only when all facts bearing on the manner in which the consignment was dealt

with are disclosed that it will be possible for the consignor to say that an inference of misconduct can be drawn or to allege and prove misconduct on the part of the Administration. Any allegation of misconduct on the part of the consignor without knowing the circumstances as would happen when he is not taken into confidence as to the way in which the consignment was dealt with by the Administration before loss, would be a reckless conjecture bordering on falsehood. The risk note, therefore, provides that in cases falling under cls. (a) and (b) of the proviso, the burden of proving misconduct should lie on the consignor after the Administration has disclosed and given evidence, if necessary, of the maner in which the consignment was dealt with so long as it remained in its possession or control and if misconduct on the part of the Administration or its servants could not be fairly inferred from such evidence.

[39] The Administration has admittedly not discharged its obligations of disclosure either before suit or during its pendency. On 14th August, plaintiff informed the Chief Commercial Manager that the consignment has not reached its destination. They requested him to make an enquiry into the matter and also requested other officers of the Administration for information about its whereabouts. They got no reply. A reminder had to be sent. In answer to it, a reply was received intimating that the matter was being enquired into. They waited for some time more. No further information was at all received as to what had happened to the consignment. They sent notices under S. 77, Railways Act and under S. 80, Civil P. C, alleging both loss and non-delivery. Their allegations were allowed to go unchallenged during the period of notice. In the plaint both loss and non-delivery were specifically pleaded. They were not denied either expressly or by necessary implication near or remote. The loss was for all purposes admitted before suit and even in the written statement. If, in spite of loss and non-delivery, the Administration wanted to take advantage of their restricted responsibility under the risk notes, it had to show either that the case was not covered by cls. (a) and (b) of the proviso or to disclose and, if necessary, to prove how it dealt with the consignment before it was lost. When no information of any kind was vouchsafed to the plaintiffs about the handling of the consignment by the Administration, they were not in a position to allege misconduct and it seems to me that in the circumstances of this case it was not necessary in law for them to do so for obvious reasons. The contention that a plaintiff, where consignment has been booked under Risk Note B, cannot under any conceivable circumstances succeed without expressly alleging misconduct does not seem to be justified by the language of Risk Note B, and Mr. Medhi has not been able to cite any authority in support of so sweeping a proposition. An authoritative interpretation of the Risk note form B from their Lordships of the Privy Council is to be found in *Surat Cotton Spinning and Weaving Mills Ltd* v. *Secy. of State*, 41 C.W.N. 837 : (A.I.R. (24) 1937 P.C. 152). This decision was followed in *Governor-General in Council* v. *Visheshwar Lal*, A. I. R. (34) 1947 Pat. 84 : (230 I. C. 283). Lord Thankerton in delivering the judgment of their Lordships of the Privy Council observed as follows :

"The first portion of the proviso provides that the railway administration shall be bound to disclose to the consignor 'how the consignment was dealt with throughout the time it was in the possession or control, and, if necessary, to give evidence thereof, before the consignor is called upon to prove misconduct.' In their Lordships' opinion, this obligation arises at once upon the occurrence of either of cases (a) or (b), and is not confined to the stage of litigation. Clearly one object of the provision is to obviate, if possible, the necessity for litigation. On the other hand the closing words of the obligation clearly apply to the litigious stage. As to the extent of the disclosure, it is confined to the period during which the consignment was within the possession or control of the railway administration; it does not relate, for instance, to the period after the goods have been theftuously removed from the premises. On the other hand, it does not envisage a precise statement of how the consignment was dealt with by the administration or its servants. The character of what is requisite may vary according to the circumstances of different cases, but if the consignor is not satisfied that the disclosure has been adequate, the dispute must be judicially decided. As to the accuracy or truth of the information given, if the consignor is doubtful or unsatisfied, and considers that these should be established by evidence, their Lordships are of opinion that evidence before a Court of law is contemplated, and that, as was properly done in the present suit, the railway administration should submit their evidence first at the trial.

At the close of the evidence for the administration two questions may be said to arise, which it is important to keep distinct. The first question is not a mere question of procedure, but is whether they have discharged their obligation of disclosure, and in regard to this, their Lordships are of opinion that the terms of the risk note require a step in procedure, which may be said to be unfamiliar in the practice of the Court; if the consignor is not satisfied with the disclosure made, their Lordships are clearly of opinion that it is for him to say so, and to call on the administration to fulfil their obligation under the contract and that the administration should then have the opportunity to meet the demands of the consignor before their case is closed; any question as to whether the consignor's demands go beyond the obligation should be then determined by the Court. If the administration fails to make the opportunity to satisfy the demands of the consignor so far as endorsed by the Court, they will be in breach of their contractual obligation of disclosure.

The other question which may be said to arise at this stage is whether misconduct may be fairly inferred from the evidence of the Administration; if so, the con-

signor is absolved from his original burden of proof. But, in this case, the decision of the Court may be given when the evidence of both sides has been completed. It is clearly for the Administration to decide for themselves whether they have adduced all the evidence which they consider desirable in avoidance of such fair inference of misconduct. They will doubtless keep in mind the provisions of S. 11, Evidence Act."

[40] According to this decision as soon as a case falls under cls (a) and (b) of the proviso, the obligation on the part of the Administration to disclose the nature of their dealings with the consignment arises. It is not postponed to the stage of the litigation. The necessary disclosure ought to be made before a claimant decides to go to law. The Administration was requested to make enquiries about the consignment as it did not reach the destination when expected. Information as to its whereabouts was asked for. Ultimately its loss was alleged in the notices sent to the Administration. The Administration had ample opportunities of discharging its initial obligation under the risk note. The language of the risk note as interpreted by their Lordships of the Privy Council does not require the owner of the consignment to make an express demand for disclosures at this stage. If the consignment is lost in circumstances which bring it under cl. (a) or (b), the Administration has to make the disclosure. In this particular case it cannot be said that no demand was made (by) plaintiffs when asking for enquiry as to what had happened to be communicated to them. If any demand was necessary, it was made in effect though not formally. The Administration had ample opportunity to discharge their obligation under the risk note. It preferred not to do so. Plaintiffs when instituting their suit had no knowledge how the consignment had been dealt with. They could not allege misconduct.

[41] After the institution of the suit, the Administration had another opportunity. It could make the necessary disclosure and put the plaintiffs on proof of misconduct. According to the view of their Lordships if the disclosure is made before suit but it does not satisfy the claimant, the Administration has first to submit its evidence. In this case no disclosure at all had been made before suit. The initial obligation, therefore, continued. The Administration could discharge it if it so desired. The need, of course, for it would have been felt only if the Administration had believed that its dealings with the consignment did not disclose any misconduct on its part or on the part of its servants. After proving the nature of the dealings it could require the plaintiff to prove misconduct if it could not be inferred from their own disclosures. It may not make any disclosure at all and may not put the plaintiff to proof of misconduct by accepting liability for the loss. This is what the Administration has done in this case. If without making any disclosure, the Administration had contested its liability to compensate the true owner, it would obviously have been in breach of its contractual obligation and thus could not relegate the plaintiffs to the position in which they could have been called upon to prove misconduct. The plaintiffs were not in a position to plead misconduct at any stage of the case. It was not possible for them to do so in point of fact. The legal obligation to prove misconduct also did not arise in the absence of disclosures or proof as to manner in which the consignment had been dealt with. This would be the situation according to the rule enunciated by their Lordships of the Privy Council. My conclusion, therefore, is that it was not necessary for the plaintiffs in this case to allege and prove misconduct. Apart from admitting liability the Administration has been clearly in breach of the contractual obligation and cannot claim in enforcement of the contract that the plaintiffs should have alleged and proved misconduct. No issue in these circumstances covering the question of misconduct really arose the case.

[42] If, however, proof of misconduct is regarded as a condition precedent to a valid claim for compensation, the Administration has by its conduct exposed itself to a presumption that the loss of the consignment was due to the misconduct of the Administration or its servants.

[43] This presumption would arise under S. 114 (g), Evidence Act.

[44] The plaintiffs by claiming compensation for loss of the consignment without pleading misconduct on the part of the Administration or its servants can at the most be regarded as having treated the Administration as a bailee notwithstanding that Risk note B had been executed. In the absence of any information from the Administration as to how the consignment was dealt with, they did not concede to the Administration the benefit it could claim after discharging its contractual obligation. They were driven to this course and they could legitimately adopt it notwithstanding the admission that the Risk note had been executed. The breach of the contractual obligation under Risk note B disentitles the Administration to claim any benefit under the Risk note. Their responsibility in the case of such a breach would be that of a bailee under S. 72 (a), Railways Act. The Administration could resist the claim by merely showing that they had taken such care of the consignment as a man of ordinary prudence would have done under similar circumstances as required by S. 151, Contract Act. The initial onus of

proving that the Administration had, as a bailee, discharged its legal obligation by taking such care as the law required was also on the Administration. In the words of Lord Halsbury:

"Where a bailment is made to a particular person, a bailment for hire and reward, the bailee is bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rests upon him," *vide Morison, Pollexfen & Blair* v. *Walton*, (Unreported, 10th May 1909) cited by Buckley, L. J., in *Travers & Sons, Ltd.*, v. *Cooper*, (1915) 1 K. B. 73 at p. 89: (83 L. J. K. B. 1787).

[45] No effort has been made to discharge this onus either and it was evidently for the reason that the Administration never wanted to dispute their liability to compensate the rightful owner of the consignment. The Administration, in these circumstances, cannot on any conceivable basis evade responsibility to pay compensation for the loss and non-delivery of the consignment to the rightful claimant.

[46] The authorities relied on by Mr. Medhi are distinguishable and are not of any assistance to us in the decision of the case. In the first two cases, *Hiralal Gourishankar, Firm* v. *Governor-General in Council*, A. I. R. (36) 1949 Nag. 246: (I. L. R. (1949) Nag. 116) and *Governor-General in Council* v. *Kishengopal*, A. I. R. (35) 1948 Cal. 300, relied on by him, damages were claimed for short deliveries. The consignments were booked under Risk Notes A and B. In both the cases Risk Note A was applicable. Under Risk Note A, the responsibilities of the Administration are not the same as under Risk Note B. The decisions in these cases were based on the combined effect of both the Risk notes. In *Ralliaram Dingra* v. *Governor-General in Council*, A. I. R. (33) 1946 Cal. 249: (I. L. R. (1944) 2 Cal. 487), it was conceded in the circumstances of the case that the burden of proving misconduct was on the plaintiff. In *Badridas Firm of Purulia* v. *Governor-General in Council*, A. I. R. (34) 1947 Pat. 118: (225 I. C. 502), the claim for damage was also on account of short delivery. The defendant pleaded that there was no misconduct on the part of the Railway or its servants. The counsel for the petitioners when arguing that all material facts relating to the details of the carriage of the goods from stage to stage had not been disclosed conceded that plaintiff had not called upon the Administration to furnish all the information. As plaintiff had not done so in the trial Court, they were not allowed to make a grievance of it in revision. The observation made in *Ganesh Das Bisheshwar Lal* v. *Governor General in Council*, 6 Pat. 189: (A. I. R. (14) 1927 Pat. 193) to the effect that the Administration must admit loss in its pleadings also do not help the appellant. The loss was alleged in the plaint and not denied in the written statement. This must be taken as admitted.

[47] The second contention relates to the amount of compensation which has been decreed. Mr. Medhi contends that the amount decreed is excessive. His contention is based on the provisions of the Hoarding and Profiteering Prevention Ordinance, 1943 (Ordinance No. XXXV (35) of 1943) as amended.

[48] The consignee firm Messrs. Bhuramall Sohanlall were entitled to be reimbursed for loss caused to them by non-delivery. In para 10 of the plaint it was averred that the consignment was expected to be delivered on 17th July 1944. This allegation was not denied by contesting defendants. The loss to the consignees and also to the plaintiffs, their ultimate representatives, would, it is contended by the learned counsel for the defendant appellant, be represented by the price at which the consignment could be sold in open market in the middle of July. Plaintiffs have proved that the consignee firm (defendant 4) sold their rights in the consignment to Messrs. Meghraj Begwani (defendant 5). They, in their turn, sold the consignment to the plaintiffs Jitmall Oswal (P. W. 3), a *gomasta* of Messrs. Meghraj Begwani (defendant 5) was examined on plaintiffs' behalf. He deposed that the railway receipt, Ex. 8, was purchased by his firm for Rs. 17,548 12-3 and was sold to the plaintiffs for Rs. 19,027. According to him, the two transactions, *viz.*, purchase by his firm and the sale to the plaintiffs took place on 26th June 1944. They were entered in the books of his firm on the same day. His statement was that as soon as his firm got the railway receipt they sold it to the plaintiffs. He also stated that the agreement for the purchase of the railway receipt from the consignees (defendant 4) had been made about 15 to 20 days before the actual purchase. This alleged agreement, however, is admittedly oral and there was no entry with respect to it in the books of account of the defendant firm. The actual sale to defendant 5 came on 26th June 1944. The consignment was booked on 17th June 1944. Jitmall's statement that there was an oral agreement to purchase the railway receipt some 15 to 20 days before the actual transaction is not credible. The consignment had not even been booked from Budge-Budge at that time. The books of account show that the two transactions took place on the same day. The price said to have been paid by Messrs. Meghraj Begwani was Rs. 17,548-12-3 and the plaintiffs are alleged to have paid the sum of Rs. 19,027-7-0. P. W. 4 has deposed that on 29th Asar (14th July) his firm purchased 2 mnds. 19 srs. of oil (net) at

the rate of Rs. 80 per maund. This is the only evidence about the alleged market price of cocoanut oil at Gauhati in the middle of July.

[49] No representative of the consignors or the consignees was examined by the plaintiffs and there is no evidence on the record to show at what price the consignment was sold to Messrs. Bhuramall Sohanlall (defendant 4). Contesting defendants at a somewhat late stage of the case in the trial Court asked for leave to examine the consignors by interrogatories. This application was resisted by the plaintiffs and the permission to examine the consignors was refused. Assuming, however, that the consignment was sold by the consignees to Messrs. Meghraj Begwani for Rs. 17,500, it is not unfair to presume in the circumstances of this case that the consignees themselves got it at a lower price. They must have sold it at some profit. The fact, however, remains that the consignee parted with their rights in the consignment on 26th June 1944 for a sum of Rs. 17,500 if the statement of P. W. 3 is relied on. The consignees (defendant 4), according to the contention of the learned counsel for the appellant, could claim this sum or even a higher figure by showing that the market price in the middle of July was higher and the sum claimed was not in excess of the controlled price of cocoanut oil. Plaintiffs have claimed that they paid Rs. 19,027-7-0 for the consignment and they have claimed this sum on this basis. It seems to me that they cannot claim this sum even if it is assumed that the sum of Rs. 19,027-7-0 was actually paid by them as held by the learned Additional Subordinate Judge. The consignees (defendant 4) sold their rights in the consignment to Messrs. Meghraj Begwani (defendant 5). They sold it in their turn to plaintiffs. The measure of compensation ought to be the loss to the consignees even if the transactions of 26th June are to form the basis for the determination of the amount of compensation. The consignees on plaintiffs' own showing would not have lost more than Rs. 17,500 if the consignment had not been received. The subsequent sale of the consignment to the plaintiffs cannot be the basis for determining the amount of compensation without any reference to the market price in the middle of July. If that could have been made the basis, the amount of compensation could be increased to any extent by a series of transactions. The Administration is responsible only to the consignees. The subsequent or the ultimate transferee stands in the shoes of the consignee so far as the loss is concerned. The price that he pays cannot afford any criterion for assessing compensation, for it is the loss to the consignee which the Administration has to make good. Besides, the sum of Rs. 19,027-7-0 could not be regarded as the market price even on 26th June as the seller of the plaintiffs had purchased it that very day at Rs. 17,500. The plaintiffs cannot, therefore, claim Rs. 19,027-7-0 on any conceivable basis and the amount of compensation could not have been anything more than Rs. 17,500 on plaintiff's own showing. But Mr. Medhi contends that even if the consignee actually sold the consignment for Rs. 17,500, the plaintiffs cannot claim the amount unless they show that the price charged by the consignees was not in excess of that permitted by the provisions contained in the Hoarding and Profiteering Prevention Ordinance, 1943. He points out that the Ordinance was applicable to the whole of British India including Assam. Under S. 6 of the Ordinance, no dealer could charge more than 20 per cent. on the landed cost in the case of imported articles and on the producer's sale price in the case of indigenous articles. This Ordinance, he claims, was in force in 1944. He points out that the finding arrived at by the learned Additional Sub-Judge that cocoaunt oil was not a controlled commodity in Assam is unsustainable in view of the provisions of S. 6 of the Ordinance.

[50] The learned advocate for plaintiffs-respondents had no answer to this contention. The Ordinance was admittedly in force in 1944. It also applied to the province of Assam. Under S. 3 of the Ordinance, the Central Government by Notification in the official Gazette had the power to fix maximum price or rate in respect of any article which may be charged by a dealer or a producer. There is no evidence on the record to show that any price of cocoanut oil was fixed by any competent authority for the province of Assam. In these circumstances, S. 6 of the Ordinance became operative. It provides that:

"Where no maximum has been fixed by Notification under cl. (c) of sub-s. (1) of S. 3, no dealer or producer shall sell or offer for sale or otherwise dispose of an article for a consideration which is unreasonable."

The word 'unreasonable' was defined in cl. (2) of S. 6. A consideration under the Ordinance was 'unreasonable' in the case of a sale by a dealer if it exceeded the amount represented by the addition allowed by the normal trade practice in force on 31st August 1939 to the cost landed as defined in S. 6 (2) (b) (1) of the Ordinance of the article imported or to the price at which the producer sold the article in the case of an article which is not imported, and in the case of a sale by a producer if the consideration exceeded the amount represented by the addition allowed by the normal trade practice in force on 31st August 1939 to the cost of production. Where, however, the addition allowed by the normal trade

practice exceeded 20 per cent., the dealer or the producer, as the case may be, had to report the fact to the Controller General for his orders and the consideration was to be deemed 'unreasonable' unless it had the approval of the Controller General. The excess of 20 per cent. on the landed cost in the case of imported articles and on the producer's sale price in the case of articles not imported when the sale was by a dealer and similarly the excess of 20 per cent. on the cost of production in the case of the sale by a producer was the maximum limit of the reasonable consideration under the Ordinance till sanction for a higher profit was obtained from the Controller General. The fact that the price of cocoanut oil was not fixed under S. 3 of the Ordinance did not affect the operation of S. 6. The dealers at Gaubati therefore could not charge more than the maximum permissible under the Ordinance without special sanction from the Controller General. The plaintiffs had to prove the extent of the loss caused by non-delivery. They give no evidence as to whether the oil was imported or produced in the country; nor did they give any evidence as to the price that could be legitimately charged for it in conformity with the provisions contained in the Hoarding & Profiteering Prevention Ordinance, 1943. They even resisted efforts on the part of the contesting defendants to bring evidence on the record which would have shown the price actually paid by the consignee defendant 4.

[51] From the statement of Mr. Baker, I. C. S., Deputy Director of Consumer Goods, Bengal, who was examined by the defendants it appears that the price of cocoanut oil had been fixed by a notification of the Government of Bengal dated 15th February 1943. The Notification applied to the town of Calcutta and its suburbs. The wholesale price of cocoanut oil was fixed at Rs. 42 per *maund*. A copy of the Notification was placed on the record by Mr. Baker. This Notification makes on distinction between imported oil and oil produced in the country. The maximum price fixed by it covered both the varities within the specified limits. The current price of imported oil at Calcutta was even lower. This has been proved by the defendants by reliable evidence. Abdul Majid Osman Hakim, a representative of Messrs. Tata Oil Mills Co. Ltd., (Agents for the distribution of cocoanut oil imported at Bombay and Calcutta) deposed that the imported (Ceylon) cocoanut oil was being sold at the rate of Rs. 900 per ton including the cost of drums, ex jetty during the months of June and July 1944. The price of the imported oil was thus actually below Rs. 42 a *maund*. The oil produced in the country could not be sold at higher than Rs. 42 a *maund* at Calcutta and in its suburbs. Plaintiffs have made no attempt to prove the cost of production of cocoanut oil produced in the country. They prevented defendants from showing the actual cost of the consignees. It would be just to presume that the evidence about the price at which the consignment was purchased by the consignees (defendant 4) would not have been favourable for it, its cost of production at Calcutta if it was oil produced in the country could not have been higher than the selling price of Rs. 42 *a maund* which applied to oil both imported and that produced in the country. It must have reasonable margin of profit for both.

[52] The consignment was booked from Budge-Budge. A Calcutta firm were the consignors. Budge-Budge has not been shown to be included in the suburbs of Calcutta to which the Notification applied. It is at a distance of about 17 miles from the Sealdah Station of Calcutta. The maximum price of cocoanut oil at Budge-Budge could not be substantially higher than Rs. 42 per *maund*. The learned counsel for the appellant defendant contends that in the absence of any evidence from the side of the plaintiffs showing the exact amount that could have been charged under the Ordinance at Gubati, a fair basis for assessing compensation would be afforded by the addition of 20 per cent profit a near equivalent to the maximum price of Rs. 42 a *maund* at which coconut oil could be sold at Calcutta and in its suburbs. This in any case, he represents, is the highest rate at which compensation may be assessed on the evidence produced by the defendants. We have found above that the highest sum that plaintiffs respondents can claim on their own showing is Rs. 17,500 for the entire consignment if the statement of P. W. 3 is relied on. The appellants have not disputed the amount claimed as the price of mixed Badama oil. The sum claimed under this head is Rs. 2,645-12 6p. A sum of Rs. 1,890 is claimed as the price of barrels. This also is not in dispute. The total of these undisputed items comes to Rs. 4 535-12 6 p. The balance of Rs. 12,964 3-6 would represent the price of cocoanut oil if plaintiffs are awarded Rs. 17500 as compensation. The total quantity of cocoanut oil was 204 *mnds.* 4 *srs.* 5 *chattaks*. Its price at Rs. 42 a *maund* would work out to about Rs. 8,572-8-0. If the sum of Rs. 12,964-3-6 is allowed as the price of cocoanut oil, it would represent an addition of about 50 per cent. to the Calcutta price. We regard this addition as excessive. On the other hand, a strict calculation on the basis proposed by the learned counsel for the appellant also does not seem justified as the consign-

ment was booked from Budge-Budge. Plaintiffs-respondents, in our opinion, would be adequately compensated and sufficient allowance will be made for any higher price than Rs. 42 a *maund* that the original consignees may have paid by their being allowed an addition of 33 per cent instead of 20 per cent to the maximum price for Calcutta and its suburbs. On this basis the price of cocoanut oil comes to Rs. 11,401. This added to the undisputed items of the claim brings the total to Rs. 15,936. This, in our view, is the highest figure that can be allowed to the plaintiffs by way of compensation on the evidence before us.

[53] I agree with my Lord the Chief Justice that plaintiffs are not entitled to charge interest for the period before suit The case is not covered by the provisions contained in the Interest Act and I do not think interest can be allowed on equitable grounds in the circumstances of this case. The result is that plaintiffs are entitled to a decree for the sum of Rs. 15,936 with costs thereon in both the Courts. They shall have interest at 6 per cent. per annum from the date of the decree till realisation.

V.R.B. *Decree varied.*

A. I. R. (37) 1950 Assam 188 *[C. N. 65.]*

THADANI C. J. AND RAM LABHAYA J.

Fakiragram Rice Mills — Appellants v. *Ramu Indu—Respondent.*

F. M. A. No. 3 of 1950, dated 29th May 1950.

(a) Workmen's Compensation Act (1923), S. 10, 2nd proviso—Absence of notice — Knowledge of management of accident otherwise than by notice whether removes bar to claim.

Second proviso to S. 10 lays down that the want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim if any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed had knowledge of the accident from any other source at or about the time when it occurred. Where, therefore, an injured person working in a mill is removed to the hospital for treatment of injury caused while working in the mill and after the discharge of that person from the hospital the manager of the mill interviews him, it is reasonable to suppose that the management of the mill knew how the accident had occurred. In such a circumstance the absence of notice cannot be regarded as a bar to the entertainment of the claim. [Para 5]

Annotation : ('46-Man) Work. Comp. Act, S. 10 N. 2.

(b) Workmen's Compensation Act (1923), Ss. 10 and 22 — Claim is to be made under S. 10 and not under S. 22.

A claim under the Act is not required to be made by an application under S. 22 of the Act. A claim is required to be made under S. 10, and no particular form is prescribed. Section 22 refers in terms to an application for settlement of any matter, that is, it contemplates an application for settlement after a claim is made under S. 10. [Para 6]

Annotation : ('46-Man.) Work. Comp. Act, S. 10 N 1; S. 22 N. 1.

(c) Workmen's Compensation Act (1923), S. 4—Workman's hand permanently deformed—Loss of earning capacity — Evaluation of.

Where a workman's left hand was permanently deformed and he was unable to carry out his duties as a labourer, it was held that the view of the Commissioner that the injury had resulted in the loss of the left arm below the elbow resulting in 50 per cent. loss of earning capacity was correct even if the injury was not to be regarded as one of the injuries listed in the schedule resulting in a 50 per cent. loss of earning capacity. [Paras 9, 10]

Annotation : ('46-Man) Work. Comp. Act, S. 4 N. 1.

J. C. Sen—for Appellant.
P. K. Gupta—for Respondent.

Thadani C. J.—This is an appeal under S. 30, Workmen's Compensation Act from an order passed by the Commissioner for Workmen's Compensation, Goalpara, dated 29th November 1949, by which he awarded a sum of Rs. 1,470 to the respondent, on Ramu Indu, a workman within the meaning of the Workmen's Compensation Act in respect of injuries received by him, which resulted according to the Commissioner, in the loss of his left arm below the elbow and reduced his earning capacity by 50 per cent. in accordance with the schedule attached to the Act.

[2] The respondent was injured in the course of his employment on 22nd May 1949. As a result of serious injuries caused to his hand, he was forthwith removed to the Dhubri Civil Hospital where he was detained for over 2 months; he was discharged from the Hospital on 25th July 1949 : 4 days later he appeared before the Deputy Commissioner, Goalpara, an ex-officio Commissioner under the Workmen's Compensation Act, and complained to him that while oiling the mill belonging to the Fakiragram Rice Mills, his left hand was fractured, resulting in his detention in hospital from 22nd May 1949 to 25th July 1949; his daily wages were Rs. 2-5-0 and he had worked continuously for 10 months.

[3] On receiving this complaint which the Commissioner treated as a claim, the Commissioner issued notice to the Mill to show cause why it should not be ordered to pay compensation. One Sri Maidhanda Agarwalla, a partner in the Mill, appeared before the Commissioner and denied liability and contended that as the workman had not filed a formal application he was not entitled to any compensation, that in any case he was a casual workman; his work lay outside the factory, and that he was forbidden to handle any part of the machinery; on 22nd May 1949, the respondent entered the

factory building with his wife in order to demonstrate to his wife that he had become a full-fledged engineer; in the course of handling the engine, his hand was fractured.

[4] The learned Commissioner came to the conclusion from the evidence that the respondent and his wife both worked in the Mill and had quarters provided for them by the Mill authorities; he held that the respondent was not a casual labourer, and that the accident occurred in the performance of his duties as a workman employed by the Mill.

[5] Mr. Sen for the appellant has contended that in this case, the provisions of S. 10 of the Act were not complied with in that no notice of the accident was given as required by the Act. Even so, Proviso 2 to S. 10 of the Act lays down that the want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed had knowledge of the accident from any other source at or about the time when it occurred. From the fact that the injured person was removed to the Dhubri Hospital, it is reasonable to suppose that the management of the Mill then knew how the accident had occurred. It also appears from the evidence that after the respondent was discharged from the Hospital, the Manager of the Mill interviewed him. In these circumstances, we do not think the absence of notice can be regarded as a bar to the entertainment of the claim.

[6] Mr. Sen has next contended that the claim itself was not properly made; that a claim under the Act must be made by an application as required by S. 22 of the Act. We do not think a claim is required to be made by an application under S. 22 of the Act. A claim is required to be made under S. 10, and no particular form is prescribed. It is not disputed that the claim in this case was made before the Commissioner within one year of the occurrence of the accident. The application referred to in S. 22 of the Act is an application for the settlement of any matter by a Commissioner and has no reference to the manner in which the claim for compensation is to be made. Mr. Sen contended that as sub-s. (2) of S. 22 requires particulars to be mentioned in an application within the meaning of S. 22 particulars such as (a), (b) (c) and (d), it must by implication refer to the particulars of the claim. But S. 22 refers in terms to an application for settlement of any matter, that is to say it contemplates an application for settlement after a claim is made under S. 10.

[7] Assuming, however, that S. 22 includes a claim application, sub-s. (3) of S. 22 lays down that if the applicant is illiterate or for any other reason is unable to furnish the required information in writing, the application shall, if the applicant so desires, be prepared under the direction of the Commissioner. It is plain from what has been stated in the order-sheet, dated 29th July 1949, that the learned Commissionsr, realising the disability of the respondent, himself wrote out the substance of the claim in his order dated 29th July 1949.

[8] Mr. Sen next contended that it was not the respondent's job to oil the machinery, that what he did was not only gratuitous but something against the warning of the management. This contention, however, is concluded by the finding of the learned Commissioner that the respondent received the injuries in the course of his employment.

[9] The last point argued by Mr. Sen was as to the amount of compensation which could properly be awarded under the Act. He contended that the injury received by the workman was not one of the injuries listed in schedule I to the Act, that the view of the learned Commissioner that the injury has resulted in the loss of the left arm below the elbow resulting in 50 per cent. loss of earning capacity was erroneous. Mr. Sen has referred us to the evidence of Dr. A. N. Hazarika who has stated:

"This forearm has been shortened by about half; the movements of the left wrist and fingers have been impaired, and his gripping power greatly lost: the fingers have become smaller as they cannct be used. The left hand is permanently disabled to perform his usual occupation as a labourer, that is to say, he cannot use the hand in lifting ordinary loads, but he will be able to pick up a pencil or a piece of paper and will be able also to spread paddy in the sun if he is not to lift loads. His hand is permanently deformed and the tip of the middle finger is lost."

[10] From the evidence of Dr. A. N. Hazarika, it is clear that even if the injury is not to be regarded as one of the injuries listed in the schedule resulting in a 50 per cent. loss of earning capacity, the fact that the workman's hand is permanently deformed and he is unable to carry out his duties as a labourer, means that he has lost the use of the thumb and the 4 fingers of his left hand. For the complete loss of the use of the thumb, the percentage of loss of earning capacity is 20%; for the loss of the index finger 10 per cent., and for the loss of any finger other than the index finger, 5 per cent. Adding up these percentages, it comes to the same figure of 50 per cent. loss of earning capacity. We see no reason, therefore, to reduce the amount of compensation

awarded by the learned Commissioner. The result is that the appeal is dismissed with costs.

[11] **Ram Labhaya J.**—I agree.

V.S B. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 190 *[C. N. 66.]*

THADANI C. J. AND RAM LABHAYA J.

Kishori Ram Malla — *Appellant* v. *Abdul Majid* — *Respondent.*

First Appeal No. 317 of 1947, D/-29-5-1950, from judgment and decree of Addl. Sub-Judge, A. V. D., D/- 31-7-1947.

Tort—Conversion—Gain by wrongful act—Fish caught by wrongful act of trespassing — Money realised by sale of — Disposal of.

A wrongdoer is not entitled to keep with himself any part of the money realised by the sale as the result of a wrongful act on his part. A person obtaining money by the sale of the fish as a result of wrongful operations by trespassing into the fishery in possession of another person, cannot be permitted to withhold any portion of the profit accruing to him as the result of the wrongful act on his part. Nor can he be allowed to claim collecting charges incurred in catching fish. [Para 7]

K. R. Barooah and B. C. Barua — for Appellant.

J. C. Sen — for Respondent.

Ram Labhaya J. — This is an appeal from the judgment and decree of the Addl. Sub Judge, A. V. D., dated 31st July 1947 in a suit for compensation for wrongful catching and removal of fish by the defendant from a fishery leased to the plaintiff. The plaintiff claimed Rs. 5336-1-0. The claim was decreed to the extent of Rs. 4911 6-0 with proportionate costs. The decretal amount was to carry interest at the rate of 2 per cent. per annum from the date of the decree till realisation. The cross-claim of the defendant was disallowed.

[2] Plaintiff's case was that he was the lessee of fishery Mahal No. 11 in the Sadiya Frontier Tract of the Lakhimpur district for three years, (1944-45, 1945-46 and 1946-47) in succession. The lease in each year commenced from 1st of April. Bardighalibeel was alleged to be included in plaintiff's fishery Mahal No. 11. Defendant was the lessee of Songkhong Mahal No 8 in the said tract for the year 1944-45. The two fisheries were said to be at considerable distance from each other. On 21st February 1945 defendant sent about 75 or more fishermen to collect fish from the Bardighalibeel and they at his instance caught and removed fish from that beel from 21st February to 25th February (both days inclusive) and from 3rd March to 11th March (both days inclusive). The fish was sent to Dibrugarh market where it was sold. Plaintiff reported the matter to the Superintendent of Police, Lakhimpur and the Political Officer, Sadiya Frontier Tract, on 21st February 1945. On 24th February, plaintiff's uncle went to the site and found the fishermen busy catching fish in the beel in question. They admitted that they had been fishing in the beel since 21st February at the instance of defendant in this case. On that day they gave an undertaking to deliver all fish caught from the beel to the plaintiff, in future. A writing, Ex. 1, was executed. In the document it was stated by the executants that they were all defendant's men and that they were catching fish in Borbeel under his orders. On their learning that Borbeel was settled with Abdul Majid and not with Kishori Ram Malla, defendant, they agreed to send fish to the town to plaintiff's men on receipt of a certain share agreed to between the parties. They further promised to realise the price of fish sent on previous days to the defendant from him. Six out of the fishermen signed the document as executants and it was attested by witnesses.

[3] The Political Officer, Sadiya Frontier Tract, also passed an order on 24th February directing plaintiff to stop fishing in Bordighalibeel after a visit of inspection to the locality in the presence of both the parties. Plaintiff claimed Rs. 4252.5.0 on account of the price of the fish realised by the defendant. He also claimed a sum of Rs. 1083-12-0 on account of expenditure incurred in connection with the enquiry made by the Political Officer, S. F. Tract, on the spot and under another head.

[4] Defendant repudiated the claim. He averred that there was no beel by the name of 'Bardighali' and no such beel was included in plaintiff's fishery. He denied that his men caught fish illegally or dishonestly from the alleged Bardighalibeel and claimed that the water from which fish was caught by his men from 21st February onwards was included in his Songkhong Mahal No. 8. He admitted receiving a notice dated 24th February 1945 from the Political Officer Sadiya Frontier Tract to stop fishing, but alleged that he protested against the order by sending a telegram that he had been fishing in the waters covered by his lease. Liability for compensation under both heads of claim was denied. Exhibit 1, referred to in the plaint, was said to have been obtained by intimidation. Defendant preferred a counterclaim of Rs. 631-7-4 on the ground that plaintiff had caught fish from the disputed water on 26th February, 27th February and 2nd March 1945 without any right.

[5] The learned Sub-Judge found that the fish had been caught from Borbeel which was included in fishery No. 11 leased to the plaintiff. In his view defendant had no right to catch fish from that beel and that his catching fish through his men from that beel was a wrongful act on his part. He further found that the price

of fish realised by him was Rs. 4127-10 0 which the plaintiff was entitled to recover from him. He also allowed a sum of Rs. 783 12-0 to the plaintiff on account of expenses incurred by him in connection with the enquiry as to his rights by the Political Officer, Sadiya and for money spent under another head.

[6] The learned counsel for the appellant has first pointed out that plaintiff's case as put in the plaint was that fish had been caught from Bardighalibeel. The finding of the Court was that fish had been caught from Borbeel. It is urged that without any amendment of the plaint, the plaintiff could not claim to recover the price of fish caught from Borbeel as his case was not that fish was caught from Borbeel or that Borbeel was included in his fishery No. 11. (Holding that this contention had no force his Lordship examined the contention that plaintiff had failed to establish that Borbeel was included in his fishery No. 11 and concluded:) In these circumstances there can be no manner of doubt that the finding arrived at by the learned Sub-Judge that Borbeel from which fish was caught was part of fishery No. 11 is correct.

[7] The learned Sub-Judge allowed the plaintiff a sum of Rs. 783-12 0 on account of expenses incurred by him in connection with the inquiry by the Political Officer, Sadiya, as to the rights of the parties to catch fish in Borbeel and also on account of payment made by him to one Sarju for catching the fish there. The learned counsel for the appellant has not disputed the liability of the defendant to pay this amount. He, however, disputes the correctness of the assessment of the price of the fish which according to the decree of the Court below was Rs. 4127-10 0. The learned counsel points out in this connection that defendant-appellant was a military contractor. He could sell good quality fish to the Army at a rate higher than that prevailing in the open market, and the plaintiff was not entitled to the full sum realised by the defendant by sale of a part of the fish as a contractor to the Army. We do not think defendant is entitled to keep with himself any part of the money realised by the sale of fish which had been caught as the result of a wrongful act on his part. The fish was caught at his instance. His men trespassed into the fishery of the plaintiff. He and all those were wrong-doers. The money that was made by the sale of the fish was the result of wrongful operations. The learned counsel has not been able to refer us to any law or principle of equity on which the defendant could be permitted to withhold any portion of the profit accruing to him as the result of a wrongful act on his part. The learned counsel has claimed that in collecting the fish defendant had to pay a certain portion of the proceeds to his fishermen. We think for reasons given above he cannot claim any amount by way of collection charges either. This view finds support from *Rohan Singh* v. *Durga Bakhsh Singh*, A. I. R. (16) 1929 Oudh 55: (111 I.C. 760). In this case the learned Judges held that

"Mesne profits are in the nature of damages which the Court may mould according to the justice of the case In the case of fraudulent and dishonest trespassers while awarding mesne profits against them on rent basis it is right to refuse them charges for collecting rent of property in their possession as trespassers."

The principle laid down in this case is in point and we are not persuaded to hold that the assessment of compensation in this case is excessive or that it calls for any interference.

[8] The result is that the appeal fails and is dismissed with costs.

[9] **Thadani C. J.** — I agree.

V S.B. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 191 *[C. N. 67.]*

THADANI C. J. AND RAM LABHAYA J.

Mafizuddin Bhuyan and another — *Petitioners* v. *Alimuddin Bhuyan and others* — *Respondents.*

Civil Revn. No. 24 of 1950, D/- 29th May 1950.

(a) Arbitration Act (1940) S. 39 (1) (vi) — Objections to award — Dismissal on ground of limitation — Appeal.

Whether objections to an award are dismissed on the merits or they are dismissed on the ground that they are filed beyond time, the Court by dismissing them in effect refuses to set aside the award, and an order refusing to set aside an award is clearly appealable under S. 39. [Para 2]

Annotation: ('46-Man.) Arbitration Act, S. 39, N. 1.

(b) Arbitration Act (1940), S. 14 (2) — Objection as to want of service — It can be raised for first time in revision — Civil P. C. (1908), S. 115.

An objection that a party to the arbitration proceeding was not served by the Court with a notice of the filing of the award under S. 14 (2) cannot be raised for the first time in revision. [Para 4]

Annotation: ('46-Man.) Arbitration Act, S. 14 N. 2; ('50-Com.) Civil P. C., S. 115 N. 2.

J. C. Chaudhury and D. K. Sarma — for Petitioners.

K. R. Barooah — for Opposite Party.

Thadani C J. — This is an application under S. 115, Civil P. C., directed against an order of the learned Additional Subordinate Judge, L. A. D. dated 30th November 1949, by which he dismissed the applicants' appeal on the ground that no appeal lay from an order passed by the Munsiff of Nowgong who had dismissed certain objections to an award on the ground that they were filed beyond time. The learned Subordinate Judge, while dismissing the appeal on the ground that no appeal lay, agreed with the Munsiff that the objections to the award were filed beyond time.

[2] It is contended on behalf of the applicant that the learned Sub-Judge was in error in holding that no appeal lay. We think this contention must prevail. Whether objections to an award are dismissed on the merits or they are dismissed on the ground that they are filed beyond time, the Court by dismissing them in effect refuses to set aside the award, and an order refusing to set aside an award is clearly appealable under S. 39, Arbitration Act.

[3] In a case reported in *Bholanath* v. *Chandra Shekhar*, A. I. R. (37) 1950 Cal. 53, Das J., observed:

"In my opinion, the fact that by the same order the Munsiff overruled the objections to the filing of the award and also directed a decree to be passed in terms of the award, does not take away the right of the aggrieved party to file an appeal in accordance with the provisions of S. 39."

In a case reported in *Hola Ram Verhomal* v. *Governor-General of India in Council*, A. I. R. (34) 1947 Sind 145: (I. L. R. (1946) Kar. 459), the view taken was that an order refusing to set aside an award on the ground that objections were filed out of time, was an appealable order under S. 39, Arbitration Act. The learned Sub-Judge has referred to a decision of the Rangoon High Court reported in *D. B. Das* v. *Daya Lal & Sons*, A. I. R. (20) 1933 Rang. 38: (142 I. C. 835), but that decision was given before the passing of the Arbitration Act of 1940.

[4] While we think the learned Judge was in error in holding that no appeal lay against the order of the Munsiff who refused to set aside the award on the ground that objections to the award were filed beyond time, it does not follow that our interference in this matter is called for. Both the Courts below have found as a fact that the objections to the award were filed out of time. In order to meet this difficulty, the applicant's advocate for the first time in this Court contended that the applicant was not served by the Court of the first instance with a notice of the filing of the award under the provisions of S. 14 (2), Arbitration Act. We cannot permit this point to be raised for the first time in revision. Moreover the diary shows that a notice under S. 14 (2) was served upon the applicant. The date of the service is stated to be 5th February 1948 and the objections were filed on 24th March 1948, clearly beyond the period allowed by law.

[5] Accordingly we decline to interfere, and the revision application is dismissed with costs. The rule is discharged.

[6] **Ram Labhaya J.**—I agree.

V.R.B. *Revision dismissed.*

A. I. R. (37) 1950 Assam 192 *[C. N. 68.]*

THADANI AG. C. J.

Someswar Chaudhury — Appellant v. *Province of Assam — Respondent.*

R. A. No. 11 of 1949, D/- 29-6-1949.

Assam Land and Revenue Regulation (I [1] of 1886), S. 148 (3) — "Sufficient cause" — Order cancelling annual patta of appellant — Appellant not served personally with non-renewal notice — Appeal after period of limitation — Maintainability — Effect of non-service.

Appeal against an order of Deputy Commissioner cancelling the annual patta filed after the period of limitation shall be deemed to be in time if the appellant had no knowledge of the order due to want of personal service of non-renewal notice. [Para 3]

From the fact that the appellant had applied for periodic patta, no inference can be drawn that he must have known that his annual patta had been cancelled, as a periodic patta can be granted even if annual patta is not cancelled. [Para 3]

The effect of non-service of non-renewal notice personally is that the annual patta must be deemed to be in force and until the annual patta is cancelled by a notice in accordance with law, it will be deemed to be renewed from year to year until duly cancelled. [Para 4]

R. K. Chaudhury, K. R. Barooah and B. N. Chaudhury — for Appellant.

K. R. Barman, Govt. Advocate — for Respondent.

Judgment. — In this case, Mr. Barman for the Government has taken a preliminary objection as to limitation contending that the appeal has been filed long after the period of limitation. It is contended by Mr. Barman that the order in question was made by the Deputy Commissioner, Kamrup, on 9th July 1947 cancelling the annual patta of the appellant, and that the appeal under S. 148 (1) (c) should have been filed within two months of the date of the order. The appeal was in fact filed on 25th January 1949.

[2] Sub section (3) of S. 148, Assam Land and Revenue Regulation, says :

"An appeal may be admitted after the period of limitation prescribed therefor by this section when the appellant satisfies the tribunal or officer to whom he appeals that he had sufficient cause for not presenting the appeal within that period."

In para. 5 of the petition of appeal it is stated :

"That, to the great surprise of the humble appellant, he came to learn on 3rd December 1948 that not only no orders regarding issue of periodic patta had been passed, but on the contrary, by an order which was not communicated to the appellant, the Deputy Commissioner, Kamrup, had by his order dated 23rd February 1948, passed a composite order as to this land along with some Government lands (for which no pattas had ever been issued to anybody) that the land would not be settled. The appellant further came to learn on that date (3rd December 1948) for the first time that the annual pattas had been cancelled on 9th July 1947 without the service of any non-renewal notices on him."

[3] While Mr. Chaudhuri for the appellant has relied upon the statement contained in para. 5 of the memorandum of appeal. Mr. Barman has contended that the order cancelling the

patta itself states that notice of non-renewal was to be issued to annual patta-holders and that this order was in fact carried out, and that the appellant was duly served with the non renewal notice. It is true that the peon attempted to serve some 12 annual patta-holders who were affected by the order of the Deputy Commissioner, dated 9th July 1947. But it is also clear from the report made by the process-server that he did not serve the appellant personally but left the notice 'hanging,' whatever that may mean, in his dwelling house. I am not prepared to hold, on the facts in this case, that the service of the non renewal notice alleged to have been made upon the appellant, was a satisfactory one. If the appellant did not know anything about the non-renewal notice, it is not unlikely that he was not aware of the cancellation of the annual patta cancelled by the Deputy Commissioner's order dated 9th July 1947. Mr. Barman relies upon a circumstance which, he contends, indicates that the appellant knew about the cancellation of his annual patta. He points out that in January 1948, when the appellant made an application for the grant of a periodic patta, in regard to the same land, the Deputy Commissioner visited the place and refused the grant. Mr. Barman contends that at any rate in February 1948, the appellant must have known that his patta had been cancelled. This argument might have prevailed, if it were a fact that a periodic patta is granted only when an annual patta is cancelled; but Mr. Barman very properly admitted that a periodic patta can be granted when the annual patta in respect of the same land had not been cancelled. I do not think an inference should necessarily be drawn from the fact that when the appellant made an application for the grant of a periodic patta, he must have known that his annual patta had been cancelled.

[4] Accordingly I hold that the appeal is in time and in the view I take of the service upon the appellant of the non renewal notice of the annual patta, namely, that it was not served upon him, it follows that his annual patta must be deemed to be in force with effect from 1st April 1948, and until the annual patta is cancelled by a notice in accordance with law, it will be deemed to be renewed from year to year until duly cancelled. The result is that this appeal is allowed, but with no order as to costs.

G.M.J. *Appeal allowed.*

A. I. R. (37) 1950 Assam 193 *[C. N. 69.]*

THADANI C. J. AND RAM LABHAYA J.

Bharat Chandra Das and another—*Petitioners* v. *The State.*

Criminal Revn. No. 61 of 1950, D/- 21-7-1950.

1950 Assam/25 & 26

(a) Penal Code (1860), S. 411—Conduct of accused in concealing property at time of its recovery—Evidence Act (1872), S. 8.

The conduct of the person, accused of having purchased a stolen property, in unsuccessfully concealing it at the time of recovery is indicative that at that moment he either suspected or believed that the article purchased by him must have been the subject-matter of some offence. But it cannot be regarded as any conclusive evidence of the state of the mind of the accused at the time when he purchased it. This piece of circumstantial evidence does not exclude the possibility that the purchase was innocent and without any guilty knowledge or belief. [Para 7]

Annotation: Penal Code, S. 411 N. 3; Evidence Act S. 8 N. 2.

(b) Penal Code (1860), S. 411—Word "believe" if equivalent to "suspect"—Purchase of stolen property in presence of other persons.

The word "believe" occurring in S. 411 is much stronger than "suspect". It involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. A person who has purchased stolen property openly in the presence of others cannot be said to have purchased it, knowing it to be stolen or having reason to believe that it is stolen. In a case like this it is not sufficient to show that the accused was careless or had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether the property had been honestly acquired. [Para 7]

Annotation: Penal Code, S. 411, N. 5.

S. K. Ghose and P. Chaudhuri —for Petitioners.
Government Advocate and C. Lyngdoh —for the State.

Ram Labhaya J.—The two petitioners, Bharat Chandra Das and Barada Charan Das are brothers. They were convicted under S. 411, Penal Code, by Mr. B. M. Dam, S. D. O., Silchar, and were sentenced each to 6 months rigorous imprisonment. On appeal their convictions and sentences were maintained. They have petitioned for the revision of the orders of the Courts below.

[2] The petitioners were dealing in watches and fountain pens at Badarpur. The shop house of Bhupendra Nath Sen Gupta (P. W. 1) at Silchar was burgled on the night following 1st June 1948 and five new watches, one clock, three fountain pens and some cash and papers were removed. A report of the burglary was made on 2nd June 1948.

[3] During the course of the investigation two persons viz., Dinesh Chandra Kar and Prabhat Chandra Shome were arrested. Dinesh Chandra Kar, a previous convict, was found guilty under Ss. 457/380/75, Penal Code, and was sentenced to rigorous imprisonment for 2 years. Prabhat Chandra Shome was convicted under S. 411, Penal Code, and sentenced to three months rigorous imprisonment. They did not appeal from their convictions. While the investigation was in progress, Dinesh Chandra Kar led the Investigating

Officer to the Shop of the petitioners at Badarpur. Three watches and two fountain pens, which were identified by the complainant as his, were recovered from the shop. These were found to be stolen property. The finding that the watches and the pens were part of the stolen property removed from the shop of the complainant on the night following 1st June 1948, is not in question.

[4] The defence put forward by the petitioners was that all the five articles were purchased by them from Dinesh Chandra Kar for Rs. 100 and that they had no knowledge that the articles were stolen. The only basis on which the orders of the Courts below are assailed, therefore, is that it has not been proved that the petitioners knew or had reason to believe that the property which was recovered from their possession was stolen property.

[5] The complainant deposed that the value of the entire property stolen was about Rs. 500. No documentary evidence was produced at the trial in support of this allegation. So far as the articles recovered from the petitioners are concerned, their value was not stated separately at all. The case of the petitioners was that they paid Rs. 100. In this they are supported by D. W. 1 in whose presence the transaction took place. There is nothing on the record to show that the value of these articles was more than Rs. 100 or that they were purchased at a price much lower than their usual market price. There were some other persons present at the time of the transaction besides D. W. 1. The transaction was in no sense secret. If these articles were purchased openly and at a reasonable price the transaction would not justify an inference of guilty knowledge. No attempt has been made from the prosecution side to bring to light any other circumstance which would go to show that at the time of the transaction the accused knew or had reason to believe that the property they were purchasing was stolen property. The learned Additional Sessions Judge has no doubt observed that the price of Rs. 100 said to have been paid by the petitioners was a moderate price and even inadequate but he has not referred to any evidence on which this finding could be based. No one has made any statement as to the approximate value of the articles recovered from the possession of the petitioners. It cannot, therefore, be said that the sum of Rs. 100 paid by them was not adequate consideration for these articles. There is no document evidencing the transaction by which the accused purchased these watches. This may be a suspicious circumstance but by itself it would not be sufficient for attributing guilty knowledge to the petitioners at the time of the transaction, particularly in view of the fact that Dinesh Chandra Kar was offering the articles for sale openly in the presence of several persons.

[6] The conduct of the petitioners at the time of the recovery has really formed the foundation for the finding that the petitioners knew or had reason to believe that the articles purchased by them were stolen. Dinesh Chandra Kar, accused, was taken to Badarpur. There he pointed out the shop of Bharat Chandra Das and Barada Charan Das, petitioners. At that time Barada Charan Das alone was present in the shop. The Investigating Officer asked him if Dinesh Chandra Kar had sold three watches and two fountain pens to him. He was then reading a newspaper. He did not answer the question but very slowly opened the drawer of a table close to him, took out of it a watch, wrapped it in a piece of paper torn from the newspaper he was reading and went out of the shop through the back door. The complainant was standing behind him at the time.

[7] He saw him going with the watch. He brought this fact to the notice of the Investigating officer who followed Barada Charan and caught him with the wrist watch in the courtyard behind. He then asked him to produce the 2 other watches and 2 fountain pens. The stolen watches and a fountain pen were produced from the almirahs where other watches and fountain pens were kept by the accused for their trade. One fountain pen was produced by Bharat from under a bedding. The attempt on the part of Barada Charan Das to take out the watch from the drawer does no doubt indicate that at that moment he either suspected or believed that the articles purchased from Dinesh Chandra Kar must have been the subject-matter of some offence. The presence of the police officer with Dinesh and the enquiry about the three watches and the 2 fountain pens would lead him to that conclusion. But the question is not whether at that moment one or both of the petitioners suddenly realised that the property they had purchased was stolen but it is, whether at the time they purchased it they knew or had reason to believe that they were purchasing stolen property. The unsuccessful attempt to conceal a watch can merely show that state of the mind of the petitioners at the time of the recovery. The presence of the police could make them nervous and apprehensive. The conduct at the time of recovery cannot be regarded as any conclusive evidence of the state of the mind of the petitioners at the time when they purchased it. This piece of circumstantial evidence does not exclude the possibility that the purchase was innocent and without any guilty knowledge or belief. The evidence

being circumstantial in nature it must be conclusive. It should exclude the possibility of innocence. It should be incompatible with any other hypothesis except that of guilt. We do not think the conduct of one out of the two petitioners leads necessarily to the conclusion that they had guilty knowledge at the time they purchased the articles in question. It cannot therefore be held positively that they received or retained stolen property. The circumstances are no doubt suspicious but suspicion is no substitute for proof. The word "believe" occurring in S. 411, Penal Code, is much stronger than "suspect." It involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. A person who is purchasing stolen property knowing it to be stolen or having reason to believe that it is stolen, would not purchase it so openly as the petitioners did. There were other persons present. Even they did not suspect that the property was stolen. In a case like this it is not sufficient to show that the accused were careless or had reason to suspect that the property was stolen or that they did not make sufficient enquiry to ascertain whether the property had been honestly acquired. We think the petitioners are entitled to the benefit of doubt.

[8] The petition is allowed. They are acquitted. Their bail bonds shall stand cancelled.

[9] **Thadani C. J.** — I agree.

G.M.J. *Petition allowed.*

A. I. R. (37) 1950 Assam 195 *[C. N. 70.]*

THADANI C. J. AND RAM LABHAYA J.

Srinibas Dhelia — Appellant v. *Hariram Tulchan and others — Respondents.*

Supreme Court Appeal No. 2 of 1950, D/- 10th July 1950, for leave to appeal to Supreme Court from judgment and decree of this Court, D/- 5th January 1950.

(a) Hindu law — Joint family — Family property — Presumption — Evidence Act (1872), Ss. 101 to 103.

There is no presumption that a Hindu family, because it is joint, possesses joint property or any property. To render a property joint, the claimant has to prove that the family was possessed of such property with the income of which the property could have been acquired or from which the presumption could be drawn that the property possessed by the family is joint property or that it was purchased with joint family funds or by joint efforts. These alternatives are not matters of legal presumption. They must be proved by evidence like any other fact. [Para 6]

Anno. Evidence Act, Ss. 101-103 N. 4 and 16.

(b) Hindu law — Joint family — Trade — Presumption — Evidence Act (1872), Ss. 101 to 103.

There is no presumption that a business carried on by a member of a joint Hindu family is joint family business. [Para 10]

Anno. Evidence Act, Ss. 101-103 N. 4 and 16.

(c) Hindu law — Joint family — Family property — Joint business by two brothers — Acquisition of property from proceeds by one — Property, if joint family property.

Two brothers started joint business from the proceeds of which one of them acquired certain property. It was not alleged that they had any joint family property. There was no proof that any family nucleus was utilised for the joint business. All that was alleged was that the two brothers formed a joint Hindu family :

Held that the property belonged exclusively to the brother who acquired it and that an express finding that there had been a separation between the two brothers before the acquisition was not necessary to arrive at such a finding. [Paras 16 and 20]

J. N. Bora — for Appellant.

S. K. Ghosh and K. M. Brahamin — for Respondents.

Ram Labhaya J.— This is a petition for leave to appeal to the Supreme Court from the judgment and decree of this Court dated 5th January 1950, by which the decree of the trial Court was affirmed. Leave is sought on the basis that the present value of the property in dispute exceeds Rs. 20,000; the decree also involves indirectly a claim or question respecting property of like value and the case involves substantial questions of law. It is also claimed in the petition that the case is a fit one for appeal under cl. (c) of Art. 133 of the Constitution of India. The defendant is the petitioner.

[2] We do not think any substantial question of law is involved in this case. Plaintiffs-respondents were the transferees of the property in suit. They purchased it from the sons and grandsons of Jainarain by a registered deed dated 9th May 1941. The property sold consisted of 8 *dags* (fields) measuring 4 K. 19 L. There were also super-structures on the land which were included in the sale.

[3] The case of the plaintiffs-respondents was that Jainarain was the sole owner of the firm working under the name and style of Messrs. Ramjasrai-Jainarain. He purchased the property, of which the suit property was only a part, in 1901. The sale deed was in favour of Jainarain and his father Ramjasrai. Jainarain mortgaged the whole of the property purchased except dag No. 1452 to the plaintiffs as its sole owner with the concurrence of Srinibas who attested the mortgage and thus acquiesced in the claim of Jainarain. The successors of Jainarain, viz., his sons and grandsons, sold the property to the plaintiffs in 1941. Defendant at that time was in possession of a part of the property sold. According to the plaintiffs, his possession was permissive.

[4] The defence set up by the petitioner was that Ramjasrai, father of Jainarain, and Ramchandra his father were brothers. They were members of a joint Hindu family. They started joint business when they came to Assam (from Rajputana) at Khowang and Khowant T. E. in the name of Ramjasrai Jainarain and acquired properties in Dibrugarh sub-division including the suit property, with the proceeds of this business.

[5] It was apparently common ground that the property in suit was acquired by the earnings of the business which was being carried on in the name and style of Messrs. Ramjasrai-Jainarain. The point at which the parties were at issue was whether the firm itself was a joint family firm started and continued by the two brothers Ramchandra and Jainarain, or whether Jainarain was the sole owner of the business. This was the real point in controversy.

[6] The learned trial Judge while recognising the possibility that the two brothers Ramchandra and Jainarain may have been members of a joint Hindu family addressed himself to the question whether the two brothers were also joint in business which admittedly was being carried on in the name of two members belonging to one branch of the family. While considering this question he observed that

"even if it be presumed or assumed that defendant's father Ramchandra and paternal uncle Ramjas were living joint while in Dibrugarh as a joint family, there cannot be a presumption that they possessed joint properties or acquired properties jointly. There must be proof or evidence that they were jointly possessed of such properties or such nucleus that with its help the properties now in question claimed by the defendant to have been joint acquisition, could have been acquired."

[7] In the light of this statement of the law, the learned trial Judge after carefully considering the evidence of the parties came to the conclusion that there was no evidence that Ramjasrai and the defendant's father Ramchandra formed a joint Mitakshara Hindu family or that they jointly acquired the properties in suit or that those properties were acquired from their joint family funds. He also found that the properties in suit were the properties of Ramjasrai Jainarain in which the defendant had failed to establish that he had any share or interest.

[8] It may be noted that the above findings were arrived at on the assumption that the two brothers were members of a joint family. The finding that there was no evidence that the two brothers Ramchandra and Ramjasrai formed a joint Hindu family or they jointly acquired the property in suit disposed of the limited question covered by issue 1 which arose out of the defence set up. The language of the issue is not happy but the question it involves was whether the two brothers were doing business as members of a joint Hindu family after migration to Assam as alleged by the defendant.

[9] What the learned trial Judge decided was that the property in suit was not acquired by the two brothers acting jointly as members of a joint Hindu family. The second part of the finding that Jainarain was the sole owner of Messrs. Ramjasrai-Jainarain and, therefore, of the property in suit, is covered by issue 2, which arose out of the case set up by the plaintiffs. The two issues are facets of the same problem which is involved in this litigation and which is to the effect, whether the business from the proceeds of which the property was acquired was started and carried on by the two brothers or that it belonged all through to Jainarain who merely used his father's name for the purposes of his business.

[10] The statement of Hindu law contained in the judgment of the trial Court to which reference has been made above was not questioned before us at the appeal stage. It is settled law that there is no presumption that a family, because it is joint, possesses joint property or any property. To render a property joint, the claimant has to prove that the family was possessed of such property with the income of which the property could have been acquired or from which the presumption could be drawn that the property possessed by the family is joint property or that it was purchased with joint family funds or by joint efforts. These alternatives are not matters of legal presumption. They must be proved by evidence like any other fact that may be alleged. It is equally true that there is no presumption that a business carried on by a member of a joint Hindu family is joint family business. The learned counsel, who argued the appeal, did not claim the benefit of any legal presumption in favour of the defendant. There was thus no question of Hindu law at which the parties were at variance. The only live issue before us was whether Jainarain was the sole owner of the firm Ramjasrai-Jainarain and, therefore, also of the property in suit as alleged by the plaintiffs or whether the business which the firm Ramjasrai-Jainarain was carrying on was started and carried on bythe two brothers jointly as alleged by the defendant.

[11] This was a simple question of fact and after considering all available evidence on the record, we came to the conclusion that the finding arrived at by the trial Court with respect to the property in question was correct. No question of Hindu law was raised or decided and we

fail to see how it can be said that a substantial question of law is involved in the appeal.

[12] The learned counsel for the defendant petitioner does not seem to contend that the defendant was unjustifiably deprived of the benefit of any legal presumption. He himself relied on *Anand Rao* v. *Vasant Rao*, 11 C. W. N. 478 : (9 Bom L. R. 595 P. C.) a pronouncement from their Lordships of the Privy Council. In this it was held that

"when the question was whether a certain property was the joint property of a Hindu family or the separate estate of a member and it was proved that the family lived joint in one house and that there was nucleus of joint property of substantial value, the onus was on the party setting up a case of a separate estate."

[13] This authority supports the statement of law which was not challenged till the appeal stage. The onus of proving that a property was separate and not joint family property would be on the party alleging it if the circumstances which existed in the Privy Council case are proved. In this case no allegation was made in the written statement, and no proof was given later that there was any nucleus with which the business in question could have been started. The Privy Council case is no authority for the proposition that there is any presumption that a joint family possesses joint property or that a business in the name of one member of a joint Hindu family is joint business.

[14] *Parbati Dasi* v. *Bai Kuntha Nath*, 18 C. W. N. 428 : (22 I. C. 51) was another Privy Council case relied on by the learned counsel. This also does not help him. In this case the dispute was whether a property standing in the name of a junior member of a Hindu family was his self-acquired property. The criterion laid down by their Lordships was the source from which the sale consideration came. In the particular case before them, it was found that there was no evidence that the son, in whose name the property was purchased, had any separate fund or that the properties in dispute were purchased with money belonging to him. On those facts it was held

"that the presumption was clear and decisive that the property was acquired by the father in the name of his son and it was not the latter's self-acquired property."

There was no initial presumption made in favour of the property being joint family property. It was only after it was found that there was no evidence that the son had any separate fund or that the properties in dispute were purchased with money belonging to him that a presumption was made to the effect that the property in dispute was acquired by the father in the name of his son. What was stated as presumption was no more than an inference from proved facts. This case was not decided on any Hindu law presumption and has no application to a case where property is admittedly acquired from the proceeds of a business which has been carried on in the name of two members of a family for years

[15] The learned counsel has urged that there ought to have been an express finding on the question whether Ramchandra and Ramjasrai did not form a joint Hindu family governed by Mitakshara school of Hindu law at the time the property in suit was acquired. His point was that before a decree could be passed in plaintiffs' favour it should have been found that the two brothers had separated before the property in suit was acquired in the name of Ramjasrai Jainarain.

[16] The contention is based on some misapprehension. The question whether the business of the firm of Messrs. Ramjasrai-Jainarain was started and carried on by the two brothers as members of a joint Hindu family or by Jainarain alone was dealt with fully and disposed of. The finding concurrently arrived at has been that Jainarain was the sole owner of the business and that Ramchandra, father of the defendant, was not interested in that business in any capacity. This finding disposes of the first two issues in the case. But the learned counsel insists that an express finding was necessary that there had been a separation between the two brothers before the acquisition of the property in suit in order that a valid finding to the effect that the property in dispute belonged exclusively to Jainarain could have been arrived at. He has relied on two decisions of their Lordships of the Privy Council in support of this contention.

[17] The first of these is reported in *Mt. Cheetha* v. *Babu Mireen Lall*, 11 M. I. A. 369 : (2 Sar. 203 P. C.). In this case the dispute was admittedly about property which was originally ancestral belonging to a joint and undivided Hindu family governed by the Bengal School of Hindu Law. The plaintiff claimed title as widow and heiress of one Damodar Doss. Their Lordships held that in order to make out a case sufficient to rebut the well-established presumption of Hindu law that a family which was once joint retains that status, it was for the plaintiff to show that it had become divided. It was further held that the ancestral property of such a family would remain joint unless it is shown by partition or otherwise to have become separate. A mere statement of the facts of this case is enough to show that this case has got no bearing on the facts of the present case. In the case before their Lordships of the Privy Council, the property was admittedly a part of an undivided estate and plaintiff claimed exclusive title. She could not succeed without proving that there

was partition of the family property or that the interest of her husband's brother, who was a coparcener, had been conveyed to her husband or it had been relinquished in his favour. There is nothing in common between this case and the case now before us.

[18] The second case relied on is reported in *Prit Koer* v. *Mahadeo Pershad Singh*, 22 Cal. 85 : (21 I. A. 134 P. C.). In this case a daughter in the absence of sons, after the deaths of her father's widows, claimed to inherit the estate alleging that it belonged to her father separately. It was found that the estate had been at one time in her father's possession jointly with his only brother, they having been members of a joint family under the Mitakshara. On the death of plaintiff's uncle, his sons became entitled to the property jointly with plaintiff's father as survivors. It was held that it was for the plaintiff to adduce evidence that there had been a separation between her father and his co-sharer or co-sharers. From the evidence the inference drawn was that the previous joint holding had continued till her father's death. This case is also obviously distinguishable and does not support the contention of the learned counsel. In both the Privy Council cases the property in dispute was admittedly joint family property. The claimant in each case was from one branch of the family. The claim to exclusive title could not be substantiated except by proof of separation of the family. In the present case there was no allegation in the written statement that the two brothers had any joint family property before migration to Assam. There was no proof that any family necleus was utilised for the joint business. All that was alleged was that the two brothers formed a joint Hindu family. Both came to Assam and started joint business from the proceeds of which the disputed property was acquired. It was held by the learned trial Judge that even if the two brothers were joint, there was no presumption that the business which was being carried on in the name of two members of one branch was joint or that the property acquired in their names was jointly acquired.

[19] The proposition so stated assumes the existence of a joint Hindu family. It was in the background of this assumption that the trial Judge came to his conclusion that the property in suit could not be held to be joint property of the two brothers as the defendant did not allege or prove that family nucleus existed or was utilised for the business carried on in the name of Ramjasrai Jainarain and he could not also substantiate that two brothers jointly started and carried on the business. It was on this basis that the question in dispute was decided in this Court also. It was not necessary to find that the two brothers had separated before the property in dispute was acquired. The dispute did not relate to any property which at one time admittedly belonged to the joint family as in the two Privy Council cases considered above. The question of separation may have arisen if defendant had alleged or proved that there was joint family property which was actually utilised or which could have been utilised for starting a new business in Assam.

[20] The contention of the learned counsel rests on an entirely erroneous view of the significance of the two decisions of their Lordships of the Privy Council and has got absolutely no force.

[21] The learned counsel has also observed that the finding that there was no ancestral nucleus is not based on any evidence. No evidence was needed as defendant had not pleaded that the business in question was started with the aid of any ancestral nucleus. He also made no attempt to prove that any nucleus existed. His case merely was that the property was acquired by the two brothers jointly and finding on the point was against him.

[22] The learned counsel has cited certain authorities bearing on the question as to what is signified by the words 'substantial question of law' occurring in Art. 133, Constitution of India. In these cases it has been held under S. 110, Civil P. C., that a question of law in respect of which there may be difference of opinion would be a substantial question of law. This proposition is unexceptionable but we have not been able to discover and the learned counsel has not been able to show that there is any question of law in this case on which difference of opinion is possible. As said above, the dispute between the parties was narrowed down by their pleadings to a question of fact which was determined by our judgment against which an appeal is sought to be preferred. We also held that at that stage the question of onus had become immaterial as all the evidence was before the Court and it was not necessary in the circumstances of the case to resort to onus for the decision of this case. No objection has been taken to this view of the matter. What is left in these circumstances is a decision on a pure question of fact.

[23] The learned counsel has not assailed the correctness of the view that defendant-petitioner was estopped by his acquiescence from challenging the title of Jainarain to the property in dispute. The decree in plaintiffs' favour cannot be reversed if this finding is not challenged.

[24] It is a question whether the case fulfils the requirements of cl. (a) of Art. 133 as to the valuation of the subject-matter or whether the final decree involves directly or indirectly some claim or question to or respecting property of

which the value is not less than Rs. 20,000. But it is not necessary to go into this question as in the view that we take of the matter it is not possible to grant a certificate for leave to appeal either under cl. (a) or (b) of Art. 133, Constitution of India.

[25] We are not satisfied that any substantial question of law arises in this case. The case, therefore, does not fulfil the requirement of cls. (a) and (b) of Art. 133, Constitution of India, and it manifestly does not attract the application of cl. (c) of the Article. No question of any great public or private importance is involved. The petition, therefore, must fail and is dismissed with costs.

[26] Hearing fee Rs. 50.

[27] **Thadani C. J.**—I agree.

V.R.B. *Petition dismissed.*

A. I. R. (37) 1950 Assam 199 *[C. N. 71.]*

RAM LABHAYA J.

Tileswar Kalita and others—Petitioners v. *Tankeswar Barua and another — Opposite Party.*

Criminal Revn. No. 62 of 1950, D/-10th August 1950, against order of Dist. Magistrate, Sibsagar, D/-29th March 1950.

Criminal P. C. (1898), Ss. 424, 367, 439 and 537 — Defective appellate judgment — When can be set aside in revision.

The question whether an appellate judgment, which on the face of it does not comply with the requirements of S. 424 read with S. 367, Criminal P. C., should be set aside must be decided on the facts and circumstances of each case. It would not be safe to lay down any hard and fast rule on the point. [Para 20]

Where the appellate judgment without stating the occurrence, the points for decision, the decision thereon and the reasons therefor merely states that after hearing the parties it agrees with the finding of the trial Court, the defect in judgment is not merely a technical non-compliance with the requirements of law, inasmuch as it does not enable the High Court to exercise its revisional jurisdiction as required by law. Such a judgment must be set aside and the case remitted back for rehearing of the appeal. [Paras 21, 24]

Annotation : ('49-Com.) Criminal P. C., S. 424, N. 7; S. 439, N. 18, Pt. 6; S. 537, N. 12, Pts. 14, 15.

A. P. Goswami—for Petitioners.

J. C. Medhi—for Opposite Party.

B. C. Barua, Govt. Advocate (Jr.)—for the State.

Ram Labhaya J.—This petition of revision is directed against the order of the District Magistrate, Sibsagar, dated 29th March 1950 by which the order of the 3rd Class Magistrate, Sibsagar, convicting the petitioners under S. 426, Penal Code, and sentencing them to pay varying amounts of fine was upheld.

[2] The prosecution case was that the land in dispute measuring 9 bighas belonged to the complainant. It was in his possession. He got the land ploughed and had it transplanted through Bhekuli Saikia, P. W. 1. Subsequently, the accused trespassed into the land, harrowed the entire transplanted paddy over 5 bighas and completely destroyed it.

[3] It was admitted that Tileswar Kalita and Lakheswar Barua, two of the accused, had been occupying the disputed 9 bighas of land on Khandua terms. It was in January 1949 that they were served with a notice to vacate the land. It was averred that after the expiry of the period of notice the complainant got possession of the land and had it cultivated through his ploughmen.

[4] The defence was that 3 of the accused persons were in occupation of the land in question for about 10 years or even more and they got the land ploughed and transplanted as before even at the time when, according to the complainant, he was dispossessed. They denied the allegation of the complainant that the land was cultivated by his Halowa (ploughmen) in the year 1949 as alleged.

[5] The learned Magistrate has found that it was difficult to come to any definite conclusion whether a plot of about 2 bighas of land was ploughed by ploughmen on behalf of the landlord. He was not satisfied that there was any re-transplantation over this area and therefore found that no offence had been committed with respect to this plot.

[6] As regards another area of 5 bighas out of the total area in dispute, his conclusion was that the land represented by 5 bighas had been cultivated by complainant's ploughmen and this afterwards was harrowed by the accused. In spite of this finding he did not convict any of the accused for trespass which was the main charge. He convicted some of the accused only under S. 426, Penal Code, for causing destruction of the property dishonestly.

[7] On appeal, the learned District Magistrate observed that he had heard the counsel for the parties and had perused the record and also the judgment of the learned Magistrate. He also stated that he had perused the comments on the petition of appeal. He found the judgment of the learned Magistrate detailed and remarked that it dealt clearly with the points at issue. With these observations he held that the accused were rightly convicted under S. 426, Penal Code, as wrongful loss was caused to the complainant.

[8] The appellate judgment is not in conformity with the provisions contained in S. 367 read with S. 424, Criminal P. C.

[9] Section 367, Criminal P. C., requires that the judgment of the original Court shall contain the point or points for determination, the decision thereon and the reasons for the decision. Section 424, Criminal P. C., lays down that the

rules contained in Chap. 26 as to the judgment of a criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of an appellate Court other than a High Court. By virtue of this provision, the judgment of the appellate Court should also contain the points for determination, the decision thereon and the reasons for the decision.

[10] The judgment of the District Magistrate does not comply with the requirements of the provisions contained in S. 367. The point for determination, the decision thereon and the reasons for the decision have not been stated. The order does not contain any statement as to the prosecution case or of the defence. The judgment would not give any idea about the facts of the case. In order to understand the case, it would be necessary to refer to the judgment of the trial Court or to other documents referred in the order. The judgment, therefore, is not a proper judgment. It clearly contravenes Ss. 424 and 367, Criminal P. C. It may be that the learned District Magistrate gave his full consideration to the case. His judgment, however, is one which is subject to revision and it is obvious that he had not given sufficient material to this Court to come to a decision on the points which arise in the case. As held in *Arindra Rajbanshi* v. *Emperor*, 20 C. W. N. 1296: (A. I. R. (4) 1917 Cal. 285: 18 Cr. L. J. 294), it is necessary that there ought to be sufficient material in the appellate judgment itself to enable the High Court to form a conclusion as to the propriety of the conviction of each of the accused having regard to the offences with which he was charged, and to enable it to come to a conclusion as to the correctness of the sentence which has been passed upon each of the accused having regard to the nature of the offence with which each of the accused was charged.

[11] In *Abdul Karim* v. *Emperor*, A. I. R. (27) 1940 Sind 113 : (41 Cr. L J. 724), it was held that a judgment must contain the points for determination, the decision thereon and the reasons for the decision. Where the reasons in the judgment of the appellate Court are not such as to enable a revisional Court acting under the provisions of Ss. 435 and 439, Criminal P. C., to form any conclusion as to the correctness, legality or propriety of the findings, the judgment is clearly defective and the appeal must be reheard.

[12] In *Gaharali* v. *Emperor*, A. I. R. (12) 1925 Cal. 266 : (25 Cr. L. J. 901), it was held that if the judgment of an appellate Court does not discuss evidence and does not give facts indicating the occurrence dealt with in it, the judgment is not a judgment under S. 367, Criminal P. C., and such a judgment must be set aside.

[13] Mr. Medhi on behalf of the opposite party has urged that the judgment of the appellate Court, though not strictly in compliance with the requirements of Ss. 367 and 424, Criminal P. C., is not vitiated by the omission to state the points for determination, the decision thereon and the reasons therefor. He urges that it is an irregularity which is curable and in these circumstances of this case rehearing of the appeal is not necessary.

[14] His contention is that the only point in the case was whether loss had been caused to the complainant. The learned District Magistrate after hearing the counsel for the parties and going through the record agreed with the learned Magistrate that the accused, who had been convicted, had been guilty of causing loss to the complainant. In these circumstances a rehearing of the appeal was not necessary. In support of this contention he had first relied on *Patilbuva Raojibala* v. *Emperor*, A. I. R (13) 1926 Bom. 512 : (27 Cr. L. J. 1153). In this case also, the District Magistrate's judgment was very brief. He did not state the points for determination and reasons for his finding as contemplated by Ss. 367 and 424, Criminal P. C. But the learned Judge held, in the circumstances of that particular case, that the District Magistrate had gone into the facts of the case. This was indicated by his having acquitted the accused on the charge under S. 434, Penal Code, and the learned Judges were of the view that though mere expression of agreement with the judgment of the Court below was not ordinarily sufficient, regard must be had to the circumstances of the case. On the facts before them, their view was that there was no 'absence of judgment' and that the irregularity in drawing up the judgment was curable under S. 537, Criminal P. C.

[15] The second case relied on by him is reported in *Durga Charan* v. *Isamuddin Mahmud*, 48 Cr. L. J. 389 : (A. I. R. (35) 1948 Cal. 6). It was held that where the appellate judgment upholds the conviction and sentence but does not set out the prosecution case and the defence and how the prosecution case has been established, the judgment would be defective. But this fact was not considered sufficient to justify interference when the appellate Court had applied its mind to the evidence and had come to the necessary findings.

[16] The last case cited by him is reported in *Abdul Rahman* v. *Emperor*, A. I. R. (22) 1935 Cal. 316 : (36 Cr. L. J. 982). It was laid down in this case that S. 367, Criminal P. C., must be interpreted reasonably and so long as the appellate Court below writes a judgment from which the High Court can gather what the decision of

the appellate Court really was, that in the majority of instances ought to be sufficient.

[17] I have carefully considered the authorities relied on by the learned counsel. These cases are distinguishable. In *Patilbuva Ranjibala* v. *Emperor*, A. I. R. (13) 1926 Bom. 512 : (27 Cr. L. J. 1153) no general rule was sought to be laid down and the decision was based on the facts and circumstances of that particular case.

[18] In *Durgacharan* v. *Isamuddin Mahmud*, 48 Cr. L. J. 389: (A. I. R. (35) 1948 Cal. 6), the learned Judge held that though the judgment was defective, when read with the judgment of the Court of the first instance, it showed that the learned Magistrate had applied his mind to the evidence and had, in fact, come to the necessary findings.

[19] In *Abdul Rahman* v. *Emperor*, A. I. R. (22) 1935 Cal. 316 : (36 Cr. L. J. 982), the judgment in question affirmed the convictions of 30 persons and the convictions of some of the accused were set aside. The objection to the judgment was that it was not sufficiently detailed or sufficiently definite. It was pointed out that the judgment did not contain an express finding that there was any conspiracy as alleged in the charge. On facts, this case is easily distinguishable. The learned Judges were dealing in this case with an elaborate judgment and they held that if it is possible for the High Court reasonably to arrive at an understanding of what has been found in the Court below, it is not necessary that it should captiously or capriciously set aside the judgment of the Court below.

[20] It seems to me that the question whether an appellate judgment, which on the face of it does not comply with the requirements of S. 424 read with S. 367, Criminal P. C., should be set aside must be decided on the facts and circumstances of each case. It would not be safe to lay down any hard and fast rule on the point. Where the judgment in question does disclose that sufficient attention has been paid to the points in dispute and the necessary findings are contained therein, it may not be necessary to order rehearing of the appeal though there is no strict compliance with the requirements of Ss. 367 and 424, Criminal P. C.

[21] On the other hand, as held in *Abdul Karim* v. *Emperor*, A. I. R. (27) 1940 Sind 113: (41 Cr. L. J. 724) where the reasons in the judgment of the appellate Court are not such as to enable a revisional Court acting under the provisions of Ss. 435 and 439, Criminal P. C., to form any conclusion as to the correctness, legality or propriety of the findings, the judgment is defective and the appeal ought to be reheard.

[22] The reason for this view is obvious. Where no reasons are stated in the judgment of the appellate Court, the exercise of revisional jurisdiction is not possible. The revisional authority can then dispose of the case only by going into the facts. It then must discharge the functions which an appellate Court is required by law to discharge. It may be that the revisional authority may go into facts and may dispose of the case but by doing so it assumes functions of the appellate Court which is not in consonance with the requirements of the Code. Even if, therefore, a judgment of the appellate Court is not strictly in conformity with the requirements of S. 424, it should be such that it should enable the revising authority to exercise its revisional jurisdiction in the manner required by law. The judgment should not be such that the revisional authority must in order to dispose of the case be compelled to hear the case as if it were a Court of appeal. It was apparently this view of the matter which induced the learned Chief Justice of the Calcutta High Court in *Arindra Rajbanshi* v. *Emperor*, 20 C. W. N. 1296 : (A. I. R. (4) 1917 Cal. 285 : 18 Cr. L. J. 294) to order rehearing of the appeal even though the judgment in question had been prepared with considerable care. The defect in the judgment was that it did not give the revising authority sufficient material to enable it to come to a decision on the points which arose in the case.

[23] In *Gaharali* v. *Emperor*, A. I. R. (12) 1925 Cal. 226 : (25 Cr. L. J. 901), it was not possible to ascertain from the appellate judgment as to what the occurrence was. The judgment was set aside and the case remitted to the lower appellate Court for rehearing.

[24] The case before me is fully covered by these authorities. It does not state the occurrence. It does not mention the points that arose for decision, the decision thereon or the reasons therefor. It merely states that the counsel of the parties have been heard. The judgment of the Court below, according to the learned District Magistrate was detailed and that the accused had been rightly convicted as wrongful loss was caused to the complainant. In fact, the judgment merely expresses agreement with the finding arrived at in the Court below without stating anything more. The defect or the omission is not merely a technical non-compliance with the requirements of the law. The judgment does not state the reasons which led the learned District Magistrate to come to his conclusion, and thus does not enable this Court to exercise its revisional jurisdiction as required by law.

[25] In these circumstances rehearing of the case seems appropriate. The judgment of the learned District Magistrate is, therefore, set aside. The case is remitted back to him for rehearing of the appeal and its disposal in accordance with law in the light of the observations made above.

K.S. *Appeal remanded for rehearing.*

A. I. R. (37) 1950 Assam 202 *[C. N. 72.]*

THADANI C. J. AND RAM LABHAYA J.

Hiralal Patni — Petitioner v. *Chowthmal Sharma and others—Opposite Party.*

Criminal Revn. No. 68 of 1950, D/- 21-8-1950, from order of Magistrate, 1st Class, Gauhati, D/- 4-4-1950.

(a) Criminal P. C. (1898), S. 203 — Complaint involving civil dispute.

Parties should not be encouraged to resort to the Criminal Courts in cases in which the points at issue between them are such that they can more appropriately be decided by a civil Court. Any tendency on the part of the litigants to take a short cut by instituting a complaint where a suit is the proper remedy should be checked by criminal Courts and they should be on their guard against lending aid to such procedure: [Para 21]

(*Held* on facts that the issues involved in the complaint were appropriate to adjudication by a civil Court; and the proceedings were quashed).

Annotation : Cr. P. C., S. 203, N. 5, Pt. 6.

(b) Merchandise Marks Act (1889), Ss. 6 and 7—Contract of sale of yarn of specified counts—Yarn below specified counts supplied—Offence, if committed.

Where there was a contract between the complainant and the accused who were the managing agents of a mill for the supply of yarn of 10 counts and the yarn having been received by the complainant certain specimens of the yarn were tested and found to be under 10 counts, but it was nowhere stated in the complaint that when the yarn emerged from the mill in a manufactured state, the accused knew that it was below 10 counts and that in spite of this knowledge they applied a false trade description :

Held, assuming the description of the tensile strength of yarn amounts to trade description, the complaint did not fall within the purview of either S. 6 or S. 7. [Para 9]

Anno : Merchandise Marks Act, S. 6, N. 1 ; S. 7, N. 1.

A. K. Basu, S. K. Ghose, S. P. Sarkar and G. Goswami—for Petitioner.

F. A. Ahmed (A. G.), Sir Syed Md. Saadullah, R. K. Chaudhuri and B. N. Chaudhuri — for Opposite Party.

Thadani C. J.—This is an application under the provisions of Ss. 439 and 561A of the Code of Criminal Procedure for quashing a complaint brought in the Court of Mr. N. C. Sarma, Magistrate, 1st Class, Gauhati, on 4th April 1950, by one Chowthmal Sharma, describing himself as the Manager of Messrs. Krishna Chandra Muralidhar a firm doing business at 71, Cross Street, Calcutta, against three persons (a) Sir Bhag Chand Soni, son of Tikam Chand, Ajmir, (b) Joykumar Patni, son of Hiralal, and (c) Hiralal Patni—under Ss. 417 and 420, Penal Code, and Ss. 6 and 7, Merchandise Marks Act, (IV [4] of 1889). The complaint is in these terms :

"The humble petition of the complainant abovenamed most respectfully sheweth ;

(1) That the complainant is the Manager of Messrs. Krishna Chandra Murlidhar a partnership firm dealing, amongst other things, in cotton cloth and yarn and also acting as commission agents, having their *guddy* at 71 Cross Street, Calcutta.

(2) That Messrs. Assam Stores at Fancy Bazar, Gauhati, is one of the agents of the complainant's firm at Assam.

(3) That sometime in the month of March 1949, the complainant's firm contracted with the Maharaja Kishangarh Mills Ltd., Kishangarh, Rajasthan, for supply by the said Mills of 475 bales of yarn, of which 373 bales were to be of 10s (10 counts) and the rest of higher counts according to the well-known standard of grey cotton yarn and the scheduled price fixed by the Government and the said yarn was to be sent to the aforesaid Assam Agents, e. g. Messrs. Assam Stores of Fancy Bazar, Gauhati.

(4) That Messrs. Tikkamchand Bhachand Ltd., were the Managing Agents of the said Maharaja Kishangarh Mills Ltd., hereinafter referred to as the Mills.

(5) That the accused 1 is the Managing Agent the accused 2 is the main executive in the Company, as Attorney Managing Agents, and the accused 3 is the Deputy Managing Director of the said Mills.

(6) That at the time of making the contract as aforesaid, it was stipulated that the accused persons would secure for the complainant's firm the necessary permit from the Textile Commissioner of India for sale and despatch of the said bales of yarn contracted for.

(7) That in pursuance of the said contract, the complainant's firm deposited with the accused persons a sum of Rs. 50 000 towards the price of the yarn which was to be adjusted against bills with Railway Receipt and Draft to be submitted by the accused persons through Banks after despatch of the goods contracted for.

(8) That the said Mabaraja Kishangarh Mills Ltd., through their Agents, the abovenamed two accused, got the necessary permit No. CYC-10D/6/Prejan/1143 of 20th April 1949, in favour of the Assam Stores from the Textile Commissioner of India, the supreme authority in textile matters, and thereafter began despatching bales of yarn from June 1949 and the first consignment arrived at Gauhati in July 1949. Between July and September 1949, the petitioner's firm made a total payment of, including the aforesaid deposit of Rs. 50,000, the sum of Rs. 2,51,412-5-6 through Banks against Railway Receipts, Invoices and Drafts cleared through the Banks covering 412 bales only of grey yarn out of the contracted quantity of 475 bales, in four consignments, and the accused persons did not despatch the remaining 63 bales.

(9) That according to rules then prevalent due to Assam Government Control of Cotton Yarn, the said bales on arrival at Gauhati, were freezed by the Assam Government and the same could only be sold on a Release and Distribution Order by the Textile Commissioner of the Assam Government.

(10) That on 31st August 1949, the Provincial Textile Commissioner of Assam passed the Release Order covering the bales by his Memo No. TCP 72/49/204 of 31-8-49, but the Deputy Commissioner of Kamrup ordered the Assam Stores to sell 100 bales of 10s (10 counts) yarn out of those goods to Gauhati Central Trading

Co-operative Society Ltd., by his latter No. DKGTX 37/49/13 of 13.9 1949.

(11) That on opening of some of the bales of yarn and on examination, the complainant's Gauhati Agents found that the yarn was not all up to the standard and quality of the yarn contracted for. Thereafter, on 27-9-49, the Assam Stores applied to the Head Teacher of the Government Weaving Institute of Gauhati for a test and report of the samples of yarn. The said Head Teacher's report of 3-11 49 revealed that out of the six samples tested by him, not one was of the standard 10s (10 counts) and the count number as well as the breaking strength of the yarn supplied marked as 10s (10 counts) were much under the average allowed under the law.

(12) That the complainant, after the report of the Head Teacher of Government Weaving Institute got suspicious that the accused had cheated him by passing of old, unsaleable low count yarn, but charging the scheduled price for 10s, sent samples of four bales to the Textile Commissioner of India (Bombay) whose report showed that the accused had committed wholesale cheating and that they had sent to the complainant yarns not ordered and below the average standard. Complainant had a further test made of four samples by the Technological Laboratory of the Government sponsored Indian Central Cotton Committee whose report showed the same state of affairs.

(13) That learning of this state of affairs, the Textile Commissioner of the Government of India had ordered that the Mills should refund Rs. 1-14-0 per 10 lb. of yarn from the price charged and that the bales should be re-stamped in the presence of the Mills' representative, but the Mills' representative refused to be present.

(14) That the accused persons applied false trade descriptions of the bundles of grey yarn by making them 10s (10 counts) when, in fact, they were not so. The accused persons also deliberately cheated the complainant's firm by invoicing and by permit the goods at 10s (10 counts) etc., knowing fully well that they were not so and thereby inducing the complainants' firm to accept the said goods under a belief that they were, in fact, of the standard counts as represented and to pay for them which they would never have done had they been not so deceived and the complainants' firm suffered heavy loss as they had to sell the goods at a much lower price. The accused have thus committed offences under Ss. 417 and 420, Penal Code, and also under Ss. 6 and 7, Merchandise Marks Act. The accused have also cheated the complainants' firm in respect of 68 bales of yarn alleging them to be 22s and 26s (counts) and they were found by the Government Weaving Institute, Gauhati, to be of inferior count.

The complainant, therefore, charges the accused persons under Ss. 417 and 420, Penal Code and Ss. 6 and 7, Merchandise Marks Act (IV [4] of 1889) and prays that your honour would be graciously pleased to issue process against them.

It is further prayed that warrants of arrest may be issued against the accused.

Sd/Chothmal Sharma.
4-4-1950."

[2] The learned Magistrate examined Chowthmall Sharma upon this complaint and the examination recorded by the Magistrate is:

"I complain against Hiralal Patni, Joykumar, and Bhagchand. They are partners of the firm of a Kishangarh Mills Ltd., and accused Bhagchand is the Managing Agent. Joykumar Patni is the main executive of the Managing Agency. Hiralal Patni is the Deputy Managing Director. The Assam Stores of Fancy Bazar is our Agent in Assam. I belong to the firm of Krishna Chandra Muralidhar and I am the Manager of that firm. We obtained a permit for 475 bales of yarn of various counts to be supplied at Gauhati. We arranged with the three accused for supply of the yarn according to specifications and deposited Rs. 50,000 with them as advance. After that we made payment and the total amount paid was Rs. 2,51,412 and odds. They supplied 412 bales, and on the bales there were specification marks showing the trade description, that is to say, the counts of yarns contained in the bales. We had these yarns examined, but the yarn did not agree with the descriptions given in the bales and the yarns were mixed and of low counts and breaking strength. The yarn was tested by the Head Teacher of the Gauhati Weaving School and was also sent to the Textile Commissioner of India in Bombay and the result was as I have stated. I would not have paid the money if I had known that they would not supply according to the permit. We have thus been cheated and the accused have also committed an offence under Ss. 6 and 7, Merchandise Marks Act. Bhabani Saha, the Head Teacher of the Government Weaving School, Gauhati, and others are my witnesses. Their names are given in the petition."

[3] Mr. Fakhruldin Ahmed for the complainant conceded that nothing that is stated in paras. 1-13 of the complaint constitutes an offence. He, however, relied upon para. 14 and contended that the accused named in the complaint deliberately supplied a false trade description to the bundles of grey yarn, in that, whereas the contract was for the sale of yarn of ten counts tensile strength, the yarn delivered, when tested, was discovered to be an average tensile strength of 8.75 counts, and thereby they cheated the complainant firm by obtaining from them a price for the yarn delivered to which they were not entitled, and also committed an offence under Ss. 6 and 7, Merchandise Marks Act.

[4] The petitioner's case is this: The contract which is the subject-matter of the complaint, was made on 16th March 1949 by one Narsingdas Jain with the mill at Kishangarh, and was duly entered in the "*Sowda*" book of the mill and signed by Narsingdas Jain; on behalf of the mill it was signed by one Hiralal, a salesman of the mill; none of the three accused persons personally had anything to do with the making of the contract; the yarn was to be delivered ex-mill at the stipulated price; on 17th March 1949, Narsingdas Jain paid to the mill a sum of Rs. 26,000 and another sum of Rs. 1,00,000 (one lac) on 14th March 1949 for which receipts were given to Narsingdas; in due course Narsingdas gave instructions to the Mill to despatch 412 bales of yarn to Assam Stores at Gauhati instructions which were duly complied with by the mill in June 1949; the relevant Railway receipts and *hundis* were made over to the Central Bank of India Limited at Ajmer in the case of two consignments and to the Punjab National Bank Ltd., at Kishangarh in the case of

the remaining two consignments; the amount of the bills paid by the banks was Rs. 2,01,412-15 6 and the balance of Rs. 40,498-2-0 was adjusted against the deposit of Rs. 1,26 000 held by the Mill. On 24th August 1949 the Mill called upon Narsingdas Jain for instructions in the matter of the despath of the remaining 63 bales of yarn and 969 bales of cloth the latter of which are not the subject matter of the complaint ; Narsingdas failed to give instructions in this behalf, and the Mill sent reminder to him on 7th September 1949 followed by a registered notice on 13th September 1949 intimating Narsingdas that if he did not take delivery of the goods, the mill would sell the goods by public auction on his account; Narsingdas made no reply and the Mill advertised the sale of the goods, which were in due course sold by auction on 25th September 1949 and 26th September 1949, the mill intimated Narsingdas that after giving him credit for a sum of Rs. 5,97,207-10-0 being the sale-proceeds of the goods realised at the auction, the balance still due from him was Rs. 82,422-15-3 ; on 25th October 1949, the mill instituted a suit against Narsingdas in the Court of the District Judge, Kishangarh, being suit No. 1552 of *Sambat* 2006, for the recovery of a sum of Rs. 82,422-15 3 together with certain other amounts due from Narsingdas, amounting to a total sum of Rs. 1,92,516-6-3 ; on 1st December 1949, the District Judge issued a writ for attachment before judgment against Narsingdas : 4 months later on 4th April 1950 the present complaint was brought at Gauhati against the accused persons by one Chowthmall Sharma.

[5] Now, it is significant that the contract which the complainant Chowthmall Sharma has alleged in the complaint is also purported to have been made in March 1949, but equally significant is the fact that the date of the contract has been omitted from the complaint. Moreover, the contract alleged by Chowthmall Sharma is not in writing. This was admitted by Mr. Fakhruddin for the complainant. Mr. Fakhruddin also admitted the price at which the complainant firm is alleged to have bought the yarn. Mr. Fakhruddin further admitted that no receipt was obtained by the complainant firm or anybody else for the payment of Rs. 50,000 alleged to have been made by the complainant firm to the mill.

[6] We have set out the rival versions of the complainant and the accused, not with a view to indicating our preference for the one to the other, but with a view to indicating how undesirable it is, on the facts of this case, to permit a criminal Court to decide questions which a civil Court is best suited to decide. It is obvious that if the present complaint were to be tried and decided by a Magistrate, he would have to decide such complicated questions as the formation of the disputed contract, including the parties thereto, the terms of the contract, its breach, whether the alleged breach of the terms as to countage amounts to a breach of the contract, or a breach of warranty and other allied questions. We do not think these questions can properly be decided by a criminal Court.

[7] On the other hand, there is a suit instituted by the mill in Rajasthan against Narsingdas Jain for the recovery of nearly two lacs of rupees arising out of the contract for the sale of 475 bales of yarn and some bales of cloth. The suit was instituted before the present complaint, It is true that in the suit filed by the mill in the Rajasthan Court, the complainant firm is not a party. But there is nothing to prevent the complainant firm from instituting a suit to enforce their rights, if any, arising from the breach of the contract as alleged in their complaint.

[8] Apart from the fact that the issues involved in the complaint are more appropriate to adjudication by a civil Court, we have come to the conclusion that, on the face of the complaint, no criminal offence has been made out. There is no allegation in the complaint that the complainant firm paid monies to the mill as a result of any deception practised by the accused personally. It is not the case of the complainant firm that the tensile strength of the yarn was personally tested by the accused persons and found to be below 10 counts, nor is it the case of the complainant firm that the accused persons stamped the yarn with their own hands as of 10 counts, knowing it to be untrue. The stamping of the yarn was an act done apparently by the employees of the mill, and not by any of the accused personally. In the absence of any allegation by the complainant firm that the mill had deliberately delivered yarn stamped as of 10 counts tensile strength, knowing it to be untrue, we do not think any question of deception arises within the meaning of S. 415, Penal Code. The essence of cheating is first, deception, and then inducing the person so deceived, to deliver property. The fact that on testing the yarn it was found to be below 10 counts, is not necessarily evidence of deception. Moreover, the report, the only evidence in the case upon which Mr. Fakhruddin has relied, says that the average tensile strength of the yarn marked 10 counts was 8.75 counts. Mr. Fakhruddin conceded that an allowance of 5% is ordinarily made to provide variations in tensile strength of yarn owing to climatic and other conditions. The average tensile strength of the yarn delivered to the complainant firm should then have been 9.5. According to the report, the average strength of

the specimens tested was 8.75. But the report also shows that certain specimens were of higher tensile strength, namely, over 10 counts, and some 12 counts. The presence of higher counts in the yarn stamped as ten counts negatives the suggestion of deception or intention to deceive. It is also to be observed that the specimens were tested some 4 months after the goods had been delivered — not at a place where, under the contract, the yarn was to be delivered, but at Gauhati, which is notorious for the humidity, a circumstance which might easily account for a further deterioration of 7.5% in the tensile strength of the yarn delivered.

[9] It was next contended that even if the complaint does not show a *prima facie* case of cheating, it shows a *prima facie* case under ss. 6 and 7, Merchandise Marks Act of 1889. Section 6 contemplates applying a false trade description. Assuming the description of the tensile strength of yarn amounts to trade description, which, in my opinion, it does not from the fact that on testing certain specimens of the yarn described as 10 counts, they were found to be under 10 counts, it does not follow that a false trade description had been applied to the yarn. Nowhere is it stated in the complaint that when the yarn emerged from the mill in a manufactured state, the accused knew that it was below 10 counts, and that in spite of this knowledge, they applied a false trade description. For the same reason, it cannot be said that the complaint falls within the purview of S. 7, Merchandise Marks Act.

[10] We are satisfied that the complaint discloses no criminal offence, and that the proceedings taken upon the complaint must be set aside.

[11] We accordingly quash the complaint and the process issued against the accused named in the complaint. The bail bonds if executed by any of the accused will stand cancelled. The rule is made absolute.

[12] In conclusion, I wish to observe that the Magistrate who entertained this complaint has not exercised that care and caution which was expected of him when he decided to issue bailable warrants against each of the accused in the sum of Rs. 20,000, on the facts of this case.

[13] **Ram Labhaya J.** — I entirely agree with my Lord the Chief Justice that the proceedings in this case be quashed, but I wish to add a few words. (After stating the facts his Lordship continued :)

[14-16] The version given above suffers from some obvious defects. The date of the contract, from which the complaint arises was not given. The name of the person who entered into the contract on behalf of the complainant's firm is not disclosed. In the complaint and the statement of the complainant that followed it was not stated distinctly who represented the Mills when the order for the supply of yarn was placed. It was said in a vague way that the sum of Rs. 50,000 was deposited with the accused. In the counter-affidavit put in on behalf of the complainant in this Court a clearer statement was made on this point. It was stated that at the time of the contract the three accused persons were present (*vide* Para. 6 of the counter-affidavit). The statement necessarily implies that there was some other person representing the Mills at the time of the contract. His name has not been disclosed. These defects may not be fatal to the complaint. They, however, raise doubts as to the *bona fide* nature of the complaint. The transaction related to 475 bales of yarn. The price of 412 bales came to about Rs. 2,50,000. The bargain is alleged to be oral and not supported by a receipt for a huge sum of Rs. 50,000 that was alleged to have been paid at the time of the contract. This fact seen in the light of omissions stated above make the alleged transaction extremely unusual and strarge. Added to these, there is another serious omission in the complaint which goes to the root of the matter. As stated above, all that is said about the three accused against whom the complaint has been lodged is that they were present at the time the order for the supply of yarn was placed. There is no allegation contained in the compaint or in the statement of the complainant made on 4th April 1939 that the accused personally entered into the contract or that they had any criminal intent to cheat or defraud at that time. They are proceeded against as they happen to be Managing Agents of the Mills (*vide* Paras. 4 and 5 the complaint). The element of criminality which is alleged to exist in the case is brought out in Para. 14 of the complaint. It is alleged in this para that the accused persons applied false trade descriptions to the bundles of grey yarn by making them appear as containing 10 counts yarn when in fact they did not contain such yarn. The accused persons also, it was alleged, deliberately cheated the complainant's firm by invoicing the goods of 10 counts knowing full well that they were not so and thereby induced the complainant's firm to accept the said goods. It would be noticed that acts attributed to the accused are not stated as their personal acts. Paragraph 16 of the counter-affidavit from the complainant's side brings this aspect of the matter into clear relief. It is stated in this para that in the case of the yarns under dispute, the usual formalities were observed:

"The Maharaja Kishangarh Mills, the Managing Agents of which are admittedly the three accused per-

sons, obtained the permit from the Textile Commissioner of Government of India and began despatching the yarns to Assam Stores, Gauhati, marking the packages with the quality of the yarn and the price fixed by them and realising the price of the goods through Banks from the complainant's Firm Krishnachandra Muralidhar of Calcutta."

In plain words it was stated that the Mills obtained the permit and sent the goods. In Para. 12, the responsibility for marking the goods was fixed on the Mill's Executives. Their names were not mentioned. A direct statement that the three accused were personally liable for applying false marks was, to say the least, avoided. The accused were described as the Managing Agents. They were thus made responsible for every thing done in the Mills in connection with the consignments in question and have been sought to be made liable in their capacities as Directors of the Managing Agency. That, this was the idea underlying the complaint is also indicated by the fact that learned counsel for the complainant-respondent relied on *Emperor* v. *Dhanraj Mills Ltd.*, A. I. R. (30) 1943 Bom. 182: (44 Cr. L. J. 574) for showing that a Corporation can be guilty under S. 6, Merchandise Marks Act. This case, however, does not help him. In that case the complaint was not against any of the Directors concerned with the management of the Company but it was against the Company itself. Assuming that a Company can be prosecuted under the Merchandise Marks Act, the complaint ought to be against the Company. This is intelligible as it would not be possible in most cases to fix responsibility for giving false description on individual employee of the Company who may have been responsible for it. If it could be established that the description on the bales or on the yarn was false, a *prima facie* case may be made out against the Company but not necessarily against individuals who constitute the managing agency of the Company. The liability for false description, if any, would be of the Mills and it would be for the Company to show that if there is any false description, it was not with intent to defraud. The existence or proof of false description by itself would not make out a case against the Directors of a Company, who are acting as Managing Agents of the Manufacturing Mills. In these circumstances it is fairly obvious that no basis for criminal liability has been disclosed against the three accused personally.

[17] Accused 2, the petitioner before us, has given his version in the petition of revision which is supported by an affidavit. His case is that there was a contract between one Nursingdas Jain and the Mills at Kishangarh for the supply of 475 bales of yarn. It was entered in "*Sowda*" book of the Mills. It was signed by Narsingdas Jain, who placed the order with the Mills. The order was not limited to 475 bales of yarn; 1322 bales of cloth had also to be supplied. The Mills were represented by their salesman and none of the accused was present at the time of this transaction which came on 16th March 1949.

[18] On 17th March, a sum of Rs. 26,000 and on 24th March another sum of rupees one lakh were paid as deposits towards the price of the goods required to be supplied later. It was alleged that this money which Nursingdas Jain paid was obtained by him from Kishanchand Muralidhar's Indore Firm whose account at Kishangarh he used to operate. Permits were obtained from the Textile authorities by the Mills in the name of various parties under instructions, written and verbal, from Nursingdas Jain. The permit for despatch of 475 bales of yarn was obtained in the name of Assam Stores, Gauhati, and 412 bales of yarn were sent to Assam Stores, Gauhati, in June 1949 and the amount recovered against railway receipts and *hundis* was shown as Rs. 2,01,412-15-6. The balance of the price, viz., Rs. 40,498-2-0 was adjusted from the initial deposit of Rs. 1,26,000. As no instruction was received from Nursingdas Jain for the balance of 63 bales of yarn and 969 bales of cloth, notices were sent to him. No reply was received to the registered notice of 13th September 1949. The Mills after publishing a notice on 19th September 1949 for auction of the goods, sold them in open auction on 25th and 26th September 1949. The difference payable by Nursingdas Jain on the transaction came to Rs. 82,422-15-3. He had other transactions with the Mills. His total liability on all the transactions came to Rs. 1,92,516-6-3, and a suit was instituted against him on 25th October 1949 for the recovery of this sum.

[19] The points which arise for determination from the two conflicting versions are:

(1) Whether the complainants' firm entered into an oral contract with the Mills directly without the intervention of Nursingdas Jain and if so, when and by whom were the parties to the contract represented ? (2) What sum, if any, was paid on behalf of the complainants' firm on the date of the contract ? (3) What were the terms of the contract? (4) Was any breach of the contract committed by the Mills ? (5) Whether the yarn supplied did not answer the quality and the standard stipulated for and was a false description marked on them ? (6) Were the three accused responsible for false description of the goods personally or was it with their knowledge or under their directions that the false description was applied and was the false description applied with intent to defraud ? (7) Could all

the accused be held responsible for false description by virtue of their position as Managing Agents, even if they had no personal knowledge that a false description within the meaning of the Merchandise Marks Act had been applied to the consignments ?

[20] A mere statement of the questions which arise for decision shows clearly that complicated questions of fact and law arise for decision in the case and that a criminal Court is not the proper forum for the decision of such cases.

[21] Parties should not be encouraged to resort to the criminal Courts in cases in which the points at issue between them are such that they can more appropriately be decided by a civil Court. Any tendency on the part of the litigants to take a short cut by instituting a complaint where a suit is the proper remedy should be checked by criminal Courts and they should be on their guard against lending aid to such procedure. The correctness of this view has not been questioned. Its application to the facts of this case seems equally unquestionable. The question whether there was a false description of the goods would admittedly depend on expert testimony. According to the complaint, about 14 samples presumably from 14 bales were examined. These samples were taken out by the agents of the complainants' firm. No less than 412 bales of yarn were received at Gauhati. The bulk of the yarn has not been tested. It is pointed out that experts may differ, and climatic condition in Assam may possibly have affected the quality of a part of the yarn to some extent. These are all possibilities. The very foundation of the complaint, viz., the alleged oral contract and its items, is in dispute. The question whether there has been any breach and whether that breach amounts to an offence on the part of the persons proceeded against is another substantial issue in the matter. It is not disputed that difficult questions of law and fact do arise. The learned counsel realising this urged in the alternative that the complaint could at least be proceeded with so far as the case under the Indian Merchandise Marks Act is concerned. He urged that the allegations in the complaint do make out a case under this Act. It is alleged that a substantial quantity of yarn was falsely described, and it is contended that this is all that the complainant need prove for making out a *prima facie* case under the Indian Merchandise Marks Act. The learned counsel, however, ignores the fact that where description of the goods is proved to be false, it is open to the accused to show that there was no intention to cheat or defraud. The question of intention, therefore, does arise. Even in the Bombay case that was relied on by him, *Emperor* v. *Dhanraj Mill Ltd.*, A. I. R. (30) 1943 Bom. 182 : (44 Cr. L. J. 574), it was remarked by the learned Chief Justice in relation to the case before him that

"some pieces were correctly stamped and some were even longer than the figure with which they were stamped; which facts suggest insufficient checking rather than a fraudulent design."

The question of criminal intent, therefore, would arise and will have to be decided on a careful expert examination of the entire quantity of yarn supplied. Besides this, the proof of false description alone may make out a *prima facie* case against the company but not necessarily against the Managing Agent personally So, a case under the Indian Merchandise Marks Act would involve substantially the same questions as would arise if the complaint were under Ss. 417 and 420, Penal Code, alone.

[22] Another factor which has an important bearing on the question whether the complaint is *bona fide* is the obvious delay in instituting the complaint. The complainants' firm had received all the reports from experts by 7th January 1950. This complaint was not lodged till 4th April 1950. The suit against Narsingdas Jain with whom the contract for the supply of 475 bales of yarn along with cloth was made (according to the petitioner) was instituted on 25th October 1949. Narsingdas Jain was said to have received Rs. 26,000 that he had paid as deposit in March to the Mills from the account of the Indore Firm of Kishenchand Muralidhar (complainants' firm). He was also described as a partner of a firm in some transactions at Kishangarh. These allegations about Nursingdas Jain contained in Para. 5 of the petition to this Court are not all denied. All that was said in answer to Para. 5 of the petition was that the correctness of the statement was not admitted and the deponent was not aware of the fact that Nursingdas Jain made any payment in connection with the contract in question by obtaining money from the Indore Firm (*sic*) not correct to say that Nursingdas Jain was a partner in the transaction out of which this case arises. There is an implied admission that he was a partner in other transactions. As regards the alleged withdrawal of the money by Nursingdas Jain from the account of the Indore Firm of the complainants, ignorance was pleaded. The petitioner's version of the claim does substantially form the subject-matter of the suit instituted against Nursingdas Jain. He is said to have denied the existence of a valid contract with the Mills. The complaint, it is pointed out, is really a counterblast to the suit and has been instituted with a view

to obtaining a settlement of the dispute by putting pressure on the Mills. It is not easy to avoid this impression. From the facts as stated above it is safe to conclude that the complaint is an attempt to obtain from the criminal Courts in Assam a decision on matters which are pre-eminently fit for determination by a civil Court. It is apparent that the case is of an exceptional nature and a bare statement of the facts is enough to show that the case is fit for interference at this stage. The dispute is of a civil nature and can more appropriately be decided in a civil Court. Both parties have claims against the other. They arise out of a contract. Some complicated questions are also involved and a decision on these questions involves an elaborate and a very prolonged enquiry.

[23] The learned counsel for the respondent has drawn our attention to *Hariram Onkar* v. *Mt. Radha Jairam*, A. I. R. (30) 1943 Nag. 327 : (45 Cr. L. J. 175). The broad proposition laid down in this case is that proceedings can only be quashed when no offence whatever is disclosed or when the prosecution is bound, on the face of it, to fail, or for some other cause equally powerful. We agree with this statement of law. But on the peculiar facts of this case and for reasons given above, we hold that interference is fully justified. I, therefore, agree that the proceedings be quashed.

V.R.B. *Proceedings quashed.*

A. I. R. (37) 1950 Assam 208 *[C. N. 73.]*

THADANI C. J. AND RAM LABHAYA J.

Maitham Bania—Appellant v. *Ritu Kaivarta and others—Respondents.*

Second Appeal No. 12 of 1950, D/- 11th August 1950, from judgment and decree of Addl. Sub-J., L. A. D., D/- 23rd November 1949.

Civil P. C. (1908), O. 41, R. 33—Power of appellate Court to take notice of subsequent events.

The power to make further or other decree or order under R. 33 as the case may require, would justify consideration of events taking place after the institution of the suit in proper cases. There would not, therefore, be any excess of jurisdiction if the appellate Court takes notice of facts which entitles a plaintiff to a relief which though claimed in the plaint could not be given to him on the date of the suit. Normally, and as a general rule, a Court of appeal in considering the correctness of the judgment of the Court below is to confine itself to the state of the case at the time when the judgment was given. But in exceptional cases it may depart from this rule in order to shorten litigation or to achieve the ends of justice. [Para 10]

Where the suit for redemption was not premature but the relief claimed was that redemption or delivery of possession of the property be decreed without payment of mortgage money on the ground that the charge had been extinguished by operation of law and this relief was not available to the plaintiff on the date of the suit, but became available during the pendency of the appeal, it was held that the appellate Court could grant such relief. [Paras. 8 and 14]

Annotation : Civil P. C., O. 41, R. 33, N. 4.

J. N. Borah—for Appellant.

P. N. Roy—for Respondents.

Ram Labhaya J.—This is an appeal from the judgment and decree of the Additional Sub-Judge, L. A. D., dated 23rd November 1949 by which the order of the trial Court decreeing plaintiff's claim was affirmed. Defendant has appealed.

[2] The suit was for redemption of a mortgage alleged to have been made by a registered instrument for a sum of Rs. 80 in 1937. The property in question was 5B 14 Ls. of land. It was prayed that redemption be allowed without payment of the mortgage money as the mortgage had been extinguished by operation of law, viz., under S. 9, Assam Money-lenders' Act as amended by Act VI [6] of 1943.

[3] The defence raised was that the property had been sold to the defendant in 1933-34. This has been negatived by the two Courts below. The finding is on a question of fact and is not assailable at this stage. The learned counsel for the appellant, therefore, has not challenged this finding.

[4] The trial Court found that the mortgagee had been in possession for 9 years from the date of the mortgage. The usufruct of the land for 9 years was, according to the learned trial Judge, more than double the consideration of the mortgage. Plaintiff was thus found entitled to a decree for possession of the property without payment of the mortgage money.

[5] The learned Sub-Judge has affirmed the decree but on a different basis. He has come to the conclusion that the mortgage charge could be extinguished under S. 9 (2) (1) only after the expiration of 12 years from the date of the execution of the mortgage deed. As this period had not expired on the date of the suit and even on the date of the decree of the trial Court, the learned Sub-Judge was of the view that the decree for possession without payment of the mortgage money could not have been passed by the Munsiff. He, however, affirmed the decree on the ground that the period of 12 years also had expired before the date of the hearing of the appeal and the mortgage then stood completely discharged.

[6] The learned counsel for the appellant urges that on the date the suit was instituted the plaintiffs could not ask for possession of the property without payment of the mortgage money. His contention is that the suit, in these circumstances, was premature, and any cause of action that may have accrued during the pendency of the appeal could not have been taken

notice of. The suit should have been dismissed and the plaintiffs directed to institute a fresh suit.

[7] We think the argument is not well founded. The suit was essentially one for redemption. There was a cause of action for the suit for redemption of the property. There was no impediment in the way of the plaintiffs asking for redemption on payment of money. The cause of action existed for a redemption suit therefore.

[8] The relief claimed was that redemption or delivery of possession of the property be decreed without payment of mortgage money on the ground that the charge had been extinguished by operation of law It is not disputed that this relief was not available to the plaintiffs on the date of the suit. But it became available during the pendency of the appeal, in the lower appellate Court. The ordinary rule is that the rights of parties must be determined as at the date of the action, and not on the basis of rights which accrued to them after the institution of the suit. This rule should not apply to this case. It cannot be said that plaintiffs had no cause of action for the suit. The relief that was claimed on the basis of action was in excess of what they were entitled to. But they became entitled to the relief claimed later on. It would be extending the operation of the rule if it is applied to the circumstances of the case before us.

[9] The rule itself has not been followed consistently in all the High Courts. A redemption suit which was premature was dismissed in *Rangayya Naidu* v *Basanna Simon*, A. I R. (13) 1926 Mad. 594 : (94 I. C. 639) even though the cause of action had accrued to the plaintiffs after the institution of the suit. But in *Tulsi Ram* v. *Dina Nath*, A. I. R. (13) 1926 Lah 145 : (89 I. C. 333), the view taken was that if a suit was premature at the date of its institution, it should not be dismissed if the cause of action has accrued after the institution of the suit.

[10] We need not resolve this conflict of authority on this point as in the opinion that we have taken of the matter the rule above stated has no application to the facts of this case. The powers of the appellate Court have been described in O. 41, R. 33 Civil P. C. This rule was introduced in the Code in 1922. It confers on the appellate Court the power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. The power to make further or other decree or order as the case may require would justify consideration of events taking place after the institution of the suit in proper cases. There would not be any excess of jurisdiction if in the exercise of the power given to the appellate Court under O. 41, R. 33 the Court takes notice of facts which entitled a plaintiffs to a relief which though claimed in the plaint could not be given to him on the date of the suit. Normally, and as a general rule, a Court of appeal in considering the correctness of the judgment of the Court below is to confine itself to the state of the case at the time when the judgment was given. But in exceptional cases it may depart from this rule in order to shorten litigation or to achieve the ends of justice.

[11] In *Derasadh Dishnois* v. *Basti Ram*, A. I. R. (27) 1940 Lah. 194: (188 I. C. 616), Dalip Singh J., held that where a suit when instituted was premature but had ceased to be premature in appeal, the question whether it should be decreed or not was a matter within the discretion of the appellate Court.

[12] In *Pandurang Narayan* v. *Ramchandra*, A. I. R. (17) 1930 Bom. 554 : (54 Bom. 902), a Division Bench of the Bombay High Court held that the Court was not precluded from taking cognizance of events which have happened since the filing of the suit or appeal.

[13] The learned counsel for the appellant has not been able to cite any authority in support of the contention that in the circumstances of the case the lower appellate Court exceeded its jurisdiction in allowing the relief which the plaintiffs became entitled to during the pendency of the appeal.

[14] We think the power to take notice of subsequent events did exist in this case particularly as the suit for redemption was not premature. The exercise of the power is fully justified on facts. It would not have been fair or just to force the plaintiffs either to pay the money which was not due or to institute another suit.

[15] We see no reason to interfere. The appeal is dismissed. Parties shall bear their own costs in this Court.

[16] **Thadani C. J.**—I agree.

G.M.J. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 209 *[C. N. 74.]*

THADANI A. C. J.

Prasanna Ram Pathak—Appellant v. *Balabox Agarwalla—Respondent.*

R. A. No. 155 of 1947, D/- 18th November 1949 against decision of A. D. C., Kamrup, D/- 4th March 1947.

Assam Land and Revenue Regulation (I [1] of 1886)—Patta-holder - Annual patta—Grant of.

An annual patta, until it is either cancelled or notice of non-renewal given to the patta-holder by the authorities concerned, confers good title upon the person to whom the patta is issued. The possession of a person other than the annual patta-holder is irrelevant. His possession might be that of a trespasser or a permissive

possession emanating from the patta-holder himself, in which case obviously he cannot claim the rights of a patta-holder and claim that the annual patta be issued to him. [Para 3]

C. Lahkar—for Appellant.
K. C. Goswami—for Respondent.

Judgment.—This is an appeal against the decision of the learned A. D. C., Kamrup, dated 4th March 1947, by which he ordered that the annual patta should remain in the name of Balabox Agarwalla and refused to recognise the possession of the present appellant.

[2] Mr. Lahkar for the appellant has contended that it has been found as a fact that the appellant was in possession of the land, although the respondent was nominally the patta-holder, and having regard to the long possession of the appellant, the patta should have been granted to him and that the name of the respondent should have been removed from the patta.

[3] There is no substance in the contention. An annual patta, until it is either cancelled or notice of non-renewal given to the patta-holder by the authorities concerned, confers good title upon the person to whom the patta is issued. The possession of a person other than the annual patta-holder is irrelevant. His possession might be that of a trespasser or a permissive possession emanating from the patta-holder himself in which case obviously he cannot claim the rights of a patta-holder and claim that the annual patta be issued to him.

[4] There is no reason to interfere with the judgment of the learned A. D. C. The appeal is accordingly dismissed, with no order as to costs.

V.S.B. *Appeal dismissed.*

A. I. R (37) 1950 Assam 210 *[C. N. 75.]*

THADANI C. J.

Gayanath Mandal — Appellant v. *Dhruba Hazarika—Respondent.*

R. A. No. 75 of 1949, D/-22nd December 1949.

(a) Assam Land and Revenue Regulation (I [1] of 1886), S. 81—Maintainability of application by ostensible purchaser.

Section 81 refers to an application by anybody whatsoever. Hence, a purchaser having ostensible title to property, which has been sold at a revenue auction, is not debarred from applying under the provisions of that section on the ground of hardship or injustice. Whether the seller had or had not title to the property is not material to the maintainability of his application. [Para 2]

(b) Assam Land and Revenue Regulation (I [1] of 1886), Ss. 81, 74 (2)—Property sold in contravention of S. 74 (2) — Revenue sale set aside.

A revenue sale of property held before the expiration of the period of thirty days mentioned in S. 74 (2) being not in accordance with the provisions of the Regulation is liable to be set aside under S. 81. [Para 3]

D. N. Medhi—for Appellant.
B. C. Barua—for Respondent.

Judgment. — This is an application under S. 81, Assam Land and Revenue Regulation, by one Gayanath Mandal seeking to set aside a revenue sale on the ground of hardship.

[2] A preliminary objection has been taken by Mr. Barua for the respondent to the effect that an application by the petitioner who has no *locus standi* does not lie under the provisions of S. 81 of the Regulation. Section 81 is in these terms:

"The Provincial Government may, on application made to them at any time within one year of a sale becoming final under S. 80, set the sale aside on the ground of hardship or injustice."

Manifestly it refers to an application by anybody whatsoever. In this case, the applicant is a purchaser of the property sold at a revenue auction from one Biswanath Agarwalla for a sum of Rs. 1000. Apparently on the strength of the sale-deed, he bases his title to the property, and I do not think it can be contended that a person having ostensible title to property, which has been sold at a revenue auction, is debarred from applying under the provisions of S. 81 of the Regulation on the ground of hardship or injustice. Whether the seller had or had not title to the property is not material to the maintainability of an application under S. 81 of the Regulation.

[3] In this case, the allegation of the appellant is that the property which is situated in a village bazar, measuring approximately ¼ of an acre, was sold at Rs. 12, when the market-value of the land in that locality was in the neighbourhood of Rs. 1000. Mr. Medhi for the appellant has contended that in this case the sale is liable to be set aside on the ground of injustice within the meaning of S. 81 of the Regulation in that the sale has not been conducted in accordance with the provisions of the Regulation. He has referred to S. 74 of the Regulation which is in these terms:

"74. (1) Every sale under this Chapter shall be made either by the Deputy Commissioner in person, or by an officer specially empowered by the Provincial Government in this behalf.

(2) No such sale shall take place on a Sunday or other authorized holiday, or until after the expiration of at least thirty days from the date on which the list of estates has been published under S. 72.

(3) The Deputy Commissioner may, from time to time, postpone the sale, and every postponement of sale of a permanently settled estate shall be reported to the Commissioner or (where there is no Commissioner) to the Provincial Government."

Section 74 refers to S. 72 which is in these terms:

"72. (1) If the Deputy Commissioner proceeds to sell any property under S. 70, he shall prepare a statement in manner prescribed, specifying the property

which will be sold, the time and place of sale, the revenue assessed on the property and any other particulars which he may think necessary.

(2) A list of all estates for which a statement has been prepared under sub-s. (1) shall be published in manner prescribed, and the copy of the statement relating to every such estate shall be open to inspection by the public free of charge in manner prescribed.

(3) If the revenue of any estate for which a statement has been prepared under sub-s. (1) exceeds five hundred rupees, a copy of the statement shall be published in the official Gazette.

(4) When the arrear has accrued on an estate, not being a permanently-settled estate in the district of Sylhet, a copy of the statement prepared under sub-s. (1) shall be served on the defaulter, or, if he cannot be found, posted on the estate in manner prescribed.

(5) When the arrear has accrued on a permanently-settled estate in the district of Sylhet, a copy of the statement shall be posted on, or in the vicinity of the estate in manner prescribed and, if any proprietor of the estate has registered his name and address in the manner prescribed, a copy of the notice shall be despatched to him by post in a registered cover to that address.

(6) In making rules prescribing the manner of registering names and addresses for the purposes of sub-s. (5), the Provincial Government may impose a fee for such registration and may fix a period after which such registration will, unless renewed, become void."

Sub-section (2) of S. 72 refers to the manner in which the list of all estates shall be published, and the manner is laid down in R. 136 of the rules for recovering arrears framed under Chap. V, Part II, Land Revenue Manual. Rule 136 reads as follows :

"*136.* The list of estates referred to in the foregoing rule shall be published—(a) in the Court of the Revenue Officer by whom it has been prepared ; (b) at the office of the sub-Deputy Collector in whose circle the estate is situated; (c) at the Office of the Tahsildar or house of the mauzadar within whose tahsil or mauza the defaulting estate lies and (d) where gaonburas are employed, on the signboard of the gaonbura within whose charge the defaulting estate falls.

136A. The sale statement mentioned in R. 135 shall be served under sub s. (4) of S. 72 of the Regulation on the defaulter or, if he cannot be found, it shall be posted on a conspicuous part of the estate."

It is not disputed that the list of estates, as prepared by the Deputy Commissioner, was published in this case in the Court of the Revenue Officer on 19th February 1949, at the Office of the Sub-Deputy Collector on 18th February 1949 at the Office of the Mauzadar on 15th February 1949, and on the sign-board of the gaonbura on 18th February 1949. The last date on which the publication was made in terms of cl. (a) of R. 136 was on 19th February 1949. Thirty days within the meaning of sub-s. (2) of S. 74 of the Regulation, expired on 20th March 1949, but it is common ground that the sale was effected on 16th March 1949, clearly, therefore, the sale was not in accordance with the provisions of the Regulation.

[4] In this view, I set asie the sale on usual terms. The appeal is allowed accordingly.

V.S.B. *Appeal allowed.*

A. I. R (37) 1950 Assam 211 *[C. N. 76.]*

THADANI C. J. AND RAM LABHAYA J.

Kanakeswar Bora—Complainant v. *Asatu Kalita and others—Accused.*

Criminal Reference No. 9 of 1949, D/- 21-11-1949.

Criminal P. C. (1898), Ss. 258, 259 — Charge framed—Complainant and his witnesses remaining absent—Acquittal of accused—Legality of.

After examining the complainant and his witnesses the Magistrate framed charges against accused under Ss. 379 and 426, Penal Code. But when he found both the complainant and his witnesses absent on the date to which the trial was adjourned he passed an order to the effect that the accused were not guilty and that they were acquitted under S. 258 (1), Criminal P. C.

Held, that the procedure adopted by the Magistrate was not warranted by law and that if the complainant and his witnesses were absent on the adjourned date the Magistrate should have secured their presence by coercive process; their absence was not a ground for acquitting the accused. [Para 3]

Annotation : Cr. P. C., S. 258, N. 3; S. 259, N. 9.

J. C. Medhi—for Complainant.

Judgment.—This is a reference made by the learned Sessions Judge of Upper Assam Districts under the provisions of S. 438, Criminal P. C., in the case of one *Kanakeswar Bora* v. *Asatu Kalita* and 4 others.

[2] The complainant, Kanakeswar Bora, brought a complaint before the Senior Magistrate, Jorhat, in which he alleged that on 2nd February 1948, the accused persons (respondents in this case) at about 8 P. M. met him on the road and stole a money bag from his possession containing Rs. 250. The Senior Magistrate, Jorhat, transferred the case to the 2nd Class Magistrate, Jorhat, who examined the complainant on oath and sent the complaint to the Police for report; on 24th May 1948, on receipt of the report from the Police, the learned 2nd Class Magistrate issued process against the accused persons under Ss. 379 and 323, Penal Code. The accused apparently did not respond to the summons and the learned Magistrate issued warrants against them on 24th June 1948, and 20th July 1948. On 20th September 1948, the Magistrate examined the complainant and 4 of his witnesses; on 5th October 1948, he framed charges against the accused Asatu Kalita and Bopai under Ss. 379 and 426, Penal Code, and discharged the other accused persons under S. 253, Criminal P. C. On 23rd October 1948, the complainant's witnesses failed to appear and the case was adjourned to 20th November 1948, on which date also the complainant and his witnesses were absent. The learned 2nd Class

Magistrate then proceeded to pass the following order :

"Complainant absent and no cause shown. The defence is ready. The P. Ws also are absent and are not presented for cross-examination, and no cause is shown for the absence. Under the circumstances, I do not find the accused guilty under Ss. 379/426, Penal Code, and I acquit the accused under S. 258 (1), Criminal P. C."

[3] The learned Sessions Judge points out that the order of the learned 2nd Class Magistrate acquitting the respondents cannot be maintained in the absence of a judgment in accordance with the provisions of S. 367, Criminal P. C., holding that there were not sufficient reasons to convict the respondents. We think the procedure adopted by the learned 2nd Class Magistrate was not warranted by law, and that if the complainant and his witnesses were absent on 20th November 1948 the learned Magistrate should have secured their presence by coercive process; their absence was not a ground for acquitting the accused.

[4] We accordingly set aside the order of acquittal passed by the learned Magistrate and remand the case for re-trial from the stage at which the learned Magistrate committed the particular illegality. We direct the learned Magistrate to secure the presence of the complainant and his witnesses for further cross-examination after charge by such means as are authorised by law, and thereafter to call upon the respondents to lead evidence in their defence, if they so desire, and after hearing arguments, to dispose of the case according to law, bearing in mind the provisions of S. 367, Criminal P. C.

V.S.B. *Case remanded.*

A. I. R. (37) 1950 Assam 212 *[C. N. 77.]*

THADANI AG. C. J.

Paharatdin Ahmed — Appellant v. *Bhatti Bangaon Co-operative Fishery Society — Respondent.*

Revenue Appeal No. 45 (m) of 1949, D/-22nd August 1949.

(a) Assam Land and Revenue Regulation (I[1] of 1886)—Rules under, R. 190-A—Settlement of fisheries otherwise than by auction—Provincial Government if can order settlement.

When a S. D. O. or Deputy Commissioner decides to settle a fishery otherwise than by an auction sale, he is obliged to communicate to Government the name of the person on whom the fishery is proposed to be settled. But that does not mean that the Provincial Government can make a counter proposal as regards the person upon whom the S. D. O. or Deputy Commissioner should settle the fishery. There is no rule which empowers the Provincial Government to name the person upon whom the S. D. O. or the Deputy Commissioner is obliged to settle the fishery. [Para 6]

Where the order of the S. D. O. settling the fishery otherwise than by auction was influenced by the order of the Provincial Government, held that the order could not be upheld. [Para 7]

(b) Assam Land and Revenue Regulation (I [1] of 1886) – Rules under, R. 190 — Appeal against Government order.

The order of the Provincial Government settling a fishery otherwise than by auction is an order against which no right of appeal is given under the Regulation. [Para 8]

R. K. Choudhuri and J. C. Medhi— for Appellant.

K. R. Barman, Government Advocate — for the Crown.

B. N. Deka—for Respondent.

Judgment.—This is an appeal purporting to be an appeal under R. 190 of the Rules framed under the Assam Land and Revenue Regulation.

[2] The facts of the case are these: On 2nd December 1948, the Subdivisional Officer, Sibsagar, forwarded to the Deputy Commissioner, Sibsagar Jorhat, a petition of one Nagaram Gaonbura and others and a petition of Mvi. Paharatdin Ahmed, the appellant, for settlement of Demow Fishery otherwise than by sale. The S. D. O., Sibsagar, had recommended the petition of the appellant for the following reasons. According to the S. D. O., the appellant, Mvi. Paharatdin Ahmed, had obtained fishing rights for 3 years from 1st April 1946 to 31st March 1949 on an annual payment of Rs. 2600 on certain conditions which included the clearing of water-hyacinths within the first year of the lease and an undertaking to supply one maund of fish daily to Sibsagar Town during the months of July to September on a rate fixed by the Subdivisional Officer. The S. D. O., Sibsagar, reported that the appellant had carried out the conditions of the lease and had spent a considerable amount of money in clearing water-hyacinths and removing logs and had supplied fish in the Municipal Market according to the terms of the lease. He, therefore, recommended that the Government should settle the fishery upon the appellant for a term of 3 years from 1st April 1949 to 31st March 1952. The Deputy Commissioner, Sibsagar, forwarded the petitions to the Government recommending that the fishery be settled upon the appellant. The Government of Assam, however, did not agree with the recommendations of the S. D. O., or the Deputy Commissioner and passed the following order, dated 10th February 1949:

"This fishery was leased out at an annual value of Rs. 2600 for 3 years. This lease expires on 31st March next. The Deputy Commissioner, Sibsagar, now recommends to lease it out for a term of 3 years at an annual value of Rs. 3,500 (three thousand five hundred). The Government policy with regard to settlement of fisheries is to settle fisheries with fisherment Co-operative Societies even at a 10% rebate. In this case, the Bhatti Bongaon Co-operative Fishery Society is one of the

applicants for settlement of the Dimow Fishery. The Subdivisional Co-operative Inspector, the Primary and District Congress Committee Presidents certify its *bona fides* and recommend its case This Dimow fishery is, therefore, settled under R. 190A of the A. I R Manual for 3 years from 1st April 1949 to 31st March 1952 with the Bhati Bongaon Co-operative Fishery Society at an annual value of Rs 3,500 (three thousand and five hundred) subject to the following conditions:

1. That the lessee will effect considerable improvement in the fishery by clearing water hyacinth etc. within the first year of settlement.

2. That the lessee will execute a bond binding himself to supply one maund of fish per day regularly in Sibsagar Town during the months of July to September, failing which, the lease of the fishery will be liable to cancellation with forfeiture of security deposit."

The Sub-divisional Officer, on receipt of the order passed by Government, passed the following order on 24th February 1949:

"Settlement sanctioned with the Bhati Bongaon Fishery Society for 3 years, with an annual value of Rs. 3,500 from 1st April 1949 to 31st March 1952, vide Government No. R.F.28/48/41, dated 10th February 1949, received with D C's Memo No. S.J.R III/1/49/30, dated 19th February 1949."

It is against this order of the S D. O. that an appeal under R. 190 of the rules framed under the Regulation has been preferred.

[3] Mr. Barman for the Government contends that no appeal lies against the order, which is only nominally an order passed by the S. D O. but is, in fact, an order of the Provincial Government. Mr. Chaudhuri for the appellant, on the other hand, contends that the order against which the appellant has preferred the appeal is an independent order passed by the S. D. O. and, as such, is appealable under R. 190.

[4] Whether one interprets the order of the S. D. O., dated 24th February 1949, as an independent order or merely as an order which purports to communicate to the parties concerned the order of the Provincial Government the result of the appeal will, in my opinion, be the same. Mr. Chaudhuri on behalf of the appellant has contended that the Provincial Government has no power under the Regulation to settle fisheries upon any body, that the power to settle fisheries under the Regulation is given to the Deputy Commissioner alone and that there is a procedure prescribed for settling fisheries which lays down that ordinarily, fisheries shall be settled by an auction sale unless by previous sanction, the Provincial Government decides that it may be settled otherwise than by an auction sale.

[5] Mr. Barman for the Government contends that the proper interpretation of R. 190A is that the Provincial Government has the right to settle fisheries upon anybody it likes and in any manner it likes. It may be that the Provincial Government has the right to settle fisheries upon anybody it likes and in any manner it likes but not under the Regulation. Under the Regulation, the Provincial Government is merely empowered to sanction previously a sale otherwise than by auction; that is to say, the Deputy Commissioner, in virtue of the previous sanction accorded by Government for sale of a fishery otherwise than by auction sale, is empowered to settle the fishery, but not the Provincial Government.

[6] In this case the S. D. O. and the Deputy Commissioner had recommended that the fishery in question should not be sold by public auction but should be settled without a public auction. It is true that both the S D. O. and the Deputy Commissioner had recommended that the appellant should be given the fishing rights without an auction. They were apparently under an obligation to inform the Government that the fishery should be settled upon the appellant otherwise than by an auction sale. When a fishery is sold by public auction under the Regulation, the sale is subject to confirmation by the Development Commissioner. Naturally, therefore, when a S D. O. or Deputy Commissioner decides to settle a fishery otherwise than by an auction sale, he would communicate to Government the name of the person on whom the fishery is proposed to be settled. But that does not mean that the Provincial Government can make a counter proposal as regards the person upon whom the S. D. O or Deputy Commissioner should settle the fishery. If the Government decides to accord sanction for settlement of a fishery otherwise than by an auction sale, so far as I can see from the rules framed under the Regulation, there is no rule which empowers the Provincial Government to name the person upon whom the S D. O or the Deputy Commissioner is obliged to settle the fishery.

[7] Mr. Chaudhuri's contention is that the order of the S. D. O. is an order in respect of which the S. D. O. had assumed full responsibility and is, therefore, an appealable order. I am inclined to accept the contention. The difficulty, however, in giving effect to the order of the S. D. O. is this. It is clear from the correspondence in the case that it was never the S. D. O.'s intention to settle the fishery upon the respondent; he clearly intended to settle the fishery without an auction sale upon the appellant, and yet in his order he states that the fishery is settled upon the respondent, which I cannot regard, under the circumstances, as an order uninfluenced by the order of the Provincial Government. I am not prepared, therefore, to uphold the order of the S. D. O., which I hereby set aside.

[8] But even after setting aside the order of the S. D. O., the difficulty created by the order of the Provincial Government, dated 10th February 1949 still remains. The order of Government is an order against which no right of appeal is given under the Regulation. This difficulty was pointed out to Mr. Chaudhuri, namely that even after the order of the S. D. O., dated 24th February 1949, is set aside, the order of the Provincial Government will stand, and to that extent the appeal would be infructuous.

[9] The result then is that while the order of the S. D. O., dated 24th February 1949, is set aside, the order of the Provincial Government dated 10th February 1949 survives.

[10] The appeal is disposed of by the above order.

V.B B. *Order accordingly.*

A. I. R. (37) 1950 Assam 214 *[C. N. 78.]*

THADANI C J. AND RAM LABHAYA J.

Ka Or Shabong—*Petitioner* v. *Ka Lasubon Shabong and others* — *Opposite Party.*

Civil Revn. No. 13 (H) of 1949, D/- 30-11-1949, against order of Deputy Commissioner, Khasi and Jaintia Hills, D/- 16-12-1948.

(a) Civil P. C. (1908), S. 115— Decision going to root of jurisdiction.

If the trial of a suit depends on the question whether a particular enactment is in force in a particular territory the decision of the question goes to the root of the jurisdiction of the trial Court and the High Court will interfere with the erroneous decision of the trial Court. [Para 5]

Anno. Civil P. C., S. 115, N. 12.

(b) Specific Relief Act (1877), Ss. 1, 42—Suit for mere declaration — Court-fees Act (1870), S. 7 (iv) (c), Sch. II Art. 17 (iii).

Specific Relief Act does not apply to Khasi and Jaintia Hills and a suit for a mere declaration of title without the consequential relief of possession and without payment of *ad valorem* court-fee is maintainable. [Paras 6, 7]

Anno Specific Relief Act, S. 1, N. 1; S. 42, N. 7; Court-fees Act, S. 7 (iv) (c), N. 1.

R. K Goswami—for Petitioner.

C. Lyngdoh — for Opposite Party.

Thadani C. J. —This is an application under S. 36 of the rules framed for the Administration of Justice and Police in the Khasi and Jaintia Hills against an order, dated 16th December 1948. passed by the Deputy Commissioner, Khasi and Jaintia Hills.

[2] One Ka Or Shabong instituted a suit against certain defendants for a declaration of her right, title and interest to certain properties situated at Laitlyngkot in the Khasi and Jaintia Hills. At the trial of the suit, the E. A. C. tried two issues as preliminary issues—one relating to jurisdiction and the other to the payment of requisite court-fee—both in favour of the plaintiff, by his order, dated 20th August 1947. Against this order, the defendants preferred an appeal to the Deputy Commissioner who, by his order, dated 16th December 1948, while agreeing with the E. A. C 's finding on the issue as to jurisdiction, took the view that the plaintiff's suit for a declaration only was not competent, and called upon the plaintiff to seek consequential relief and to pay additional court-fee on the relief as to possession, and directed the E. A. C. to try the suit on payment of *ad valorem* court-fee.

[3] The learned advocate for the applicant has contended that the learned Deputy Commissioner, in ordering the plaintiff to add consequential relief as to possession and to pay additional court fee on the consequential relief, has misconstrued the scope of the rules framed for the Administration of Justice and Police in the Khasi and Jaintia Hills — a construction which has resulted in depriving the trial Court of its jurisdiction to try the suit, as framed, namely, a suit for declaration of title only. It appears that the learned E. A. C., in disposing of the question as regards relief as to possession, took the view that the Specific Relief Act was not applicable either to the parties or to the territories in which the cause of action arose and declined to order the plaintiff to seek additional relief and to pay court-fee thereon.

[4] Mr. Lyngdoh for the opponent has contended that in view of the judgment of this Court in Civil Revision No. 33 (H) of 1949, the application must be rejected.

[5] We have carefully read our judgment, dated 17th August 1949, and we think that the question involved in the present application was not then under consideration. What we are concerned with in this case is the question whether or not the Specific Relief Act is applicable to this particular territory. The learned Deputy Commissioner has apparently founded his order on the supposition that the Specific Relief Act is in force in the territory in question. It is true that a revisional Court will not interfere simply because there has been an error of law. But it is plain that the question whether a particular enactment is applicable to a particular territory is a question of fact, and not one of law, and it is equally plain to us that if the trial of the suit depends on the question whether a particular enactment is in force in a particular territory, the decision of the question goes to the root of the jurisdiction of the trial Court.

[6] The learned Deputy Commissioner has taken the view, by implication at any rate, that the Specific Relief Act applies to the territory in question. But a bare reference to S. 1, Specific Relief Act shows that the Act does not extend to Scheduled Districts as defined in Act XIV [14]

of 1874, and it is not disputed that the territory in question forms part of a Scheduled District. No regulation or order has been brought to this territory.

[7] We, therefore, set aside the order of the learned Deputy Commissioner, dated 16th December 1948, and restore that of the trial Court. which will dispose of the suit according to law without calling upon the plaintiff to seek further relief and to pay *ad valorem* court-fee, as ordered by the Deputy Commissioner.

[8] **Ram Labhaya J.**—I agree in the conclusions. The Deputy Commissioner has apparently exceeded his jurisdiction in including the relief for possession in the suit by his own order and ordering the plaintiff to pay *ad valorem* court-fee thereon. His order is, therefore, liable to reversal. The relief prayed for is properly valued and the court-fee is not deficient. Issue 2 must, therefore, be decided in plaintiff's favour. as has been done by the trial Court. In the result, the order of the trial Court on the issue in question must be restored and that of the Deputy Commissioner reversed.

D.H. *Revision allowed.*

A. I. R. (37) 1950 Assam 215 *[C. N. 79.]*

THADANI C. J.

Muzafar Sheik —*Appellant* v. *Jahuruddin Sheikh* — *Respondent.*

R. A. No. 57 of 1949, D/- 16-12-1949, against order of Deputy Commissioner, Nowgong, D/- 25-3-1949.

Assam Land and Revenue Regulation (I [1] of 1886), S. 53A (2) (as amended in 1946)—Retrospective effect.

The period of three years in S. 53A (2) (as amended by Act XI [11] of 1946) applies even to orders passed before the Assam Land and Revenue (Amendment) Act (XI [11] of 1946) came into force. [Para 4]

P. K. Lahiri —for Appellant.

J. Chaudhuri —for Respondent.

Judgment.—This is an appeal against an order of the learned Deputy Commissioner of Nowgong, dated 25th March 1949, by which he set aside an order of the S. D. C., dated 6th January 1949, by which he had removed the name of Jahuruddin Sheik from the Mutation Register. On appeal by Jahuruddin to the Deputy Commissioner, the learned Deputy Commissioner set aside the order of the S. D. C. Muzafar Sheik has now appealed to this Court seeking to have his name restored in the Mutation Register.

[2] It is conceded by Mr. Lahiri for Muzafar Sheik, the appellant, that the order in the Field Mutation Register in favour of the respondent Jahuruddin was made on 10th August 1933; i. e., before the Assam Land and Revenue (Amendment) Act 1946 (Act XI [11] of 1946) came into force, there was no time limit for filing an application under S. 53A, sub-s. (2). But by S 2, Assam Land and Revenue (Amendment) Act of 1946 (Act XI [11] of 1946) in sub-s. (2) of S. 53A of the principal Regulation, namely, the Assam Land and Revenue Regulation, between the words 'may' and 'apply,' the words 'within a period of three years of the date of such order' have been inserted. Sub-section (2) of S 53A of the Regulation will, therefore, read thus :

"Where any person is aggrieved by an order directing registration under this section which has been made after verification of the information received by local inquiry only, he may within a period of three years of the date of such order apply to the Deputy Commissioner to have such order set aside."

[3] It is common ground that the appellant in this case applied to the Deputy Commissioner to have his name entered in the Mutation Register on 1st July 1947 and the Assam Land and Revenue (Amendment) Act, 1946, came into force on 2nd January 1947. Mr. Lahiri for the appellant contends that the amendment Act has no application to an order such as the one passed in this case, for if 3 years period applies to the order in this case made on 10th August 1943 the application would have been barred in August 1946. He contends that it was not the intention of the Legislature to apply the Assam Land and Revenue (Amendment) Act of 1946 to orders which had been passed before the Act came into force namely on 2nd January 1947.

[4] I am unable to accept this contention. If that was the intention of the Legislature, it could have been stated in express terms. Indeed, it may well be the intention of the Legislature to leave untouched orders made under S. 53A more than 3 years before the Amendment Act of 1946 came into force. The language of sub-s (2) of S. 53A as amended, in my opinion, applies to all orders which direct registration under S. 53A, Assam Land and Revenue Regulation. In this case, the order having been passed more than 3 years before 2nd January 1947, the Deputy Commissioner was right in rejecting the application of the appellant.

[5] The appeal fails and is, therefore, dismissed with no order as to costs.

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Assam 216 *[C. N. 80.]*

RAM LABHAYA J.

Thirai Doloi — Appellant v. *Singheswar Chutia and another—Respondents.*

Second Appeal No. 13 of 1949, D/- 16-12-1949.

(a) Evidence Act (1872), S. 114 — Payment towards principal—Inference as to interest.

The fact that a certain sum is paid towards the principal on a certain date does not justify the conclusion that interest up to that has been paid. In fact, it is not a matter of presumption or inference at all. [Para 5]

Anno. Evidence Act, S. 114, N. 39.

(b) Civil P. C. (1908), S. 100 — Erroneous inference drawn from a proved fact justifies interference in second appeal. [Para 5]

Anno. Civil P. C., 100-101, N. 28, 32.

B. C. Barua—for Appellant; U. K. Goswami—for Respondents.

Judgment.—This appeal arises out of a suit for recovery of a sum of Rs. 320 on the basis of a registered deed of mortgage executed on 1.9.1930. The deed provided that the mortgagor would pay interest at the rate of Rs. 3 per cent. per mensem. The debt was to be repaid within one year. A sum of Rs. 80 only was paid on 4-8-1943 towards the principal. An endorsement stating this fact was made on the back of the mortgage-deed. The suit was for recovery of Rs. 320, representing the balance of the principal, viz , Rs. 120 and Rs. 200 as interest.

[2] The defendant pleaded repayment of the debt. He also raised the plea of limitation.

[3] The learned Munsiff of Jorhat found that the payment of Rs 80 towards the principal on 4-8-1943 was proved. The endoresement on the back of the bond was signed by the debtor. This saved the limitation for the suit. He found that the plea of repayment had not been substantiated. He, however, granted plaintiff a decree for a sum of Rs 140-5-0 only on the ground that the payment of Rs. 80 on 4-8-1943 raised a presumption in favour of the debtor that interest up to that time had all been paid.

[4] The plaintiff appealed and that learned Subordinate Judge agreed with the trial Court. Plaintiff has come to this Court on second appeal.

[5] The only question that arises for consideration is whether plaintiff is entitled to interest from the date of the mortgage debt up to the date on which the sum of Rs. 80 was paid on the entire amount of the debt and interest from that date onwards on the balance that remained due. The presumption that the Courts below have raised from the fact of payment of principal on a certain date has got no basis or justification. The fact that a certain sum is paid towards the principal on a certain date does not justify the conclusion that interest up to that date has been paid. In fact, it is not a matter of presumption or inference at all. If repayment of the loan was not proved and if there was no evidence that interest up to that date had in fact been paid, no presumption should have been drawn in favour of the defendant. The erroneous inference drawn from a proved fact justifies interference in second appeal, as besides excepting (?) the inference there is no evidence on which the finding arrived at by the Courts below could rest.

[6] The loan was advanced on 1-9-1930. This suit was instituted on 31-5-1946. Plaintiff is claiming only Rs. 200 as interest, that is a sum equal to the principal This claim is not excessive and is permitted by law. He is, therefore, entitled to the full amount claimed The appeal is allowed. The plaintiff is granted a preliminary decree for Rs. 320 which includes principal and interest. He shall also be entitled to his cost of the suit on this amount. The decree shall further direct that the amount due shall be paid within six months from the date of the decree and on payment being made, plaintiff shall deliver up to the defendant or to such person as the defendant appoints all documents in his possession or power relating to the mortgage property and shall, if so required, retransfer the property to the defendant at his cost, free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him and on his failure to pay the amount on or before the date fixed, plaintiff shall be entitled to apply for a final decree directing that the mortgage property or a sufficient part thereof be sold and the proceeds of the sale (after deduction therefrom of the expenses of the sale be paid into Court and applied in payment of what has been found due to the plaintiff under the preliminary decree together with such amount as may have been adjudged due in respect of subsequent costs and charges, etc., and the balance, if any, be paid to the defendant or other person entitled to receive the same.

G.M.J. *Order accordingly.*

END

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CALCUTTA HIGH COURT

1950.

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AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
269	ILR (1948) 2 C 485	312	ILR (1949) 1 C 333	20	ILR (1949) 1 C 400	185	ILR (1949) 1 C 507
274	ILR (1949) 1 C 37	320	ILR (1949) 1 C 109	63	ILR (1949) 1 C 104	189	ILR (1949) 1 C 482
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296	ILR (1948) 2 C 469	348	ILR (1949) 1 C 158	69	ILR (1948) 2 C 503	253	ILR (1949) 1 C 408
305FB	ILR (1949) 1 C 271	353	ILR (1949) 1 C 371	93	ILR (1949) 1 C 62	426	ILR (1948) 2 C 554
309	ILR (1948) 2 C 496	356	ILR (1949) 1 C 318	109	ILR (1949) 1 C 293		

A. I. R. (37) 1950 Calcutta = Other Journals

AIR 1950 Calcutta			AIR 1950 Calcutta			AIR 1950 Calcutta			AIR 1950 Calcutta		
AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
1	...		128	...		217	54 C W N	110	323	54 C W N	601
8	53 C W N	700	129	51 Cr L J	610	225	53 C W N	718	325	85 C L J	6
12	53 C W N	817	134	54 C W N	307		83 C L J	306	326	...	
15	54 C W N	243		85 C L J	1	229	...		327	54 C W N	221
	85 C L J	10	135	...		230	53 C W N	640		51 Cr L J	1247
20	54 C W N	149	138	51 Cr L J	636		83 C L J	285	328	...	
23	54 C W N	58	140	51 Cr L J	645	232	...		329	54 C W N	488
30	53 C W N	835	142	54 C W N	654	236	...			51 Cr L J	1236
35	51 Cr L J	336	146	54 C W N	310	240	54 C W N	262	330	54 C W N	384
	1950 AWR (Sup)	5	147	51 Cr L J	663	244	54 C W N	376		51 Cr L J	1241
	1950 All Cr C	21	149	...		246	54 C W N	181	331	85 C L J	93
36	51 Cr L J	346	152	53 C W N	863		85 C L J	98		1950 A W R (Sup)	
53	...		156	...			1950 A W R (Sup)				56
54	...		157	51 Cr L J	668			58		51 Cr L J	1282
57	51 Cr L J	388	159	85 C L J	202		51 Cr L J	720	333	...	
	1950-20 Comp C	220		54 C W N	677	247	54 C W N	749	339	85 C L J	144
59	...		161	54 C W N	207	249	54 C W N	20		1950 A W R (Sup)	63
61	51 Cr L J	394		51 Cr L J	676		84 C L J	108		51 Cr L J	1288
	1950-20 Comp C	233	163	...		252	54 C W N	936	340	54 C W N	373
63	54 C W N	182	164	...		255	54 C W N	491		51 Cr L J	1290
66	83 C L J	397	165	51 Cr L J	680	256	...		341	...	
	51 Cr L J	376	166	...		259	54 C W N	135	342	54 C W N	372
74	84 C L J	157	168	51 Cr L J	724	261	...		343	85 C L J	57
	54 C W N	366	170	...		263	54 C W N	389		1950 A W R (Sup)	48
77	51 Cr L J	400	173	...			86 C L J	285		51 Cr L J	1293
80	51 Cr L J	407	174	54 C W N	322	265	54 C W N	442	346	51 Cr L J	1298
82	84 C L J	263		85 C L J	105	267	...		349	85 C L J	276
	54 C W N	284	177	51 Cr L J	856	270	1950-18 I T R	635		51 Cr L J	1315
83	...		179	85 C L J	390	274SB	54 C W N	394	350	85 C L J	147
85	54 C W N	139	186	...			51 Cr L J	1110		1950 A W R (Sup)	64
87	54 C W N	355	188	51 Cr L J	861	287	...			51 Cr L J	1325
92	53 C W N	899	189	...		296	54 C W N	380		85 C L J	149
96	...		191	...		298	...			54 C W N	286
97	51 Cr L J	469	193	51 Cr L J	596	300	...			51 Cr L J	1334
99	51 Cr L J	457	195	54 C W N	327	303	85 C L J	229		...	
100	54 C W N	154	196	...			51 Cr L J	1149		54 C W N	297
102	...		200	84 C L J	197	304	...			54 C W N	447
107	...			51 Cr L J	606	306	51 Cr L J	1201		51 Cr L J	1307
108	51 Cr L J	556	201	...		310	51 Cr L J	1212		...	
109	...		202	51 Cr L J	879	314	54 C W N	220		...	
111	54 C W N	680	207	...			51 Cr L J	1234		51 Cr L J	1340
116	54 C W N	84	209	54 C W N	106	315	1950-18 I T R	653		...	
	51 Cr L J	520	212	54 C W N	254	317	54 C W N	321		...	
121	53 C W N	620	213	...			51 Cr L J	1231		51 Cr L J	1340
125	51 Cr L J	546	214	54 C W N	12	318	54 C W N	476		...	
				84 C L J	1	319	54 C W N	541		...	
						322	54 C W N	164		...	

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376	86 C L J	293	421	54 C W N	438	472	54 C W N	536	531	...	
377	54 C W N	225	423	54 C W N	480	473	54 C W N	940	532	54 C W N	581
379	54 C W N	445	425	51 Cr L J	1530	477	54 C W N	577	533	...	
381	...		426	...		479	...		536	54 C W N	626
386	...		427	...		485	54 C W N	493	543	54 C W N	823
391	84 C L J	139	428	84 C L J	183	487	...		544	54 C W N	624
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397	54 C W N	454	430	...		493	54 C W N	815	548	54 C W N	716
399	54 C W N	70	431	...		498	54 C W N	801	551	1950 18 I T R	112
	1950 20 Comp C	164	434	54 C W N	496	502	54 C W N	489	555	85 C L J	155
401	54 C W N	455	435	86 C L J	21	503	54 C W N	499	559	85 C L J	256
406	54 C W N	329	437	...		506	...		564	54 C W N	933
	51 Cr L J	1486	438	...		510	85 C L J	270	565	...	
410	85 C L J	200	440	54 C W N	474	512	54 C W N	793	566	85 C L J	208
	51 Cr L J	1496	441	...		513	54 C W N	900	568	...	
411	54 C W N	451	444SB	54 C W N	334	515	55 C W N	75	570	85 C L J	50
412	85 C L J	196	457	54 C W N	784	519	55 C W N	65		1950-18 I T R	126
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413	51 Cr L J	1520	463	54 C W N	807	523	1950 A W R (Sup)	96	576	54 C W N	733
415	54 C W N	416	465	...					577	54 C W N	232
417	84 C L J	188	466	54 C W N	535	524	54 C W N	556	578	85 C L J	126
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NOTE

As most of the Indian Law Reports and the Official Reports have yet to complete their years, it has been decided not to delay issuing of these Indexes but to give the reference Table of Other Journals = All India Reporter in the next year's Index.

LIST OF CASES OVERRULED OR REVERSED IN A. I. R. (37) 1950 CALCUTTA.

('16) A. I. R. (3) 1916 Cal. 824=20 C. W. N. 789=23 C. L. J 217=34 I. C. 789, Eastern Mortgage and Agency Co. Ltd. v. Permananda Saha.	Overruled in A. I. R. (37) 1950 F. C. (C. N. 16) 140.
('36) A. I. R. (23) 1936 Cal. 576=I. L. R. (1937) 1 Cal. 112=167 I. C. 482, Sachindra Nath v. Trailokya Nath.	Held impliedly overruled by A. I. R. (35) 1948 Cal. 48 (S. B.) in A. I. R. (37) 1950 Cal. (C. N. 94) 265.
('37) 41 C. W. N. 674, Satis Chandra v. Jogendra Krishna.	Held impliedly overruled by A. I. R. (35) 1948 Cal. 48 (S. B) in A.I.R. (37) 1950 Cal. (C. N. 94) 265.
('46) 50 C. W. N. 310, Ramkisendas v. Satya Charan	Reversed in A. I. R. (37) 1950 P. C. (C. N. 32) 81
('49) 53 C. W. N. 744, Commissioner of Agricultural Income-tax, West Bengal v. Keshab Chandra Mandal.	Reversed in A. I. R. (37) 1950 S. C. (C. N. 19) 265.

THE

ALL INDIA REPORTER

1950

Calcutta High Court

A. I. R. (37) 1950 Calcutta 1 *[C. N. 1.]*

G. N. DAS AND LAHIRI JJ.

Sm. Maya Debi and others — Appellants v. *Sm. Rajlakshmi Debi and others — Respondents.*

A. F. O. O. Nos. 83 of 1945, 145 of 1947 and 22 of 1948, Decided on 2nd May 1949, from orders of Sub-Judge, Nadia, D/- 4th December 1944 and 13th August 1947.

(a) Bengal Patni Taluqs Regulation (VIII [8] of 1819), S. 13 (4)—Position of depositor under S. 13 (4) stated — Putni sale—Darputnidar depositor entering into possession of putni and obtaining decree for rent against other darputnidar — Subsequent relinquishment of possession in favour of putnidar by giving notice authorising him to realise all arrears accruing due during his period of possession — Putnidar becomes assignee by operation of law or by writing and is entitled to execute decree for rent — Civil P. C. (1908), O. 21, R. 16.

It is difficult to describe the position of the depositor under S. 13 (4), Bengal Putni Taluqs Regulation either as that of a bailiff, or as an agent, or as a trustee, or the holder of a lien, or as that of an owner. The position depends on the true view one has to take of the effect of S. 13 (4) of the Putni Regulation. His position is an anomalous one and it is difficult to define it accurately by a legal concept ordinarily known to law. He is in the position of a creditor who holds the defaulting tenure as if it was mortgaged to him. He has an additional right to be put in possession on his applying for the same. In the latter event if he obtains possession, he can retain possession of the same and collect the profits of the tenure saved from sale including rents which were unrealised at the time of his entering into possession and rents accrued during the subsistence of his possession and apply the same in satisfaction of the deposit made by him. He can, however, give up possession even before the advance made by him is satisfied, amicably without recourse to a suit or an order of the Collector. If he gives up possession in such circumstances, his right to collect the rents already accrued or to accrue thereafter, decretal or otherwise, cease and all such rights which had inhered in him because of his entry into possession becomes vested in the defaulting tenure-holder who goes into possession on the depositor vacating the same: *Case law discussed.* [Paras 14 and 16]

A, a dar-patnidar who had deposited under S. 13 (4) the arrears of revenue to avoid a putni sale entered into possession of the putni and obtained a decree for arrears of rent against *B*, another dar-putnidar. *A* gave up possession of the putni by giving notice to *C*, the putnidar. The terms of the notice showed that *A* intended to vest *C* with the right of realising all arrears of rent, decretal or otherwise, during the time he was in possession of the putni :

Held that the putnidar *C* could be regarded as the assignee of the decree-holder *A* by operation of law or by assignment in writing within the meaning of O. 21, R. 16, Civil P. C. and therefore *C* was entitled to execute the decree for rent obtained by *A*: A. I. R. (8) 1921 Cal. 74 and A. I. R. (23) 1936 Mad. 543, *Rel. on*; A. I. R. (11) 1924 Cal. 661 and A. I. R. (19) 1932 Cal. 439, *Disting.* [Paras 18 and 20]

Annotation : ('44-Com.) C. P. C., O. 21, R. 16 N. 4, 5 and 9.

(b) T. P. Act (1882), S. 111 (d) — Merger — To constitute merger there must be union of entire interest of lessor and lessee — Putni sale — Darputnidar depositing amount under S. 13 (4), Bengal Putni Regulation — He subsequently acquiring interest of another dar-putnidar in execution of his rent decree — Position of depositing dar-putnidar being that of mortgagee there is no merger of darputni purchased by him — Bengal Tenancy Act (VIII [8] of 1885), S. 168A—T. P. Act (1882), S. 63 — Trusts Act (1882), S. 90.

In order to constitute merger within S. 111 (d), T. P. Act, the interest of the lessor and the lessee in the whole of the property should become vested at the same time in one person in the same right; that is to say, there must be a union of the entire interest of the lessor and the lessee or the landlord's interest must sink in the reversion. [Para 21]

A, a dar-putnidar who had made a deposit under S. 13 (4), Bengal Putni Regulation 1819, entered into possession of the putni, obtained a decree for arrears of rent against another dar-putnidar *B* under the same putni and purchased the same in execution sale. *A* subsequently sought to execute another decree for arrears of rent against *B* by attachment and sale of his other property. The question was whether there was a merger of *B's* dar-putni interest in the putni for purposes of S. 168A, Bengal Tenancy Act :

Held that the acquisition of *B's* dar-putni interest by *A* did not have the effect of extinguishing the dar-putni interest so purchased and, therefore, there was no merger in the eye of law. *A* being in the position of a mortgagee by reason of the deposit the dar-putni so

purchased would not be an accession ipso jure so far as the mortgagor putnidar was concerned. The combined effect of S. 90, Trusts Act and S. 63, T. P. Act is that till the redemption of the security, the accession, that is, the purchased property, does not become the absolute property of the mortgagor. [Para 22]

Annotation : ('45-Com.) T. P. Act, S. 63, N. 5 ; S. 111, N. 7; ('46-Man.) Trusts Act, S. 90, N. 10.

(c) Hindu law — Debts — Decree against father — Decree cannot be executed personally against sons on strength of pious obligation (*Obiter*).

(Obiter). — Hindu son is under no pious obligation to pay the debts of his father out of his personal assets. No personal execution can be levied as against a Hindu son on the strength of a pious obligation on the part of the son to repay the father's debt: A. I. R. (21) 1934 Pat. 187, *Rel. on.* [Para 22]

Annotation: ('44-Com.) Civil P. C., S. 53, N. 1.

(d) Benami transaction — Burden of proof — Burden lies on person alleging it — Gift of land by father to son — Son's name mutated in landlord's sherista and rent paid by him — Gift is not benami — Indebtedness of father at time of gift is not conclusive—Evidence Act (1872), Ss. 101 to 103.

The question of proving that a transaction is benami rests on the person who argues against the tenor of the deed. It is also well established that no conclusion as regards the benami character of a transaction can be founded on suspicion. [Para 31]

Where a gift of land is made by a father in favour of his son and the name of the donee is mutated in the landlord's sherista and rent is paid by the donee to the landlord it must be assumed that the payment was made by the donee on his own behalf unless it is shown that he acted as agent of the donor. The fact that the donor had debts at the time of gift is not conclusive to show that the gift was a benami transaction. [Para 31]

Annotation : ('46-Man.) Evidence Act, Ss. 101 to 103, N. 20;

In No. 83 of 1945 :

Apurbadhan Mukherjee, Amarnath Banerjee and Chandra Narayan Laik—for Appellant.

Panchanon Ghose, Sourindra Narayan Ghose and Sukumar Ghose (Jr.) — for Respondents.

In No. 145 of 1947:

Panchanon Ghose, Chandra Sekhar Sen and Sourindra Narayan Ghose — for Appellant.

Apurbadhan Mukherjee and Phanindra Nath Dey for Respondents.

In No. 22 of 1948:

Chandra Sekhar Sen, Phanindra Nath Dey and Mritunjoy Dey — for Appellants.

Apurbadhan Mukherjee and Sourindra Narayan Ghose — for Respondents.

G. N. Das J.—These three appeals arise out of proceedings in execution of decrees for rent. In First Miscellaneous Appeal No. 83 of 1945, the appellant is Sm. Maya Debi. First Miscelloneous Appeal No. 22 of 1948 and First Miscellaneous Appeal No. 145 of 1947 arise out of the same execution proceedings. In F. M. A. 22 of 1948, the appellants are Probodh Kumar Roy and Pabitra Kumar Roy. In F. M. A. 145 of 1947, the appellants are Kshitish Chandra Roy and Shib Chandra Roy. The facts common to all these appeals may be stated now.

[2] The Maharaja of Cossimbazar was the proprietor of a zemindary under which a putni was held by one Sarat Moni Debi whose interest is now represented by Maya Debi. Under the putni there were several dar-putnies. We are concerned with three of such dar-putnies in these appeals. One of the dar-putnies was held by the Midnapore Zemindary Company. A second Dar-putni was held by Satish Chandra Roy, since deceased, Kshitish Chandra Roy and Shib Chandra Roy and Suryyapada Dutta. A third dar-putni was held by the said Roys and Dutt and Bibhuti Bhusan Pal Choudhury and three others. The putni of Sarat Moni Debi was put up for sale under Regulation VIII [8] of 1819 on 17th November 1930. On that date the Midnapore Zemindary Company, one of the dar-putnidars deposited a sum of Rs. 22,974-5-3 pies and saved the putni from sale. The deposit was made under the provisions of S. 13 (4), Putni Regulation (Regulation VIII [8] of 1819).

[3] On an application by the Midnapore Zemindary Company, the company was put in possession of the putni on 26th November 1930. The company continued in possession till the end of Bhadra 1352 B.S. On 10th August 1945 the company gave a notice to Maya Debi the defaulting putnidar expressing their intention to relinquish possession on the expiry of the month of Bhadra 1352. The notice has been marked Ex. A and is printed in the paper book of F. M. A. 22 of 1948, the terms whereof will be adverted to hereafter. We now come to F.M. A. No. 83 of 1945, in which the appellant, as we have said, is Maya Debi.

[4] The facts so far as they are relevant for the purposes of decision of this appeal are that in regard to the dar-putni held by the Roys and Dutt a decree for arrears of rent was obtained by the Midnapore Zemindary Company on 30th June 1934. In execution of that decree, the dar-putni of the Roys and Dutt was brought to sale on 9th December 1935 and was purchased by the decree-holder Midnapore Zemindary Company. In 1935, the Midnapore Zemindary Company instituted a suit for rent, being Rent Suit No. 48 of 1935, claiming arrears of rent from Srabana 1341 B. S. to Jaistha 1342 B.S. This suit was decreed and the company proceeded to execute the same in Rent Execution Case No. 13 of 1942. The prayers made in the execution petition were a sale of other immovable properties of the judgment-debtors and in case the decretal dues were not realised thereby, the appointment of a receiver and for arrest of the persons of the judgment-debtors. In this execution proceeding an objection was raised by the Roys giving rise to miscellaneous case No. 28 of 1942. The miscellaneous case was dismissed on 29th April 1942.

[5] Against the order of dismissal an appeal was taken to this Court by the Roys, being First Miscellaneous Appeal No. 125 of 1942. This appeal was allowed by this Court by its order, dated 28th July 1944. The miscellaneous case was remanded to the trial Court for a decision on the question whether there was in fact a merger of the dar-putni held by the Roys and Dutt and secondly whether in law there could be such a merger.

[6] After the case went back, the learned Subordinate Judge by his order dated 4th December 1944, held that there could be no merger in law and secondly that the merger, if any, did not take place before the amendment of the Bengal Tenancy Act by the addition of S. 168-A to the Act. The learned Subordinate Judge did not come to any finding whether in fact there was such a merger but observed that a prayer for arrest of the persons of the judgment-debtors was possible. In the result, however, the learned Subordinate Judge allowed the objection case and dismissed the execution case started by the Midnapore Zemindary Company.

[7] The Midnapore Zemindary Company preferred an appeal to this Court, giving rise to First Miscellaneous Appeal No. 83 of 1945. The Midnapore Zemindary Company, it appears, did not prosecute the appeal, after the company had declared its intention of surrendering possession of the putni in favour of Maya Debi. The appeal was dismissed on 14th January 1946, for non-prosecution.

[8] Sometime thereafter Maya Debi made an application for restoration of the appeal. The question was heard in the presence of the learned advocates appearing on behalf of Maya Debi, the Midnapore Zemindary Company and the contesting respondents. On 11th December 1946, this Court passed an order setting aside the dismissal of the appeal for non-prosecution and restoring the appeal to file, striking out the name of the Midnapore Zemindary Company and substituting Maya Debi in its place. The question whether the interest of the decree-holder the Midnapore Zemindary Company had devolved on Maya Debi was left open for future adjudication.

[9] At the hearing of the appeal, Mr. Panchanon Ghose, appearing for the respondents objectors, raised a preliminary objection that this appeal cannot be continued by Maya Debi, inasmuch as Maya Debi is not an assignee of the decree-holder the Midnapore Zemindary Company either by operation of law, or by an assignment in writing. This objection has to be considered first.

[10] It is true that a decree can be executed either by the decree-holder, or by an assignee of the decree either by operation of law, or by assignment in writing. The expression "assignment in writing" has been the subject of judicial interpretation in several cases to which our attention has been drawn. In the case of *Mathurapur Zemindary Co., Ltd.* v. *Bhasaram Mondal*, 51 Cal. 703 at p. 708: (A. I. R. (11) 1924 Cal. 661), Mukherjea J. observed that in order that the applicant for execution should be considered as an assignee of the decree, there must be a vesting of the interest of the decree-holder by operation of a statute. The view so expressed by Mukherjea J. was approved of in the case of *Prabashini Debi* v. *Rasiklal Banerjee*, 59 Cal. 297: (A. I. R. (19) 1932 Cal. 439). In the case of *Mahadeo Baburao Halle* v. *Anandarao Shankarao Deshmukh*, 57 Bom. 513: (A.I.R. (20) 1933 Bom. 367), Rangnekar J. observed:

"A transferee by operation of law would be a legal representative of the decree-holder, or the person in whom the interest of the decree holder has become vested under a statute, *e.g.*, the Official Assignee of an insolvent under the Presidency Towns Insolvency Act, or the purchaser at a Court sale in execution of a decree."

[11] In a still later case of the Bombay High Court, namely, the case of *G. N. Asundi* v. *Virappa Andaneppa*, I. L. R. (1939) Bom. 271: (A. I. R. (26) 1939 Bom. 221), a Division Bench of the Bombay High Court observed that an assignment of a decree by operation of law was confined to testamentary succession, forfeiture, insolvency and the like.

[12] The question depends on the legal position of a depositor under S. 13 (4) of the Putni Regulation who has gone into possession and thereafter relinquished possession in favour of defaulting putnidars. Section 13 (4), Putni Regulation provides that if an inferior talukdar who is not himself in default makes a deposit to stay the sale of the superior tenure, out of his private funds, the deposit

"shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means, and the taluk so preserved shall be the security to the person or persons making the advance, who shall be considered to have a lien thereupon in the same manner as if the loan had been made upon mortgage."

The clause goes on to state that the depositor on his application shall be entitled

"to obtain possession of the tenure of the defaulter, in order to recover the amount so advanced from any profits belonging thereto."

[11] The position of the depositor has been stated by Dr. Rash Behari Ghose in his Law of Mortgages in British India as that of a bailiff of the mortgagor without any salary. In the case of *Shah Mukhun Lall* v. *Baboo Sree Keshen Singh*, 12 M. I. A. 157: (2 Beng. L. R. 44 P. C.), the Judical Committee stated that the position of a mortgagee was akin to that of an agent of the mortgagor for collection of rent.

[12] Mr. Mukherjee, appearing for the appellants, has submitted that the position of the depositor who has gone into possession is that of a trustee, having no rights of his own but holding the putni merely for the benefit of the defaulting putnidar. He has also stated that the position of the depositor in such circumstances is that of the holder of a lien within the meaning of S. 100, T. P. Act.

[13] Mr. Ghose, appearing for the respondents, on the other hand, has submitted that the position of the depositor in such circumstances is really that of an owner for the period of his possession.

[14] In our opinion, it is difficult to describe the position of the depositor either as that of a bailiff, or as an agent, or as a trustee, or the holder of a lien, or as that of an owner. The position depends on the true view one has to take of the effect of S. 13 (4) of the Putni Regulation. His position is an anomalous one and it is difficult to define it accurately by a legal concept ordinarily known to law. Mr. Mukherjee's contention that he is merely a trustee is obviously unsound, for the depositor has rights of his own which a trustee does not enjoy. He can appropriate the income of the property in his possession with a view to get repayment of the sum advanced. He can purchase the interest of the putnidar without being subject to disabilities which attach to a trustee. At the most his position may be said to be similar to that of a trustee. Mr. Mukherjee's further contention that he is the holder of a lien having no interest whatsoever in the property is negatived by the express terms of S. 13 (4) of the Putni Regulation and is opposed to a series of decisions of this Court to which we shall advert presently.

[15] Mr. Ghose's contention that he is the owner for the time being is also untenable, for the simple reason that the mortgagor's title is never destroyed, the depositor coming into possession for very limited purpose, namely, the purpose of realising his advances. Section 13 (4) of the Regulation states that the depositor should be regarded as having advanced a loan on a mortgage. It is true that the word "mortgage" as used in S. 13 (4) of the Regulation must have the connotation which the term bore in the year 1819. In the case of *Ramkinkar Banerjee* v. *Satya Charan Srimani*, 66 I. A. 50 at p. 59 : (A. I. R. (26) 1939 P. C. 14), the Judicial Committee observed that:

"Upto the time of the passing of the Transfer of Property Act the rights of mortgagors and mortgagees of land in India were subject to much controversy, though in general the law of England, subject to such modification as justice, equity and good conscience required, was recognised as the law of India also."

In the case of *Gopal* v. *Parsotam*, 5 ALL 121 at p. 127 : (1882 A. W. N. 128 F. B.), Mahmood J. observed that the definition of a mortgage in the Transfer of Property Act has not altered the law but only formulated in clear language the notions of mortgage as understood by writers of text books on Indian mortgages. It is, therefore, futile to say that the position of the depositor is simply that of a lien-holder having no interest in the property saved by the deposit or of an owner for a limited period. In the case of *Abdul Aziz* v. *Beharilal*, 41 I.C. 711 : (A.I.R. (5) 1918 Cal. 466), Fletcher J. observed that a depositor under S. 13 (4) of the Putni Regulation who enters into possession has the express right of a mortgagee in possession and is the only person who can collect rents, grant receipts and give a discharge for the rents due from the subordinate holders of the putni saved by the deposit. In the case of *Jakhomull Mehere* v. *Sarodaprosad Dey*, 7 C. L. J 604 at p. 609, Mukherji J. stated the position of a depositor to be that of a usufructuary mortgagee. In the later case of *Ramjiban Bhadra* v. *Tazuddin Kaji*, 15 C. W. N. 404 : (9 I. C. 489), this Court held that S. 13 (4) of the Putni Regulation gave the darpatnidar making the deposit a usufructuary mortgage of the putni in order to recover the advance from the profits of the putni. This view was assumed to be correct in the case of *Midnapur Zemindary Co. Ltd.* v. *Saradindu Mukhopadhaya*, 52 C. W. N. 724 : (A. I. R. (35) 1948 Cal. 250) and the rights of the depositor were worked out on the footing that S. 76, T. P. Act was attracted.

[16] The above discussion, therefore, shows that the position of the depositor is not that as contended for either by Mr. Mukherjee for the appellants, or by Mr. Ghose for the respondent. In our opinion his position is an anomalous one. He is in the position of a creditor who holds the defaulting tenure as if it was mortgaged to him He has an additional right to be put in possession on his applying for the same. In the latter event if he obtains possession, he can retain possession of the same and collect the profits of the tenure saved from sale including rents which were unrealised at the time of his entering into possession and rents accrued during the subsistence of his possession and apply the same in satisfaction of the deposit made by him. He can, however, give up possession even before the advance made by him is satisfied, amicably without recourse to a suit or an order of the Collector. If he gives up possession in such circumstances, his right to collect the rents already accrued or to accrue thereafter, decretal or otherwise, ceases and all such rights which had inhered in him because of his entry into possession becomes vested in the defaulting tenure-

holder who goes into possession on the depositor vacating the same. In this view, the conclusion follows that on the Midnapore Zemindary Company giving up possession by notice and on Maya Debi's entry into such possession, the latter became entitled to the interest of the decree-holder, the Midnapore Zemindary Company, in the decree with which we are now concerned which was not realised by the Midnapore Zemindary Company and satisfaction whereof was not accorded by the Midnapore Zemindary Company. In our opinion, therefore, Maya Debi may be regarded as an assignee of the decree-holder by operation of law.

[17] The question also arises whether Maya Debi can be regarded as an assignee of the interest of the decree-holder Midnapore Zemindary Company by assignment in writing. The question really turns on the interpretation of the notice Ex. A read in the light of the facts and circumstances of the case. The notice Ex. A recited that the tenants would be informed of the fact of relinquishment of possession by the Midnapore Zemindary Company and Tahsildars would be similarly informed. The notice required Maya Debi to take all steps to realise the rents due which, in our opinion, include the rents already accrued, or which might accrue after the notice. The notice proceeds to state that if Maya Debi so desires, the company will supply Maya Debi with a list of the rents due from the tenants upto the date of relinquishment of possession by the Midnapore Zemindary Company. Basanta Kumar Mukherjee, an officer of Maya Debi has deposed that Maya Debi has realised other decrees for rents which had been obtained by the Midnapore Zemindary Company, while the company was in possession, without any objection on the part of the company. He has also deposed that a list of the unrealised decrees obtained by the Midnapore Zemindary Company was made over to Maya Debi. It is true that the list has not been produced in Court, but this was never called for from Maya Debi. It appears from the records that the Midnapore Zemindary Company was served with a notice of the intended execution by Maya Debi in the connected case. The notice was duly served, but the Midnapore Zemindary Company did not object to the execution proceeding at the instance of Maya Debi. In this appeal, as we have already pointed out, Maya Debi was substituted in place of the Midnapore Zemindary Company without any objection on the part of the latter.

[18] All these facts, in our opinion, support the position that the Midnapore Zemindary Company intended to vest Maya Debi with the right of realising all arrears of rent, decretal or otherwise and Maya Debi can be regarded also as an assignee of the interest of the decree-holder by assignment in writing within the meaning of O. 21, R. 16, Civil P. C. This view, in our opinion, is supported by the decision of this Court in the case of *Ananda Mohan Roy* v. *Promotha Nath Ganguly*, 25 C. W. N. 863 : (A. I. R. (8) 1921 Cal. 74). In that case, there was an assignment of the property with all arrears. A decree for arrears of rent was obtained simultaneously with the execution of the deed of assignment. It was held that the decree passed to the assignee of the property under the words "assignment with all arrears". A similar view has been taken in the case of *Periakatha Nadar* v. *Mahalingam*, A. I. R. (23) 1936 Mad. 543 at p. 545 : (166 I. C. 922) where it has been held that anything in writing which transfers a decree and clearly shows an intention to do so, should be regarded as coming within the scope of O. 21, R. 16, Civil P. C.

[19] Mr. Ghose appearing for the respondents, has relied strongly on two decisions of this Court, namely, the case of *Mathurapore Zemindary Co. Ltd.* v. *Bhasaram Mondal*, 51 Cal. 703 : (A. I. R. (11) 1924 Cal. 661) and the case of *Prabashini Debi* v. *Rasiklal Banerjee*, 59 Cal. 297 : (A. I. R. (19) 1932 Cal. 439). In both these cases, the assignment preceded the passing of the decree for arrears of rent. As such they do not apply to the facts of the present case.

[20] On these grounds we hold that Maya Debi is entitled to execute the decrees for arrears of rent obtained by the Midnapore Zemindary Company prior to its relinquishment of possession in favour of Maya Debi, the decree remaining unrealised at the date of such relinquishment. The preliminary objection of Mr. Ghose must, therefore, be overruled.

[21] Coming to the merits of the case we are not inclined to accept the argument put forward on behalf of the appellants that there was no merger in law. There is no evidence on the record to show that the deposit of the Midnapore Zemindary Company has been satisfied. The Midnapore Zemindary Company has, therefore, a mortgage so far as the interest of the putnidar Maya Debi is concerned. In order to constitute merger within S. 111 (d), T. P. Act, the interest of the lessor and the lessee in the whole of the property should become vested at the same time in one person in the same right ; that is to say, there must be a union of the entire interest of the lessor and the lessee or as is said, the landlord's interest must sink in the reversion.

[22] In the present case, the acquisition of the dar-putni of the Roys and Dutt by the Midnapore Zemindary Company did not have the effect of extinguishing the dar-patni so pur-

chased. The dar-putni would not be an accession *ipso jure* so far as the mortgagor is concerned. The combined effect of S. 90, Trusts Act and S. 63, T. P. Act, is that till the redemption of the security, the accession, that is, the purchased property, does not become the absolute property of the mortgagor. There is, therefore, an intervening state in the Midnapore Zemindary Company, that is the depositor, under S. 13 (4) of the Regulation which prevents the union of the interest of the lessee with that of the lessor. There cannot, therefore, be a merger in the eye of law. The learned Subordinate Judge, in our opinion, was right in the view he took of the matter. In this view, S. 168A, Bengal Tenancy Act, precludes Maya Debi from proceeding against the other properties of the judgment-debtors by attachment and sale thereof. It only remains for us to consider the prayer for arrest of the persons of the judgment-debtors. In so far as Probodh Kumar Roy and Pabitra Kumar Roy are concerned, they are not the original judgment-debtors, but they have been substituted in place of their father Satish Chandra Roy. Mr. Mukherjee for the appellants contends that they are under a pious obligation to repay the debts of their father. This is true but only in a limited sense. A Hindu son is under no pious obligation to pay the debts of his father out of his personal assets. No personal execution can be levied as against a Hindu son on the strength of a pious obligation on the part of the son to repay the father's debt. This was so held in the case of *Bissessor Ram* v. *Rama Kanta Dubey*, 13 Pat. 7 : (A. I. R. (21) 1934 Pat. 187). Moreover, this point was not raised in the Court below. The only prayer, therefore, which may be granted so far as Maya Debi is concerned is the prayer for the arrest of the persons of Kshitish Chandra Roy and Sib Chandra Roy, two of the judgment-debtors. The learned Subordidate Judge seemed to be inclined to the view that such arrest was possible. The learned Subordinate Judge, however, did not consider whether the prayer was admissible in the view of the provisions of S. 51, Civil P. C. This last point, therefore, requires further investigation.

[23] In the result, this appeal is allowed in part, the order of the Subordinate Judge is varied and this case remitted to the Subordinate Judge for a decision as to whether the prayer for arrest of the persons of Kshitish Chandra Roy and Sib Chandra Roy can be allowed in the facts and circumstances of the present case. If necessary, he may take further evidence on this point.

[24] This appeal is allowed with costs, hearing-fee being assessed at two gold mohurs to be paid by Kshitish Chandra Roy and Sib Chandra Roy.

[25] We shall now deal with F. M. A. No. 22 of 1948 and F. M. A. No. 145 of 1947. A few further facts have got to be stated in order to dispose of these appeals which are at the instance of the judgment-debtors.

[26] In 1933, the Midnapore Zemindary Company instituted a suit for dar-putni rent, being Rent Suit No. 38 of 1933 against the Roys, Pal Choudhurys and Dutt. This suit was decreed and in execution of that decree the dar-putni of the Roys, Pal Choudhurys and Dutt was sold on 8th July 1936, and purchased by the Midnapore Zemindary Company. Thereafter in 1935, a suit for rent being Rent Suit No. 46 of 1935 was instituted by the Midnapore Zemindary Company against the said Roys, Pal Choudhurys and Dutt for the Jaistha kist of 1340 B. S. to 1342 B. S. This suit was decreed on 23rd December 1935. The present execution case, which is Rent Execution Case No. 91 of 1946, was instituted by Maya Debi claiming to be the representative of the Midnapore Zemindary Company which had obtained the decree for arrears of rent as already stated. Notice of the execution of this decree under O. 21, R. 16, Civil P. C., was served on the Midnapore Zemindary Company, as also on the judgment-debtors. The Midnapore Zemindary Company did not object to the execution proceeding at the instance of Maya Debi. One set of objection was raised on behalf of Probodh Kumar Roy and Pabitra Kumar Roy sons of Satish Chandra Roy, since deceased, giving rise to Miscellaneous Case No. 13 of 1947. The principal objections to the execution were firstly that Maya Debi had no right to execute the decree and secondly that the prayer for the appointment of a receiver which was made by Maya Debi in respect of a tenancy of Rs. 400 was not tenable, inasmuch as by a deed of gift, dated 7th February 1933, Satish Chandra Roy, Kshitish Chandra Roy and Sib Chandra Roy had made a gift of the tenancy in favour of Probodh Kumar Roy and Pabitra Kumar Roy and they are the owners of the said jama and no receiver can be appointed in respect thereof in execution of a decree obtained not against them but against their father Satish Chandra Roy and their uncles Kshitish Chandra Roy and Sib Chandra Roy.

[27] The learned Subordinate Judge rejected these objections and allowed execution to proceed by his order which is now under appeal. Against this order, First Miscellaneous Appeal No. 22 of 1948 has been filed by Probodh Kumar Roy and Pabitra Kumar Roy.

[28] Another set of objections was taken by Kshitish Chandra Roy and Sib Chandra Roy, giving rise to Miscellaneous Case No. 72 of 1947 where the objection was raised to Maya Debi

having the right to execute the decree as representative of the decree-holder the Midnapore Zemindary Company. This objection was overruled by the learned Subordinate Judge by his order dated 13th August 1947, and against that order Kshitish Chandra Roy and Sib Chandra Roy have preferred First Miscellaneous Appeal No. 145 of 1947.

[29] We shall now take up F. M. A. No. 22 of 1948. Mr. Sen, appearing for the appellants, has contested the view of the Subordinate Judge that Maya Debi cannot be regarded as a representative of the decree-holder Midnapore Zemindary Company. For reasons already given in our judgment in F. M. A. No. 83 of 1945, this contention must be overruled.

[30] Mr. Sen further contended that the lower Court was wrong in making an order for the appointment of a Receiver in regard to the tenancy of Rs. 400 on a finding that Probodh Kumar Roy and Pabitra Kumar Roy were the benamdars of the donors namely, their father Satish Chandra Roy and their uncles Kshitish Chandra Roy and Sib Chandra Roy.

[31] The learned Subordinate Judge finds against the appellants principally on the ground that the donors were heavily in debts and that some of them had transferred their homesteads in favour of their wives. He also commented on the fact that no evidence was led on behalf of the donees that the rents were paid by the donees themselves and the payment was not made in their names on behalf of the donors. In our opinion, the learned Subordinate Judge has approached this question from an entirely wrong standpoint. The question of proving that a transaction is benami rests on the person who argues against the tenor of the deed. It is also well established that no conclusion as regards the benami character of a transaction can be founded on suspicion. In this case, the evidence indicates, and the Subordinate Judge also accepts this evidence as genuine, that the names of the donees were mutated in the landlord's sheristha, and that rents were paid by the donees to Midnapore Zemindary Company and Maya Debi. *Prima facie*, it must be assumed that the payment was made by the donees on their own behalf unless it was established that the persons whose names appear as payers in the rent receipts produced, are really agents acting on behalf of the donors. No attempt was made by Maya Debi to show that the persons who are said to have made the payments, did make the payments as agents of the donors. In the second place, the learned Subordinate Judge overlooks the statement in a plaint Ex. 5 filed by the Midnapore Zemindary Company claiming rent for the period Ashar 1344 to Pous 1346 B. S. against the donees alone, namely, Probodh Kumar Roy and Pabitra Kumar Roy. In para. 2 of the plaint, it is expressly recited that the donees are in ownership and possession of the property in question, which is the property in respect of which the present application for appointment of receiver has been made. The suit for rent was decreed *ex parte* in favour of the Midnapore Zemindary Company on the 13th August 1940. The decree is Ex. 6. It also appears from Ex. 2 series that for a very long time rent was received by the Midnapore Zamindary Company from Probodh Kumar Roy and Pabitra Kumar Roy, the donees. The period covered by these receipts spread over the years 1343 to 1350. Exhibit 2z (7) dated 14th Chaitra 1352 B. S. shows that Maya Debi herself realised rent from Probodh Kumar Roy and Pabitra Kumar Roy the donees. The persons making the payment are stated to be Khudiram Dutt and Shyam Madhab Roy and they purport to make the payments on behalf of the donees. There is no evidence that these persons acted on behalf of the donors. Mr. Sen has also referred to an application before a Debt Settlement Board by Satish Chandra Roy filed on 28th September 1940. In this application for settlement of debt, Ex. 3, the Midnapore Zemindary Company was stated to be one of the creditors. In the schedule of properties annexed to the application, the property covered by the deed of gift was not mentioned. Neither the Midnapore Zemindary Company, nor the other creditors who were parties to the Debt Settlement proceedings objected to the non-inclusion of the property which was donated by Satish Chandra Roy and his brother Kshitish Chandra Roy and Sib Chandra Roy. The debts were settled on the basis of amicable settlements as would appear from the order sheet. It would further appear that the Midnapore Zemindary Company itself filed an application for settlement of debt. In that application also, the Midnapore Zemindary Company did not mention the disputed property to be a property belonging to Satish Chandra Roy. In this state of the evidence, the conclusion follows that the deed of gift executed by Satish Chandra Roy, Kshitish Chandra Roy and Sib Chandra Roy in favour of the appellants Probodh Kumar Roy and Pabitra Kumar Roy is not a benami transaction. The fact that the donors had debts at the time of the gift is not conclusive to show that the gift was a benami transaction. It was accepted as a valid gift by the Midnapore Zemindary Company, as also by the respondent Maya Debi herself.

[32] In these circumstances, the view taken by the learned Subordinate Judge cannot be sustained and it must be held that no receiver can

be appointed in respect of the property covered by the deed of gift. We have already dealt with the contention raised by Mr. Mukherjee that Probodh Kumar Roy and Pabitra Kumar Roy were under a pious obligation to pay their father's debt and as such an equitable execution can be levied against their personal property. For reasons given in F. M. A. 83 of 1945, this contention cannot be given effect to. F. M. A. 22 of 1948 must, therefore, be allowed. The order of the Subordinate Judge is set aside so far as the appellants are concerned and the execution case dismissed as against them. The result of our order is that the receiver automatically stands discharged. He will now pass his accounts before the Subordinate Judge.

[33] In the circumstances of this case, we direct that in this appeal the parties will bear their own costs in this Court and the Court below.

[34] It remains for us to deal with F. M. A. 145 of 1947 in which the appellants are Kshitish Chandra Roy and Sib Chandra Roy. For reasons already given in the other two appeals which we have disposed of, the only prayer which the decree-holder is entitled to make against them is the prayer for the arrest of the persons of these judgment-debtors. For the reasons given in F. M. A. No. 83 of 1945, the order made by the Subordinate Judge in this case must be varied and this case remitted to the Subordinate Judge for an adjudication whether in the facts and circumstances of this case the prayer for arrest of the persons of the judgment-debtors should be entertained or not. In this case also, we direct the Subordinate Judge to take such additional evidence as the parties may choose to adduce and thereafter dispose of the objection raised by Kshitish Chandra Roy and Sib Chandra Roy.

[35] In this appeal also, we direct the parties to bear their own costs.

Lahiri J.—I agree.

K.S. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 8 *[C. N. 2.]*

R. P. MOOKERJEE AND K. C. CHUNDER JJ.

Naresh Chandra Bose—Judgment-debtor — Appellant v. *Sachindra Nath Deb and others — Decree-holders—Respondents.*

A. F. O. O. No. 111 of 1947, Decided on 24th January 1949, against order of Sub-Judge, 1st Court, Alipore, D/- 24th May 1947.

(a) High Court (Bengal) Order (1947), S. 13 (3) — Court of origin—Decree in suit for arrears of rent obtained in Court at *J* — Decree transferred to Court at *A* for execution — Application for execution — Objection to same disallowed — Appeal to Calcutta High Court in July 1947 — Passing of Indian Independence Act — Court at *J* included within jurisdiction of Dacca High Court — Court of origin held was Court at *A* and Calcutta High Court could hear appeal.

The language used in sub-s. (3) of S. 13 clearly indicates that the Court of origin is to be determined with reference to the "proceedings" then pending in the High Court, that is, the particular proceedings out of which the matter arises which are pending in the High Court. [Para 12]

For the realisation of arrear patni rent the landlords obtained a decree in the Court of Subordinate Judge, Jessore. The decree was transferred to the Alipore Court for execution at the instance of the decree-holders. The decree-holders filed an application for execution in the Alipore Court. The Court allowed execution as prayed after disallowing certain objections of the judgment-debtor. Against this order the judgment-debtor preferred an appeal to the High Court of Calcutta on 3rd July 1947. On the passing of the Indian Independence Act the district of Jessore came to be included within East Bengal within the jurisdiction of the newly constituted Dacca High Court:

Held that the proceedings in the High Court originated either on the filing of the application for execution by the decree holder in the Alipore Court or more strictly speaking, on the filing of the objection by the judgment-debtor. The appeal arose directly out of the miscellaneous case started on the filing of the objection; the proximate connection is with that objection and the said miscellaneous case. The more distant connection was with the filing of the execution in the Alipore Court. Passing of the decree by the Jessore Court or the filing of the application for transferring the decree to Alipore Court could not be considered to be the starting point of the "proceedings" pending in the High Court. Therefore the "Court of origin" in respect of the appeal was the Alipore Court and not the Jessore Court. As a result of the passing of the Indian Independence Act and the orders issued by the Governor General thereunder the appeal did not stand transferred to the Dacca Court and the Calcutta High Court had therefore jurisdiction to hear the appeal. [Paras 12 and 17]

(b) Execution — *Lex fori* — No special provision — *Lex fori* exclusively governs execution proceedings.

In the absence of any special provision *lex fori* exclusively governs execution proceedings. Judgment and execution of judgment are considered to be integral parts of the process which the plaintiff has elected to adopt and are necessarily subject to the *lex fori*. *De La Vega* v. *Viana*, 1 B. & Ad. 284 and *Brettilot* v. *Sandos*, 4 Scot. 201, *Ref.* [Para 9]

(c) Bengal Tenancy Act (VIII [8] of 1885), S. 168-A—Property other than defaulting tenure—Appointment of receiver in respect thereof not barred.

Section 168-A does not debar the execution Court to direct appointment of a receiver in respect of property other than the defaulting tenure irrespective of the fact whether the tenure continues to exist or not. [Para 19]

(d) Civil P. C. (1908), S. 11 — *Res judicata* in execution proceedings — Decree for arrear patni rent — Execution — Property other than defaulting tenure attached — Subsequently S. 168-A, Bengal Tenancy Act introduced — Objection to attachment — Court holding that attachment must be withdrawn — It also holding that patni was still in existence — Application to appoint receiver — Application held was not barred by *res judicata* — Bengal Tenancy Act (VIII [8] of 1885), S. 168-A.

In execution of a decree for arrear patni rent property other than the defaulting tenure had been attached before S. 168-A, Bengal Tenancy Act, had been introduced. After the introduction of this section, upon the objection of the judgment-debtor, the Court held that the attachment order must be withdrawn. It was also held that some only of the rent co sharers decree-holders had auction purchased the defaulting patni in execution of subsequent rent decree and accordingly the patni was still in existence and it had simply changed hands. It was contended that this decision at a previous stage of the execution proceedings raised a bar of *res judicata* and the decree-holder was not entitled to apply for levying execution of the same by the appointment of a receiver :

***Held* that in the previous proceedings the Court had no occasion to consider whether a receiver could be appointed in respect of the property previously attached, being property other than the defaulting tenure. It could not be held that the question in issue had actually or could have at all been raised or decided in the previous proceedings. The only point for which a bar of *res judicata* might be raised was on the question that the patni had not ceased to exist. The existence of the patni, however, did not disentitle the decree-holder under S. 168-A, Bengal Tenancy Act, to apply for the appointment of a receiver in aid of execution.** [Para 21]

Annotation : ('44-Com.) Civil P. C., S. 11, N. 23.

Girija P. Sanyal, and Hari Gopal Roy — for Appellant.

Nalin Ch. Pal and Amarendra Narain Bagchi — for Respondents.

R. P. Mookerjee J. — This is an appeal on behalf of the judgment-debtor against a decision by the Subordinate Judge, First Court, Alipore disallowing certain objections raised under S. 47, Civil P. C., read with S. 168A, Bengal Tenancy Act.

[2] The judgment-debtor, Naresh Chandra Bose, held a patni under the predecessor-in-interest of the decree-holders opposite parties. For the realisation of arrear patni rent, the landlords obtained three decrees in succession in rent suit No. 2 of 1936 on 21st December 1936, rent suit No. 12 of 1937 on 9th April 1938 and rent suit No. 16 of 1939 on 17th February 1940. In execution of the last of the three decrees, the defaulting patni was sold on 15th January 1942 and purchased by two of the three decree-holders. The decree-holders auction purchasers sold the patni on 4th April 1944 to one Provash Mallik. All the rent suits had been brought in the Court of Subordinate Judge, Jessore and the decree-holders applied for the transfer of the decree obtained in rent suit No. 12 of 1937, to the Alipore Court within the district of 24 Parganas. After a certificate had been sent to the Alipore Court on 7th July 1938 the decree-holders levied successive executions.

[3] After the decree had been transferred to the Alipore Court and in course of execution case No. 86 of 1938 of the First Court of the Subordinate Judge, Alipore, the decree-holders attached certain properties other than the defaulting tenure, situate in Calcutta and belonging to the judgment-debtors. Subsequently there was an adjustment between the parties on 20th August 1938. It was agreed *inter alia* that the attachment as effected aforesaid in execution case No. 86 of 1938 would subsist till the entire decretal dues were paid off in instalments. After the passing of the Bengal Tenancy Amendment Act, incorporating S. 168A, Bengal Tenancy Act, an objection was raised on behalf of the judgment-debtor about the legality of the continuance of the attachment above referred to. The learned Subordinate Judge at Alipore by his order dated 16th April 1943, came to the conclusion that in spite of the sale of the patni in favour of the two out of the three decree-holders there had been no merger and the patni was still in existence and had not either terminated or ceased to exist. Notwithstanding the adjustment, the judgment-debtor was held to be entitled to question the continuance of the attachment. It was further held that the premises attached were not liable to attachment and sale in execution of the rent decree already referred to. The attachment was accordingly withdrawn.

[4] Subsequently on 1st March 1947 the decree-holders again filed an application in the Alipore Court for execution of the decree in rent suit No. 12 of 1937 passed by the Court of the Subordinate Judge at Jessore. The prayer was in the alternative for attachment of the properties previously released and for the appointment of a Receiver under S. 51 (d), Civil P. C. Objections were raised by the judgment-debtor to the effect that under S. 168A, Bengal Tenancy Act, there could be neither any attachment nor could any receiver be appointed in execution. The learned Subordinate Judge overruled the objection and held (1) that S. 168A, Bengal Tenancy Act, did not preclude the decree-holder from levying execution by the appointment of a receiver and (2) the earlier order dated 16th April 1943 withdrawing the attachment then in force could not bar the present application for execution by the appointment of a receiver. The present appeal is directed against this order dated 24th May 1947.

[5] A preliminary point has been raised on behalf of the appellant questioning the jurisdiction of this Court to hear this appeal. Although on 3rd July 1947 when this appeal was presented to this Court, this High Court had no doubt jurisdiction to entertain it but on the passing of the Indian Independence Act the district of Jessore came to be included within East Bengal and since then has been under the jurisdiction of the newly constituted Dacca High Court. It is contended that in terms of Art. 13, High Court (Bengal) Order, this appeal pending there just before 15th August 1947, must be deemed to have

been transferred to the Dacca High Court and this Court has now no jurisdiction to hear this appeal.

[6] Under the High Court (Calcutta) Order 1947 made by the Governor General under S. 9, Indian Independence Act, 1947, from after the appointed date, viz. 15th August 1947, the High Court in Calcutta is to continue to exist,

"save as expressly provided by S. 13, High Court (Bengal) Order 1947, for all such original, appellate and other jurisdiction as it had immediately before that date."

The relevant portion of S. 13, High Court (Bengal) Order is in the following terms:

"(1) Subject as hereinafter provided, the High Court in Calcutta shall have no jurisdiction in respect of the territories for the time being included in the Province of East Bengal.

* * * *

(3) Subject to the preceding provisions of this Article, all proceedings pending on the appellate side of the High Court in Calcutta immediately before the appointed day shall, where the Court of origin is, as from that day situated in the Province of East Bengal, stand transferred by virtue of this order to the High Court of East Bengal."

[7] Reference has also to be made to S. 4, Indian Independence Legal Proceedings Order 1947, which runs as follows:

"Notwithstanding the creation of certain new Provinces and the transfer of certain territories from the province of Assam to the Province of East Bengal by the Indian Independence Act, 1947, (1) all proceedings pending immediately before the appointed day in any Civil or Criminal Court (other than a High Court in the Province of Bengal, the Punjab or Assam) shall be continued in that Court as if the said Act had not been passed, and that Court shall continue to have for the purposes of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day;

(2) any appeal or application for revision in respect of any proceedings so pending in any such Court shall lie in the Court which would have appellate, or as the case may be revisional, jurisdiction over the Court if the proceedings were instituted in that Court after the appointed day; and (3) effect shall be given within the territories of either of the two Dominions to any judgment, decree, order or sentence of any such Court in the said proceedings, as if it had been passed by a Court of competent jurisdiction within that Dominion."

[8] The present appeal was pending in the High Court on the appointed day and therefore under S. 3, High Court (Calcutta) Order, unless the exceptions as contained in the High Court (Bengal) Order, are attracted the jurisdiction of this Court has not been ousted. Under S. 13 (1), High Court (Bengal) Order, the High Court in Calcutta shall have no jurisdiction in respect of the territories for the time being included in the province of East Bengal. The properties in respect of which the decree had been obtained, which is now being executed and has given rise to the present appeal before this Court, are now admittedly within East Bengal, i. e. within Pakistan, a different State. But the properties in respect of which execution has been levied by appointing a Receiver are under the jurisdiction of the Alipore Court.

[9] In the absence of any special provision *lex fori* exclusively governs execution proceedings. Judgment and execution of judgment are considered to be integral parts of the process which the plaintiff has elected to adopt and are necessarily subject to the *lex fori*. See in this connection *De la Vega* v. *Viana*, (1830) 1 B & Ad. 284: (8 L. J. K. B. 388); *Brettilot* v. *Sandos*, (4 Scott. 201).

[10] Under sub-s. (3) of S. 13, High Court (Bengal) Order, the present proceedings which were pending in this High Court on the Appellate Side immediately before 15th August 1947, shall if, "the Court of origin is, as from that day situated in the province of East Bengal, stand transferred by virtue of this order to the High Court of East Bengal".

[11] It is for consideration whether "the Court of origin" of the present proceedings is the Alipore or the Jessore Court. If the relevant proceedings be deemed to have originated with the filing of either the application for execution which was filed in the Alipore Court on 1st March 1947, or with the filing of the objection under S. 47, Civil P. C., on 3rd April 1947 in the same Court by the judgment-debtor Naresh Chandra Bose, the Court of origin will be the Alipore Court. If, on the other hand, the origin of the present proceedings be taken to be either the passing of the decree by the Jessore Court on 1st April 1938 or the application for transfer of the decree for execution filed by the decree-holder in the Jessore Court, the Jessore Court must be taken to be the Court of origin and in that event this appeal stood transferred to the High Court of East Bengal.

[12] The language used in sub-s. (3) of S. 13 clearly indicates that the Court of origin is to be determined with reference to the "proceedings" then pending in the High Court, that is, the particular proceedings out of which the matter arises which are pending in the High Court. The proceedings in the High Court originated either on the filing of the application for execution by the decree-holder in the Alipore Court or, more strictly speaking, on the filing of the objection under S. 47, Civil P. C., by the judgment-debtor. The present appeal arises directly out of the miscellaneous case started on the filing of the objection under S. 47, Civil P. C., the proximate connection is with that objection and the said miscellaneous case. The more distant connection is with the filing of the execution in the Alipore Court. Passing of the decree by the Jessore Court or the filing of the application for transferring the decree to Alipore Court can-

not be considered to be the starting point of the "proceedings" now pending in the High Court. In this view the Court of origin of the present proceedings now pending before this Court is the Alipore Court. To test the conclusion so reached reference may be made to certain circumstances.

[13] If this appeal be now deemed to have been transferred to the High Court of East Bengal this appeal will be either dismissed or allowed in full; or, there may be an order for remand by the Dacca High Court for consideration of some points requiring further determination. To which Court will the order of the High Court of East Bengal be communicated ? The execution proceedings out of which the present appeal arises are now pending in the Alipore Court and the Dacca High Court can have no jurisdiction to issue any direction on the Alipore Court which is under the jurisdiction of this High Court. The question whether the Alipore Court can or cannot proceed to levy execution by appointing a Receiver over properties situate within the jurisdiction of the Alipore Court cannot be effectively decided by the Dacca High Court. From the practical point of view it is this High Court alone which can pass an effective order on the Alipore Court.

[14] It must not also be overlooked that there is no provision in the High Court (Bengal) Order which has the effect of withdrawing the jurisdiction of the Alipore Court in continuing to deal with the execution case which was pending in that Court from before the appointed date. On the other hand S. 4, Indian Independence Legal Proceedings Order, 1947, provides for the continuance of the pending proceedings in the Alipore Court and the enforceability in both the Dominions Orders passed by that Court. Interpreting the expression the 'Court of origin' to mean the Jessore Court, in the present case, will lead to such anomalies and absurdities that, even if there be any doubt as to the clear meaning of this term, under the accepted rules of interpretation such an anomalous interpretation should be avoided. Only such interpretation should be adopted as will be more reasonable and be free from anomalies.

[15] It has been argued that if this High Court is held to be the competent Court for dealing with the pending appeal from the Alipore Court and the latter Court is to have seisin over the execution proceedings; there may be difficulties as the certificate of satisfaction under S. 41, Civil P. C., cannot be sent by the Alipore Court to the Jessore Court, the latter being now in a different State. It is not necessary for our present purpose to decide whether the Alipore Court can send a certificate to the Jessore Court. Even if it be held that the Alipore Court has no jurisdiction to send the certificate of satisfaction to Jessore Court that will not give rise to any practical difficulty. After a decree is transmitted by the Court which passed it to another Court the former does not lose entire seisin of the decree. *Gobindanath Saha Choudhury* v. *Durga Narain Saha*, I. L. R. (1939) 2 Cal. 173 : (A. I. R. (27) 1940 Cal. 171). It can among other things sanction an agreement for payment of the decree in instalments. (*Gandharap Singh* v. *Sheodarshan Singh*, 12 ALL. 571 : (1890 A. W. N. 197), *Paramananda Das* v. *Mahabeer Bossji*, 20 Mad. 378 :(7 M. L. J. 89). It is further competent for the transferor Court under certain circumstances to make an order for simultaneous execution by another Court: *Dwarkadas Gobindram* v. *Salikram Rekhraj*, 17 Pat. 617 :(A. I. R. (26) 1939 Pat. 144). It must not also be overlooked that simultaneous execution, in the Court in which the decree had been passed and in other transferee Courts, is possible, but is always subject to certain safeguards. Care should be taken that no hardship is caused to the judgment-debtor. The transferor Court must also, while sending the decree to another Court for simultaneous execution, take into consideration whether any, and if so, what further order should be made as regards the limitation to be put upon the execution by the transferee Court: (*Gurudas Adhya* v. *Jnanendra Narain Bagchi*, 39 C W.N. 165 :(A.I.R. (22) 1935 Cal. 568). The relevant provisions of the Code of Civil Procedure as adapted after the Indian Independence Act, for the two Dominions are the same.

[16] The pendency of execution proceedings in the Alipore Court cannot debar the decree-holder from putting the decree into execution in the Jessore Court. It will further be possible for the judgment-debtor to bring to the notice of the Jessore Court not only the fact of the pendency of the proceedings in the Alipore Court but also about the result of the execution case here. There is practically little chance or risk of the decree-holder being allowed to realise the decretal amount twice over as the judgment-debtor will have full opportunity to take necessary steps to safeguard his own interest.

[17] In my view, therefore, the "Court of origin" in respect of the present appeal is the Alipore Court and not the Jessore Court. As a result of the passing of the Indian Independence Act and the Orders issued by the Governor-General thereunder this appeal which was pending in this High Court on the appointed day did not stand transferred to the Dacca Court and this appeal must be held to be pending in this Court.

[18] We are, therefore, required to consider the merits of the appeal.

[19] As regards the interpretation of S. 168A, Bengal Tenancy Act, the point in issue has been settled in a long series of decisions of this Court. Reference need be made only to *Sudhir Krishna Ghose* v. *Satish Chandra Hui*, 48 C. W. N. 835 : (A. I. R. (31) 1944 Cal. 418 F. B.). Section 168A does not debar the executing Court to direct appointment of a Receiver in respect of property other than the defaulting tenure, irrespective of the fact whether the tenure continues to exist or not.

[20] A further contention on behalf of the judgment-debtor appellant is that properties other than the defaulting tenure had previously been attached before S. 168A had been introduced by the amending Act XVIII [18] of 1940; after the introduction of this new section, the judgment-debtor had raised an objection about the legality of the continuance of the attachment order. The learned Subordinate Judge 1st Court Alipore held that the attachment order previously made must be withdrawn. It was also held that some only of the co-sharers had auction-purchased the defaulting patni in execution of a subsequent rent decree and accordingly the patni was still in existence and it had simply changed hands :

"The puntni exists and continues so far as the other landlords are concerned. Apparently there has been no merger. The putni is liable for rent and not the ex-putnidar. I find that the putni exists and continues and it has not terminated or ceased to exist."

[21] It is urged by Mr. Sanyal appearing on behalf of the judgment-debtor that this decision by the Subordinate Judge at a previous stage of the execution proceedings raised a bar of *res judicata* and the decree-holder was not entitled to apply for levying execution of the same by the appointment of receiver. But the previous decision was that the putni continued to exist and the premises in respect of which an attachment was subsisting must be released from attachment. The Court had no occasion to consider whether a receiver can be appointed in respect of those premises being a property other than the defaulting tenure. It cannot be held that the question now in issue was actually or could have at all been raised or decided in the previous proceedings. The only point for which a bar of *res judicata* may be raised is on the question that the putni has not ceased to exist. The existence of the patni, however, does not disentitle the decree-holder under the provisions of S. 168A, Bengal Tenancy Act to apply for the appointment of a receiver in aid of execution. This objection also must therefore be overruled.

[22] The appeal is accordingly dismissed. In the circumstances of this case there will be no order for costs in this Court.

[23] Certificate under S. 205, Government of India Act is granted.

K. C. Chunder J. — I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 12 *[C. N. 3.]*

R. P. MOOKERJEE AND K. C. CHUNDER JJ.

Dominion of India—Petitioner v. *Hiralal Bothra — Decree-holder—Opposite Party.*

Civil Rule No. 1501 of 1948, Decided on 12th May 1949, from order of Small Cause Court Judge, Calcutta, D/- 10th August 1948.

Civil P. C. (1908), Ss. 13, 38, 39, 44 and 44A — Decree passed by Jamalpur Court on 15th May 1947 — Court of Small Causes Calcutta not to entertain application for execution of such decree after 15th August 1947—India (Adaptation of Existing Indian Laws) Order, 1947.

From after 15th August 1947 the Jamalpur Court has become, in relation to the Court of Small Causes, Calcutta, a foreign Court and the judgment on the basis of which a decree had been passed on 15th May 1947 by that Court is a foreign judgment. Accordingly provisions of S. 13 read with S. 44A will be attracted. Pakistan is not a reciprocating territory and hence the Court of Small Causes cannot entertain an application for starting proceedings in execution of such decree after 15th August 1947. Section 37 (b) cannot be relied upon in such a case. [Paras 20 and 21]

Annotation : ('44-Com.) Civil P. C., S. 44, N. 4.

Bhabesh Narayan Bose — for Petitioner.

Sushil Chandra Dutta — for Opposite Party.

R. P. Mookerjee J.—The decree-holder opposite party obtained a decree on 15th May 1947, from the Court of Munsif, Jamalpur, within the district of Mymensingh, against "The Governor-General of India in Council, New Delhi and B. A. Railway, having its Head Office at 3 Koilaghat Street, Calcutta." The nature of particulars of the claim on which the decree was passed cannot be ascertained from the records. On 8th December 1947, the decree-holder applied to the Court of Munsif, Jamalpur, under O. 21 R. 6, Civil P. C., for a certificate of non-satisfaction. A certificate was issued accordingly and a copy of the order was, as applied for by the decree-holder, directed by the Munsif at Jamalpur to be sent to the Registrar, Court of Small Causes, Calcutta with a copy of the decree. This order was passed in Money Execution Case No. 86 of 1947. On 13th March 1948, the decree-holder-opposite party filed in the Court of Small Causes, Calcutta, an application for execution of the decree so transferred. Execution was prayed for against the parties as described in the decree and stated already. Objection was raised on behalf of the Dominion of India as to the maintainability of the execution proceedings in the Court of Small Causes, Calcutta and as against this Dominion. The learned Judge having overruled the said objections, the Dominion of India has moved this Court in revision.

[2] Under the Indian Independence Act, 1947, 15th August 1947 was the appointed day and as from that date two new independent Dominions, known respectively as India and Pakistan were set up. No proceedings were pending on that day either in the Jamalpur Court or in the Court of Small Causes, Calcutta. Accordingly, the only question, so far as affecting the jurisdiction of the Court of Small Causes, is whether after the appointed day it is competent for the Calcutta Court to entertain an application for starting proceedings in execution of a decree which had been passed by the Jamalpur Court before the appointed day. Had there been proceedings pending either in the High Court or in the Court of Small Causes, Calcutta on 15th August 1947, the legal position would have been altogether different : See *Naresh Chandra Bose* v. *Sachindra Nath Deb*, Appeal from Original Decree No. 111 of 1947 decided on 24th January 1949 : (A. I. R. (37) 1950 Cal. 8).

[3] Whether the decree in question can be executed in the Court of Small Causes, depends principally on an adjudication as to whether from after the appointed day that decree is to be considered as one passed by a domestic Court or by a foreign one. Before we refer to the relevant provisions of the Code of Civil Procedure, it is necessary to point out that before 15th August 1947, both the Jamalpore Court and the Court of Small Causes, Calcutta, were Courts in British India. As such a decree passed by one of them could not then be considered by the other to be a foreign judgment. The Indian Independence Act, 1947, having brought into existence two separate and independent dominions, the Court of Jamalpore is now situate in Pakistan within the Province of East Bengal, and the Court of Small Causes, Calcutta, within the Indian Dominion.

[4] Section 18 (3), Indian Independence Act provides :

"Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf."

[5] Sub-sections (1) & (2), S. 2, Indian Independence Act describe the respective territories of the two new Dominions. Sub-section (1) of S. 9 further authorises the Governor-General to issue orders for bringing the provisions of the Indian Independence Act into effective operation and for removing difficulties arising in connexion with the transition to the provisions of the said Act. Under powers so reserved, two Adaptation Orders were issued—the India (Adaptation of Existing Indian Laws) Order, 1947, and the Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947. The two Adaptation Orders indicate the changes which are to be introduced in all existing laws which were in force on 15th August 1947 one adapting the laws so far as the Dominion of India was concerned and the other for Pakistan.

[6] Section 18 (3), Indian Independence Act, read with the particular Adaptation Order, applicable in India and Pakistan as the case may be, determines what changes are necessary in the "existing Indian Law" and "existing Pakistan Law." The existing laws for the particular Dominion with the adaptations indicated in the two Orders above-mentioned are in force from after 15th August 1947, not as they were in force throughout British India before 15th August 1947.

[7] The Code of Civil Procedure which was in force in British India upto the appointed day became enforceable thereafter in the two Dominions with the respective modifications and adaptations. For all practical purposes, there are two different Codes in existence, as from after the appointed day, applicable to the two separate and new Dominions.

[8] The learned Judge of the Court of Small Causes, Calcutta was not, therefore, correct in stating that under the provisions of India (Adaptation of Existing Indian Laws) Order laws which were in force in British India became applicable to both the Dominions or that the old Civil Procedure Code as such is still in force in both the Dominions. It was probably overlooked by the lower Court that there was a separate Pakistan Adaptation Order as there was for the Indian Dominion an Adaptation Order of existing laws. The adaptations made for the two Dominions unmistakably indicate the changes and adaptations are not in terms exactly the same for the two Dominions.

[9] I may indicate in passing that after 15th August 1947, the Code of Civil Procedure had been further amended either by the relevant Legislature or by any other competent authority, such amendments being applicable to and within the respective Dominion. One of such further adaptations in Pakistan was by the Adaptation of Central Acts & Ordinances Order 1949, published in the Gazette of Pakistan on 28th March 1949. The Indian Legislature also has amended the Code of Civil Procedure after the appointed day (as in Act VI [6] of 1948) to have effect in this Dominion.

[10] To illustrate the divergent effects by the two Adaptation Orders of 1947, as made by the Governor-General under sub-s. (3) of S. 18, Indian Independence Act, we may refer to two

only of the various provisions contained in the Code of Civil Procedure, those sections being relevant for the present purpose.

[11] Section 1 (3), Civil P. C., determines the extent of the application of the Code. The Code of Civil Procedure, as adapted for the Indian Dominion, now extends under S. 1 (3) "to all the provinces of India" on the other hand the Code as adapted in 1947 for Pakistan extends "to all the provinces of Pakistan."

[12] Clause 4 (1), Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947, further provides :

"Where an existing Pakistan law contains a provision defining the territories to which the law extends, or a provision referring to the territories which are within the scope of that provision, that provision shall be so adapted as to exclude any territories which on the appointed date are not to form part of the territories of Pakistan."

[13] By Cl. 4, Adaptation of Central Acts and Ordinances Order, 1949, it is further provided that in all Central Acts and Ordinances, whether specified in the schedule to that order or not, to the expression "all the provinces" when it refers to all the provinces of Pakistan, shall be added the words "and the Capital of the Federation." The provisions of this subsequent order are to have effect notwithstanding anything to the contrary contained in Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947 or in any other Order made under the powers conferred by sub-s. (1) of S. 9, Indian Independence Act, 1947, before the coming into force of this subsequent Order.

[14] Under sub-cl. (2) of Cl. 3 of the 1949 Order "the whole of British India" occurring in any Central Act, is to be substituted by the expression "all the provinces", presumably because after 15th August 1947, any reference by the Legislative Authority in Pakistan to provinces can only refer to the provinces of Pakistan. Section 1 (3), Civil P. C., as adapted by the two Orders, makes that Code, as adapted for Pakistan, extend "to all the provinces and the capital of the Federation" of Pakistan.

[15] If we now turn to S. 2 (5), Civil P. C., which defines a "foreign Court" as adapted for India this definition reads as follows :

"'Foreign Court' means a Court situate beyond the limits of all the provinces of India which has no authority in all the provinces of India and is not established or continued by the Governor-General."

[16] The same definition as adapted by the Pakistan Orders reads as follows:

"'Foreign Court' means a Court situate beyond the limits of all the provinces and the Capital of the Federation which has no authority in all the provinces and the Capital of the Federation and is not established or continued by the Governor-General."

[17] The definition of "Foreign Court" as adapted for the two Dominions clearly indicates that from and after the appointed date, Courts, which were not foreign Courts before the said date, will be foreign Courts because of the two different sets of provisions as contained in the relevant clause in sub-s. (2), Civil P. C. British India, within which both the Courts in the present case were previously situated has now ceased to exist and the test for determining, at the present stage, whether a particular Court is or is not a foreign Court in relation to another it is to be ascertained and determined with reference to the law now in force and as under the altered constitutional position.

[18] In the absence of special provisions made in the constitution, as were made about certain matters when Burma was separated from the then British India and constituted as a separate State, or as coming under any one of the Orders passed by the Governor-General under the Indian Independence Act, the law in one State cannot be held to be applicable or attracted in another and separate State. In accordance with the accepted principles of International law the Dominions of India and Pakistan are now two separate Sovereign and Foreign States.

[19] Section 1 (3), Civil P. C., as adapted and made applicable to the respective Dominion, makes it clear that the provisions of this Code, as applicable to the Dominion of India, are not the same as the Code applicable to the Dominion of Pakistan.

[20] To determine the jurisdiction of the Court of Small Causes at Calcutta to entertain or proceed with the execution of a decree passed by the Jamalpore Court we have to examine the provisions of the Code of Civil Procedure as are in force in the Dominion of India. Under this Code, there is no escape from the conclusion that, the Jamalpur Court is a Court situate beyond the limits of the Dominion of India and the said Court has neither any authority in this Dominion nor is being continued by the Governor-General here. From after 15th August 1947, the Jamalpur Court has become, in relation to the Court of Small Causes, Calcutta, a "foreign Court" and the judgment, on the basis of which the decree now under execution was passed, is a "foreign judgment." Accordingly the provisions of S. 13 read with S. 44-A, Civil P. C., will be attracted. A person who intends to enforce the judgment of a foreign Court will have to satisfy the requirements as under S. 13, unless the judgment is by a Court situate within the territories of a reciprocating country as under S. 44-A of the Code. Our attention has not been drawn to any notification in the Official Gazette declaring Pakistan to be a reciprocating territory for this section. It must accordingly be held that the Court of Small Causes, Calcutta, has no jurisdic-

tion to entertain any application for execution of a decree passed by the Jamalpur Court.

[21] A faint attempt had been made by the learned advocate appearing for the opposite party to rely on the provisions contained in S. 37, cl. (b), Civil P. C. but that is an impossible position. The Court which passed the decree has neither ceased to exist nor has ceased to have jurisdiction to execute the same.

[22] In view of the conclusion to which we have arrived that the Court of Small Causes, Calcutta, has no jurisdiction to entertain the present application for execution, it is not necessary for us to go into the next part of the defence as put forward on behalf of the Dominion of India in the written statement that the claim is not enforceable against this Dominion. If we were required to go into it, it would have been necessary for us to consider the provisions of the Indian Independence (Rights, Properties and Liabilities) Order 1947 and particularly to Art. 10 (1) of that Order. We have no materials in the records from which we may ascertain under which of the three clauses of the Article this particular claim falls. In the absence of the relevant and necessary facts, it cannot be determined whether the liability under the decree in the present case is one payable by the Dominion of India or by the Dominion of Pakistan or by the two jointly.

[23] This Rule is accordingly made absolute and the application for execution filed in the Court of Small Causes is dismissed.

[24] In view of the circumstances of this case each party will bear his own costs in this Court.

[25] Certificate is granted under S. 205, Constitution Act.

K. C. Chunder J. — I agree.

D.H. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 15 *[C. N. 4.]*

R. P. MOOKERJEE AND K C. CHUNDER JJ.

Naresh Chandra Bose — Decree-holder — Appellant v. *Bhupendra Narayan Sinha — Judgment-debtor — Respondent.*

A. F. O. O. No. 138 of 1945 and A. F. A. O. Nos. 1 and 2 of 1946, Decided on 12th May 1949, against order of Sub-Judge, Murshidabad, D/- 17th March 1945 and against orders of District Judge, Murshidabad, D/- 24th July 1945.

(a) Bengal Tenancy Act (VIII [8] of 1885), S. 168A (1)(b) — "Purchaser" includes decree-holder purchaser — Equities between landlord decree-holder-purchaser and judgment-debtor-tenant, how determined, stated.

A purchaser in S. 168A (1) (b) includes a decree-holder purchaser and he has to deposit the amount mentioned in the sub-clause, that is, the amount by which the bid offered may fall short of the decretal amount, as also the costs of execution and the arrears of rent which have accrued due between the institution of the suit and the confirmation of the sale. The procedure of the decree-holder paying to himself money by deposit in Court was in force even before the amendment in S. 168A. The payment is to be by deposit of money in Court in one capacity, i. e., as purchaser and subsequent drawing out of the same would be in another capacity as decree-holder landlord. In any case the decree-holder landlord even when S. 168A had not been enacted got these amounts though he had to have recourse to another execution for the costs of execution etc., and another suit for the arrears of rent. The change that has been made by S. 168A has been that this extra amount has to be paid by the purchaser so that the judgment-debtor-tenant would be absolved from further liability for the same : A. I. R. (31) 1944 Cal. 199, *Foll.*; A. I. R. (31) 1944 Cal. 203 and A. I. R. (34) 1947 Cal. 330, *Rel. on*; *Observation in* A. I. R. (32) 1945 Cal. 425 and A. I. R. (36) 1949 Cal. 93, *Dissent.* [Paras 8 and 9]

In determining the equities between the parties when the landlord decree-holder is the purchaser, the Court cannot overlook the time factor. If an order confirming the sale is passed by the Court and is allowed to remain unaffected for a long time, various persons may become interested in the said property on the basis of the order for confirmation being a valid and binding order. If such an order is to be set aside after the lapse of a long period various complications are bound to arise. When the decree-holder himself is the auction purchaser the payment of the subsequent arrears which had accrued due is to be made to himself and the said decree-holder is entitled to an order confirming sale by either paying himself or on declaring that the amount due is wiped out. When a decree-holder auction purchaser applies for the confirmation of the sale without either depositing the amount of subsequent arrears or discharging the said dues formally he must be taken to have given up his right to claim such arrears at any subsequent stage. He must be deemed to have done what he was required to do before he could get an order confirming the sale. No doubt it is a duty of the Court as well to see that the obligations which are required to be discharged by the decree-holder are duly performed. This, however, does not take the case out of the general and equitable principle that equity will consider that as done what should have been done and that a person cannot be allowed to take advantage of his own wrong. Under the circumstances when the attention of the executing Court is drawn subsequently to the fact that the sale had already been confirmed without the decree-holder auction purchaser fulfilling the conditions laid down under S. 168A, all that the executing Court need do is to record an order that the total amount of rent, cess and interest which had accrued due up to the date of confirmation is deemed to be satisfied by the decree-holder auction purchaser having applied for such confirmation and the confirmation having been made. [Paras 13, 14 and 15]

(b) Bengal Tenancy Act (VIII [8] of 1885), S. 168A —Decree for rent does not include costs decreed in suit.

The definition of 'rent' in S. 3 (13) would clearly show that the costs decreed in the rent suit are not included in rent. Under S. 168A, the purchaser is to deposit the rent, cess and interest decreed in the suit but he is not to deposit the costs awarded by the Court and the same has to be paid by the judgment-debtor tenant and for it execution may be taken out : A. I. R. (34) 1947 Cal. 330 ; A. I. R. (33) 1946 Cal. 88 ; 50 C. W. N. 261 ; 11 C. W. N. 1106; A. I. R. (5) 1918 Cal. 965 and 53 I. C. 993 (Cal.), *Rel. on*; 12 C. W. N. cxliv (Notes), *Dissented.* [Para 11]

Benoy Behari Sen —for Appellant.

Sitaram Banerjee and Arun Kumar Dutta —for Respondent.

K. C. Chunder J. — These are three appeals arising out of three execution proceedings of the Court of the Subordinate Judge of Murshidabad. In two of them, there was an appeal to the District Judge who modified the order in execution of the Subordinate Judge and there are two second appeals against the District Judge's decision. The third is the First Miscellaneous Appeal against the order of the Subordinate Judge. The Raja Bahadur of Nashipur is the owner of a Touzi No. 1152/1. There is a patni under it of which the appellant Naresh Chandra Basu has a ten annas interest while the remaining six annas belong to the Maitras. Under the patni, the Raja Bahadur has another jote. The jote fell into arrears of rent. Rent Suit No. 7 of 1933 was filed for arrears of rents from 1336 to 1339 B. S. This was decreed and an appeal was taken up to the High Court which upheld the decree on 28th May 1940. In the meantime Rent Execution Case No. 42 of 1939 had been filed and the jote in arrears was sold and purchased by the decree-holder on 21st November 1941.

[2] For the rent which fell due from 1340 to 1343 B. S. a rent suit had been filed in 1937 being Rent Suit No. 9 of 1937 and was decreed on 23rd December 1940 for the rent in arrears as also costs amounting to Rs. 453-3-0. Rent Execution Case No. 41 of 1943 was filed on 3rd July 1943. The prayers were for attachment and sale of other properties of the judgment debtor or in the alternative for arrest of the judgment-debtor. The judgment-debtor filed Miscellaneous Case No. 64 of 1943 alleging that as Naresh Chandra Basu, the appellant was only a part owner of the patni there has been no merger and therefore the jote being still in existence there could be no attachmeent and sale of other properties. This miscellaneous case was decided in favour of the Raja Bahadur. The decree-holder then prayed for the alternative mode of execution of arrest of judgment-debtor. The defence taken by the judgment debtor was that under S. 168A, Ben. Ten. Act, the rents subsequent to the period in suit in Rent Suit No. 7 of 1933, that is, rents for the year 1340 B. S. and subsequent years were no longer due, the decree-holder himself being the purchaser was to pay the same and could not realise it from the judgment-debtor. This defence was taken in Miscellaneous Case No. 91, of 1944. The Subordinate Judge decided that the decree could not be executed not only for the rent but also the costs etc., as in his view costs etc., were also included within rent. He therefore dismissed the entire execution petition. This has given rise to the First Miscellaneous Appeal No. 138 of 1945. In the meantime for the rent accrued due for 1344 to 1347 B. S., Rent Suit No. 8 of 1941 had been brought. It was decreed not only for the arrears of rent but also for costs amounting to Rs. 476-6-3. Rent Execution Case No. 31 of 1944 had been filed praying for attachment of a debt due to the judgment-debtor and arrest. The judgment-debtor had objected in Miscellaneous Case No. 131 of 1944 and the Subordinate Judge had dismissed the execution application by the same judgment as in the previous miscellaneous case referred to on 17th March 1945. An appeal was taken against this to the Court of the District Judge being Miscellaneous Appeal No. 35 of 1945 of the Court of the District Judge and the District Judge modified the order of the Subordinate Judge. This is the subject-matter of Second Miscellaneous Appeal No. 1 of 1946. There had been another decree for the amount of Rs. 175 8 0 for rent and Rs. 20 4 0 for costs in Rent Suit No. 8 of 1941 previously mentioned which had given rise to Rent Execution Case No. 37 of 1944 leading to Miscellaneous Case No. 132 of 1944 which was also disposed of by the same judgment by the Subordinate Judge and the prayer for execution was also dismissed on 17th March 1945. An appeal filed to the Court of the District Judge being Miscellaneous Appeal No. 36 of 1945 modified the order of the Subordinate Judge and has given rise to Second Miscellaneous Appeal No. 2 of 1946. The appellant in all these three appeals before us is the decree-holder Naresh Chandra Basu and the contesting respondent is the judgment-debtor the Raja Bahadur of Nashipur now represented by the Court of Wards.

[3] In all the three appeals the main question for decision is whether 'purchaser' mentioned in S. 168A (1) (b), Ben. Ten. Act, means also the decree-holder purchaser or, in other words, has the decree holder purchaser to deposit the amount mentioned in that sub-clause? If this is so, then it is clear that the decision of the District Judge in both the miscellaneous appeals was right and in all the three appeals before us the appellant will not be entitled to succeed as far as his claim for execution of the decrees for the arrears of rent are concerned and the two second miscellaneous appeals must be dismissed in toto there being no cross appeal the decrees of the District Judge will be upheld.

[4] The second point is if the purchaser includes also the decree-holder purchaser, then as the deposit was not made and the sale had been confirmed so long ago how are the equities to be adjusted? The third point in the first miscellaneous appeal is even if the decree-holder is not entitled to execute the decree obtained by him for arrears of rent, can he execute the same for the costs awarded to him? In this connection the question has also been raised whether arrears of rent will include interest or damages awarded

by the Court, or this will be excluded. The view of the learned Subordinate Judge was that interest or damages as well as costs could not be realised by execution. It is not disputed by the respondent that the decree may be executed for the costs. The third question relates to the question of interest. As regards the modes of execution for the balance in the first miscellaneous appeal and also in the two second miscellaneous appeals under the order of the District Judge the decree can be executed in the way pointed out in the Special Bench decision in the case of *Sudhir Krishna Ghose & another* v. *Satish Chandra Hui & others*, 48 C. W. N. 835 : (A. I. R. (31) 1944 Cal. 418). There is no dispute on this point.

[5] We shall now take up the question whether purchaser in S. 168 (1) (b), Bengal Tenancy Act includes also the decree-holder purchaser. In the case of *Phani Bhusan Muhherjee* v. *Rai Bahadur Purna Chandra Bagchi & others*. 48 C. W. N. 210 :(A. I. R. (31) 1944 Cal. 199), a Divisional Bench of this Court decided that purchaser included a decree-holder purchaser. That decision was followed by another Divisional Bench which merely cited it and accepted it as correct in the case of *Sm. Swarnamanjuri Dassi* v. *Fakir Chandra Karar & others*, reported in 48 C.W.N. 220 : (A. I. R. (31) 1944 Cal. 203). In the case of *Rai Jogendra Chandra Ghose Bahadur* v. *Bhawani Charan Law & others*. 49 C. W. N. 552 : (A. I. R. (32) 1945 Cal. 425), R. C. Mitter J. cast a doubt upon the soundness of the decision of B. K. Mukherjea J. in the case of *Phani Bhusan Mukherjee* v. *Rai Bahadur Purna Chandra Bagchi & others*, 48 C.W.N. 210 :(A. I. R. (31) 1944 Cal. 199). He pointed out some considerations for which he thought that the decision could be challenged and considered that the question should be examined again in the light of his observations. It did not become necessary for him actually to decide the point finally as the case could be decided on another ground namely whether S. 168A had retrospective operation and interfered with a vested right of a decree-holder purchaser who had sold the property and purchased it himself before the amendment came into force and had the right at the time to have the sale confirmed without making the deposit. It was decided by R. C. Mitter J. that as he had acquired a vested right which was not taken away by the amendment he was not to make a deposit and on this view the case was decided and no final decision actually given as to whether decree-holder was included in the word "purchaser." In the case of *Amano Barmanya* v. *Uma Charan Das*, 50 C. W. N. 803 :(A. I. R. (34) 1947 Cal. 330), this very question again came up for decision before a Divisional Bench and B. K. Mukherjea J. again re-affirmed his previous decision that the decree-holder was included in the word "purchaser". It may be mentioned that in some single Judge decisions also the decision in the case of *Phani Bhusan Mukherjee* v. *Rai Bahadur Purna Chandra Bagchi & others*, reported in 48 C.W.N. 210 :(A.I.R. (31) 1944 Cal. 199), had been accepted as correct. It can be considered that B. K. Mukherjea J. in his later decision in the case of *Amano Barmanya* v. *Uma Charan Das and others*, 50 C. W. N. 803 : (A. I. R. (34) 1947 Cal. 330), had reiterated his previous decision after fully considering the doubts that had been cast upon the soundness of his previous decision by R. C. Mitter J. though he had not dilated upon the same. Again, after this decision of the Divisional Bench, Chakravartti J. in a decision in the case of *Abdul Mannan* v. *Madhabi Ranjan Chakravarty*, reported in 52 C. W. N. 627 :(A. I. R. (36) 1949 Cal. 93), doubted the soundness of the decision of B. K. Mukherjea J., but here again the case was decided upon another view of the matter and no final decision was given by Chakravartti J. In this state of authorities it is beyond question, that the decision in the case of *Phani Bhusan Mukherjee* v. *Rai Bahadur Purna Chandra Bagchi & others*, reported in 48 C.W.N. 210 :(A. I. R. (31) 1944 Cal. 199) and accepted several times though doubted in two decisions is still a decision binding on us as a Divisional Bench. Mr. Sen has urged before us that we should refer the matter to a Full Bench for final decision.

[6] We have fully considered all the reasons given in the two doubting judgments as also the reasons given by B. K. Mukherjea J. and by R. B. Pal J. in their judgments in the case of *Phani Bhusan Mukherjee* v. *Rai Bahadur Purna Chandra Bagchi and others*, 48 C. W. N. 210 :(A. I. R. (31) 1944 Cal. 199).

[7] It is clear that S. 168A, Bengal Tenancy Act, is laying down a uniform mode instead of the diverse modes of execution according as the decree for arrears of rent had the effect of a rent decree or a money decree or was under the certificate procedure. In connection with this and in order to give the tenant a protection against the landlord decree-holder himself the right of the landlord to bring to sale by attachment any other property, moveable or immovable, of the tenant judgment-debtor so long as the tenure or holding in arrears was in existence was taken away. It is immaterial that there are lacuna in the Act by which even when the tenancy has not been terminated execution may be had in other ways namely by appointment of receiver etc., as pointed out in the Special Bench decision in the case of *Sudhir Krishna Ghosh and another* v. *Satish Chandra Hui and others*,

48 C. W. N. 835 : (A. I. R. (31) 1944 Cal. 418). It is, therefore, clear that as between the judgment-debtor tenant and the decree-holder landlord the section itself has favoured the tenant judgment-debtor. Clause (1) (a) can leave no room for doubt about this. The section as a whole whether it may or may not have indirectly benefited the decree-holder landlord also, has begun with restricting the rights of the landlord decree-holder and not enlarging the same in cl. (1) (a). In view of the clear provision of cl. (1) (a) this cannot be doubted and this has been pointed out in an unreported single Judge decision of this Court of Henderson J. in *Kulhame* v. *Kalyani Prasad*, in Second Misc. Appeal No. 119 of 1941 decided on 12th March 1942.

[8] Under cl. (1) (b), it is clear that the purchaser is to deposit the amount by which the bid offered may fall short of the decretal amount as also he has to deposit the costs of execution and he has further to deposit the arrears of rent which have accrued due between the institution of the suit and the confirmation of the sale. It is clear that a benefit to the judgment-debtor tenant is intended. No doubt in the case of a stranger auction purchaser the decree-holder landlord will also be benefited. But the question is, does this show any intention as between the decree-holder landlord and the judgment-debtor tenant to show perference to the decree-holder landlord over the judgment-debtor tenant? It is immaterial whether the decree-holder is also benefited in case of a stranger auction-purchaser as benefit goes to both the decree-holder and the judgment-debtor. Have we anything in this clause for which it may be considered that the preference shown for the judgment-debtor tenant by the Legislature by the restriction of the rights of the decree-holder landlord in cl. (1) (a) had suddenly been changed and preference given to the decree-holder landlord over the judgment-debtor tenant ? The words 'paid to the decree-holder' can lead to no inference that the person who is to make the payment must be some one else. The payment is not to be made directly or out of Court but the payment is to be made by deposit of the amount in Court and S. 169, Bengal Tenancy Act, regulates how the money deposited as purchase price is to be distributed. Even before the enactment of S. 168A the decree-holder was entitled to purchase the property. Under the Bengal Tenancy Act he even had not to take the permission of the Court as he had to do under the Civil Procedure Code as also the Bengal Public Demands Recovery Act. It is therefore clear that purchase by the decree-holder was within the purview of the Legislature as the decree-holder had been given a right to bid at the sale without the permission of the Court under the Bengal Tenancy Act and with such permission in the other two cases. It is further clear that under the Bengal Tenancy Act although the obliger and the obligee were the same when the decree holder became the auction-purchaser, he had no absolute right to set off but he had to deposit the money in Court and then draw it out under S. 169, Bengal Tenancy Act. In some cases the Courts *ex gratia* appear to have allowed a set off. Therefore the procedure of the decree-holder paying to himself money by deposit in Court was in force even before the amendment in S. 168A, Bengal Tenancy Act. It is therefore idle to contend that the decree holder could not have been contemplated as paying himself. The payment to be by deposit of money in Court in one capacity, i. e., as purchaser and subsequent drawing out of the same would be in another capacity as decree-holder landlord. Such procedure was already in vogue even in the case of a decree-holder purchaser under the Bengal Tenancy Act previous to S. 168A. If the amount of purchase price was sufficient, then the decree-holder was also entitled not only to his decretal amount but to the costs of execution and the arrears of rent which had fallen due since the institution of the suit up to the date of confirmation of the sale. He already had this advantage if the money was sufficient. Therefore no new advantage was being directly conferred upon him by the provision in S. 168A by providing for payment by the purchaser of the balance of the decretal amount, the costs of execution and the arrears of rent subsequent to the institution of the suit. All that the amendment did was to make it sure that the purchase price would not fall below an amount which would be sufficient to cover all these extra payments. So long as the amount was not sufficient the judgment-debtor tenant had to pay the same later on to the decree-holder landlord. In any case the decree-holder landlord, even when S. 168A had not been enacted, got these amounts though he had to have recourse to another execution for the costs of execution etc., and another suit for the arrears of rent. The change that has been made by S. 168A has been that this extra amount has to be paid by the purchaser so that the judgment-debtor tenant would be absolved from further liability for the same. This amendment therefore benefits the tenant more than it does the decree-holder landlord. Therefore there is no reason to consider even from the point of view of the intention of the legislature that it is solely or mainly to benefit of the landlord decree-holder and therefore the word "purchaser" should not include the decree-holder purchaser. Throughout the Bengal Tenancy Act as also the Code of Civil Procedure and the Bengal Public

Demands Recovery Act no difference has been made between a stranger auction purchaser and a decree-holder auction purchaser and it will be very curious if in this solitary instance such a distinction was intended. The distinction if made would place the decree-holder purchaser in a doubly favourable position as compared to a stranger purchaser. In case of a decree-holder he will not only have not to pay the money due for the arrears of rent for the subsequent period but he will in addition be in a position to realise it later on from the tenant judgment-debtor himself. The result of it will be that the tenant judgment-debtors will be at the mercy of decree-holder landlord as other purchasers being at a disadvantage would be deterred from purchasing and this is likely to open the door to various kinds of abuses which we cannot for a moment, consider to have been contemplated by the legislature as at all desirable. In ordinary language "purchaser" means one who purchases and will include decree-holder if he is such a person. The ordinary clear meaning of a word certainly may be restricted or enlarged if the context or anything in the law by implication even requires such modification of ordinary meaning. In the present section we have not been able to see anything for which the word "purchaser" should not have its ordinary meaning. Neither have we been able to see anything in the whole of S. 168A to justify a conclusion that the meaning of the word "purchaser" should be a restricted one when the word includes both decree-holder and stranger purchaser in all other parts of not only the Bengal Tenancy Act but of the Civil P. C. and Bengal Public Demands Recovery Act. Sales for arrears of rent covered by all the three Acts are being made uniform in this section. In none of these three Acts in any other section has the word "purchaser" been restricted merely to a stranger purchaser.

[9] After giving our fullest consideration to the doubts that were raised, which we have considered in our judgment, we are clearly of opinion that the decision in the case of *Phani Bhusan Mukherjee* v. *Rai Bahadur Purna Chandra Bagchi and others*, 48 C.W.N. 210 : (A.I.R. (31) 1944 Cal. 199) is a correct decision and there is absolutely no need for reference to a Full Bench. We agree with and accept the same and hold that a purchaser in S. 168A (1) (b), Bengal Tenancy Act, includes a decree-holder purchaser.

[10] The two second miscellaneous appeals have raised only this question and as this is found against the appellant the two second miscellaneous appeals are dismissed.

[11] Coming now to the special question in the first miscellaneous appeal as to what is meant by rent, that is, whether costs decreed in the suit are to be included or excluded we are of opinion that the learned Subordinate Judge overlooked the definition of 'rent' in S. 3 (13). That definition would clearly show that the costs decreed in the rent suit are not included in rent. This amount is not payable by the purchaser and for this amount there may be an execution taken out. In the decision in *Amano Barmanya* v. *Uma Charan Das & others*, 50 C. W. N. 803 : (A.I.R. (34) 1947 Cal. 330), a Divisional Bench has already decided that the auction purchaser is liable only for the actual amount of the rent and not for the entire decretal amount. It has been decided already by two Divisional Benches in the case of *Sri Sri Iswar Joy Chandi Thakurani & ors.* v. *Manmatha Nath Das*, 49 C. W. N. 756 : (A. I. R. (33) 1946 Cal. 88) and in the case of *Bankim Chandra Chatterjee & others* v. *Gour Mohan Mullick*, 50 C. W. N. 261, that rent includes cess. Under S. 161 (c), Bengal Tenancy Act, the words 'arrears' and 'arrears of rent' shall be deemed to include interest decreed under S. 67 or damage awarded in lieu of interest under sub-s. (1) of S. 68. This is the special meaning given for the purposes of Chap. XIV and S. 168A as also S. 169 appear in Chap. XIV, Bengal Tenancy Act. The deposit made under S. 168A (1) (b) is distributed under S. 169 and it has already been decided in connection with S. 169 (1) (c) that

> "any rent which may have fallen due in respect of the tenure or holding between the institution of a suit and the date of the confirmation of the sale 'includes interest on such rent'. "

There was first an obiter about this in the case of *Moharajadhiraj Bejoy Chand Mohatab Bahadur* v. *S. C. Mukherjee*, 11 C. W.N. 1106, which was dissented from in 12 C. W. N. cxliv (Notes portion) and finally it was so decided in the case of *Prafulla Nath Tagore & ors.* v. *Matabaddin Mandal & ors.*, 22 C. W. N. 323 : (A. I. R. (5) 1918 Cal. 965). This view was again confirmed in the case of *Ram Lal Das* v. *Bandiram Mukhopadhya*, 26 C. W. N. 511: (53 I. C. 993). It is, therefore, clear that the purchaser is to deposit the rent, cess and interest decreed in the suit but he is not to deposit the costs awarded by the Court and the same has to be paid by the judgment-debtor tenant and for it execution may be taken out.

[12] We have now to consider the last remaining question as to how the equities in the present case are to be worked out. In the various decisions already referred to the procedure adopted had not always been uniform. It is not necessary for our present purpose to consider the position when a person other than the decree-holder becomes the auction purchaser.

[13] In determining the equities between the parties we cannot overlook the time factor. If an order confirming the sale is passed by the Court and is allowed to remain unaffected for a long time, various persons may become interested in the said property on the basis of the order for confirmation being a valid and binding order. If such an order is to be set aside after the lapse of a long period various complications are bound to arise. Reference in this connection may be made to Ss. 159 (2), 167 and 174A (1), Bengal Tenancy Act. In working out the equities we must not forget the complications which will ensue if the order for confirmation be set aside now.

[14] The objection raised to the order for confirmation is dependent on certain laches on the part of the decree-holder himself. Illegality in question is that the decree-holder did not do what he was required to do under the provisions of the Act. No doubt it has been observed in some of the decisions that it is a duty of the Court as well to see that the obligations which are required to be discharged by the decree-holder are duly performed. This, however, does not take the case out of the general and equitable principle that equity will consider that as done what should have been done and that a person cannot be allowed to take advantage of his own wrong.

[15] When the decree-holder himself is the auction purchaser the payment of the subsequent arrears which had accrued due is to be made to himself and the said decree-holder is entitled to an order confirming sale by either paying himself or on declaring that the amount due is wiped out. When a decree-holder auction purchaser applies for the confirmation of the sale without either depositing the amount of subsequent arrears or discharging the said dues formally he must be taken to have given up his right to claim such arrears at any subsequent stage. He must be deemed to have done what he was required to do before he could get an order confirming the sale. Under the circumstances when the attention of the executing Court is drawn subsequently to the fact that the sale had already been confirmed without the decree-holder auction purchaser fulfilling the conditions laid down under S. 168A, Bengal Tenancy Act, all that the executing Court need do is to record an order that the total amount of rent, cess and interest which had accrued due up to the date of confirmation is deemed to be satisfied by the decree holder auction purchaser having applied for such confirmation and the confirmation having been made. Unless the decree-holder auction purchaser files an application entering satisfaction of the dues which had so accrued the Court is, in our opinion, competent to declare the said dues as having been satisfied by implication. The learned Subordinate Judge was therefore right in holding that the subsequent arrears up to the confirmation of sale and for which decrees might have been obtained should be taken as having been fully satisfied.

[16] Although our decision is that the amount of arrear of rent, cess and interest had been satisfied on the confirmation of the sale it is to be noticed that the decrees for the subsequent period had been obtained by the landlord before the sale of the tenure in execution of the decree in Rent Suit No. 7 of 1943. The cost which had been decreed in favour of the landlord in the subsequent rent suits were not wiped away by the order confirming the sale and so the same may be now realised by execution. We do not express any opinion on the question as to what the legal position will be when the auction purchaser is some one other than the decree-holder.

[17] The order of the Subordinate Judge in the first miscellaneous appeal will, therefore, be modified and the execution case dismissed by him will be restored and the decree holder will be entitled to apply for execution of the decree only for the amount due for costs awarded in the suit, the rest of his claim being taken as satisfied by set off and the two second miscellaneous appeals will be dismissed.

[18] The respondent will get his costs in all the three appeals from the appellant as he has substantially won in all appeals but there will be one set of hearing fee.

R. P. Mookerjee J. — I agree.

R.G.D. *Orders accordingly.*

A. I. R. (37) 1950 Calcutta 20 *[C. N. 5.]*

G. N. DAS AND LAHIRI JJ.

Abdul Sammad — Plaintiff—Appellant v. *Jitoo Chowdhury—Defendant—Respondent.*

A. F. A. D. No. 982 of 1940, Decided on 12th May 1949, against decree of Addl. Dist. Judge, Zillah 24 Parganas, D/- 6th March 1940.

(a) T. P. Act (1882), S. 106—Plaintiff taking some land on non-agricultural lease from uncles and sub-leasing some to defendant for residential purposes — Upon death of uncles plaintiff inheriting their interest and amalgamating them with some non-agricultural holding inherited by him from father—Defendant held did not become under-raiyat, within the meaning of S. 4 (3), Bengal Tenancy Act, sub-lease being non-agricultural at inception —Notice under S. 106 held valid—Bengal Tenancy Act (VIII [8] of 1885), S. 4 (3).

Plaintiff took a non-agricultural lease of 9 cottas of land under a patta from his two uncles and out of this area of 9 cottas the plaintiff granted a sub-lease to the defendant for three cottas for residential purposes. On

the death of the plaintiff's lessors who were his uncles the plaintiff inherited their interest. That interest was that of a raiyat. The plaintiff served a notice on the defendant to quit under S. 106, T. P. Act. The defendant denied the validity and sufficiency of the notice and alleged that the tenancy was governed by the Bengal Tenancy Act and that on plaintiff's inheriting his uncles' interest, the plaintiff became a raiyat and the leasehold interest held by him was merged in the higher right with the result that the defendant became an under-raiyat under the plaintiff no matter whether the sub-lease at its inception was for agricultural or non-agricultural purposes. It was found that the uncles had the interest of a non-agricultural bastu tenant in their holding of 9 cottas. It was also found that the non-agricultural holding of 9 cottas belonging to the uncles of the plaintiff which was inherited by the plaintiff was amalgamated with certain other agricultural holdings inherited by him from his father and all the holdings were converted into one holding and recorded as raiyati mokurari in the record of rights :

Held* that the sub-lease in favour of the defendant was non-agricultural at its inception and it retained that character throughout and that the notice under T. P. Act was valid: 8 C. W. N. 454, *Disting.

[Para 7]

Held also* that the defendent had not become an under-raiyat. A person would be under-raiyat within the meaning of S. 4 (3), Bengal Tenancy Act, only if he held under a raiyat at the inception of his lease: 8 C. W. N. 454, *Expl.*; A. I. R. (28) 1941 Cal. 606, *Rel. on. **[Para 9]**

Annotation: ('45-Com.) T. P. Act, S. 106, N. 13.

(b) Bengal Non-agricultural Tenancy (Temporary Provisions) Act (IX [9] of 1940), S. 3 — "Suit or proceeding" — Appeal is not suit or proceeding and cannot be stayed : Per *Biswas J.* in A. I. R. (28) 1941 Cal. 452 ; A. I. R. (29) 1942 Cal. 47 ; Civil Rules 1529 to 1629 of 1940 (Cal); A. I. R. (29) 1942 Cal. 136 and A.I.R. (32) 1945 Cal. 50, *Rel. on.* **[Para 10]**

(c) Civil P. C. (1908), O. 41, R. 25 — Remand for finding of fact ordered—Defendant submitting and unsuccessfully adducing evidence — He cannot subsequently set up case other than that set up in remand — Evidence Act (1872), S. 115. [Para 9]

Annotation: ('44-Com.) Civil P. C., O. 41, R. 25, N. 6; ('46 Man.) Evidence Act, S. 115, N. 24.

Hemendra Chandra Sen and Panchanan Pal — for Appellant.

A. D. Mukherjee — for Respondent.

Lahiri J.— The suit out of which this appeal arises was instituted by the plaintiff for ejectment of the defendant from cadastral survey plot No. 633 of Khatian 587 Mouza Garulia on termination of the defendant's tenancy by a notice to quit under S. 106, T. P. Act. The Court of appeal below dismissed the suit and hence this appeal is by the plaintiff.

[2] The plaintiff's case is that he took a lease of 9 cottas of land under a patta dated 19th Pous 1308 (3rd January 1902) from his two uncles Sk. Osman and Sk. Meajan and out of this area of 9 cottas the plaintiff granted a sublease to the defendant for three cottas for residential purposes; in the record of rights finally published in 1931 the defendant was recorded as an under-raiyat with a right of occupancy. This entry was challenged by the plaintiff as wrong. The plaintiff further alleged that he served a notice to quit under S. 106, T. P. Act, on 21st Jaistha 1342, by registered post and the defendant accepted the same with the result that the tenancy was determined with effect from 1st Sravan 1342.

[3] The defendant denied the validity and sufficiency of the notice and alleged that the tenancy was governed by the Bengal Tenancy Act and that he took the lease for agricultural purposes. The Court of first instance decreed the suit and then after passing through various stages the suit was finally dismissed by the Additional District Judge, 24-Parganas, by a judgment dated 6th March 1940, upon the finding that on the death of the plaintiff's lessors who were his uncles the plaintiff inherited their interest and as that interest was that of a raiyat the plaintiff became a raiyat and the leasehold interest held by him was merged in the higher right with the result that the defendant became an under-raiyat under the plaintiff. As the plaintiff himself became a raiyat the sub-lease granted by him to the defendant made the defendant an under-raiyat, no matter whether the sub-lease was for agricultural or non-agricultural purposes For this proposition of law the Additional District Judge relied upon the case of *Babu Ram Roy* v. *Mahendra Nath Samanta*, decided by Mitra J., and affirmed on Letters Patent Appeal by Maclean C. J. and Pargiter J.: *vide* 8 C. W. N. 454.

[4] Against this decision the plaintiff has filed this second appeal, the hearing of which under O. 41, R. 11, Civil P. C., was stayed by an *ex parte* order dated 7th April 1940, under S. 3, Bengal Non-agricultural Tenancy (Temporary Provisions) Act. On 2nd December 1947, that *ex parte* order of stay was vacated and the appeal was admitted under O. 41, R. 11. On 20th July 1948, the appeal was taken up for final hearing by B. K. Mukherjea J. before whom it was argued by the appellant that if the tenancy created by the potta dated 19th Pous 1308 was a non-agricultural tenancy at its inception, the subsequent event by which the rights acquired under the potta merged in the superior rights of the lessor, could not affect the status of the subordinate tenant. Though this was an important question in the case it was not raised in the Court below and Mukerjea J. accordingly acting under O. 41, R. 25, Civil P. C., remitted the following issue to the lower appellate Court : "What was the status of Osman at the time when the potta of 1308 was granted." The lower appellate Court was directed to take fresh evidence and record a finding on the point.

[5] In pursuance of the direction given by Mukherjea J. the lower appellate Court has recorded the following findings :

(a) "On a comparative estimate of the evidence adduced by the two parties, I am of opinion that the appellant's contention that the holding of Osman and Meajan measured only 9 cottas and that the entire holding was a non-agricultural bastu holding is true.

(b) I hold from the evidence on record that Osman and Meajan had the interest of a non agricultural bastu tenant in their holding of 9 cottas to which the disputed land appertains and their interest was not that of a raiyat."

[6] The lower appellate Court has further found that this non-agricultural holding of 9 cottas belonging to Osman and Meajan was inherited by the appellant Abdul Samad and amalgamated with certain other agricultural holdings inherited by him from his father and all the holdings were converted into one holding bearing a consolidated rent of Rs. 6 and recorded as raiyati mokurari in the record of rights.

[7] Mr. Sen appearing for the appellant has argued that in view of the finding arrived at by the Court of Appeal below after the order of remand made by Mukherjea J., it must be held that the tenancy of the defendant is governed by the Transfer of Property Act. The effect of the judgment of Mukherjea J. is that the principle of the decision of *Babu Ram Roy's case*, 8 C. W. N. 454, will apply only if the tenancy of Osman and Meajan be found to be an agricultural tenancy on the date of the potta dated 19th Pous 1308. The finding, however, is that the tenancy of Osman and Meajah was not agricultural tenancy on the date of the potta, but that it became an agricultural tenancy on a subsequent date. Upon this finding it seems to us that *Babu Ram Roy's case*, 8 C. W. N. 454, has no application. The sub-lease in favour of the defendant was non-agricultural at its inception and it retained that character throughout.

[8] Mr. Mukherjee appearing for the respondent has strenuously challenged the findings arrived at after remand on the ground that they were beyond the scope of the order of remand. The argument is that it had been found by the lower appellate Court before the remand that the amalgamation took place not with the paternal jama of the plaintiff but with other jamas inherited from the plaintiff's uncles Meajan and Osman, and it was not, therefore, open to the plaintiff after the remand to show that a part of the jama recorded in C. S. Plot No. 583 belonged to the plaintiff's father and another part belonged to his uncles. We are not impressed by this argument because we think that the scope of the order of remand was wide enough to cover an enquiry into the question as to who were the persons from whom the plaintiff inherited the different jamas. The finding as to the mode of amalgamation is only incidental to the main issue that was remitted for investigation, viz , what was the status of Osman and Meajan on the date of the potta, and after having arrived at the necessary finding on that issue, the learned Subordinate Judge went into the question of amalgamation only for the purpose of explaining the entry in the record of rights. The dakhila, Ex. 8 (c) shows that the amalgamation did not take place even on 20th Chaitra 1319. If that be so, the defendant must be held to have taken a sub-lease from a non-agricultural lessor for non-agricultural purposes and his rights will accordingly be governed by the Transfer of Property Act.

[9] Mr. Mukherjee has argued in the second place that according to the definition of an under-raiyat as given in S. 4 (3), Ben. Ten. Act, the defendant is an under-raiyat inasmuch as he held immediately under the plaintiff who is at present a raiyat though the plaintiff was not a raiyat at the time when he (plaintiff) took lease from Osman and Meajan in 1308, or at the time when he granted the sub-lease to the defendant. This argument is open to a two-fold objection: in the first place it makes the order of remand made by B. K. Mukherjea J. altogether nugatory as that order was made on the footing that the present status of the plaintiff was immaterial and the defendant's status would be determined by the status of the plaintiff on the date of the potta of 1308. After having submitted to that order and having unsuccessfully adduced evidence on that point, it is hardly open to the defendant to say now that the rights of the defendant should be determined by the present status of the plaintiff. But there is a more serious objection to this argument and that is this: In the case of *Arun Kumar Sinha* v. *Durga Charan Basu*, 45 C. W. N. 805 : (A. I. R. (28) 1941 Cal. 606), Mukherjea and Roxburgh JJ. pointed out that the rule of law laid down in the case of *Babu Ram Roy* v. *Mahendra Nath Samanta*, 8 C. W. N. 454, that a person holding under a raiyat will be an under-raiyat even if he holds it for non-agricultural purposes is open to serious exceptions. But their Lordships did not refer the matter to a Full Bench simply because it had remained unchallenged for a considerable time. This criticism of *Babu Ram Roy's case*, (8 C. W. N. 454) inclines us to put a narrow construction upon the words of S. 4 (3), Ben. Ten. Act, and to hold that a person will be an under-raiyat only if he holds under a raiyat at the inception of his lease. The interpretation sought to be put upon S. 4 (3), Ben. Ten. Act, by Mr. Mukherjee would have the effect of extending the principles of the decision in *Babu Ram Roy's case*, (8 C. W. N. 454) which we are not

prepared to do in view of the criticism by Mukherjea J. in the case of *Arun Kumar Singha* v. *Durga Charan Basu*, 45 C. W. N. 805 : (A. I. R. (28) 1941 Cal. 606).

[10] It remains for us to consider the question whether the present appeal is liable to be stayed under the provisions of S. 3, Bengal Non-agricultural Tenancy Act of 1940. It is conceded that the defendant is a non-agricultural tenant within the meaning of the Act. But Mr. Sen has argued that the appeal by the landlord is neither a suit nor a proceeding within the meaning of S. 3 and is not liable to be stayed. Mr. Mukherjee on the other hand has contended that the appeal is a continuation of the suit and in any case it is a proceeding. The decisions on the point are not uniform. In the case of *Jahur Mia* v. *Abdul Gaffur*, 45 C. W. N. 603 : (A. I. R. (28) 1941 Cal. 452), Biswas J. held that the words "suit or proceeding" in S. 3 did not include an appeal, but Mukherjea J. who agreed with the order made by Biswas J. on a different ground, was not prepared to go so far as to say that the word "proceeding" did not include an appeal. In the case of *Prankrishna Mukherjee* v. *Jnanada Roy*, 45 C. W. N. 967 : (A.I.R. (29) 1942 Cal. 47), Edgley and Biswas JJ. approved of the view taken by Biswas J. in *Jahur Mia's case*, 45 C. W. N. 603 : (A. I. R. (28) 1941 Cal. 452). *Prankrishna Mukherjee's case*, 45 C. W. N. 967 : (A. I. R. (29) 1942 Cal. 47) was followed by Edgley and Biswas JJ. in the case of *Howrah Jute Mills* v. *Bakshi Sk. Napit*, Civil Rules 1529 to 1629 of 1940 (unreported) decided on 5th January 1942. In *Ram Charit Bhakat* v. *Tetari Kumari Kuor*, A. I. R. (29) 1942 Cal. 136 : (201 I. C. 516), Henderson J. sitting singly agreed with the view of Biswas J. that the expression "suit or proceeding" in S. 3 does not include an appeal. Lastly, in *Rukmini Mahesri* v. *Prahlad Chandra Agarwalla*, 47 C. W. N. 702 : (A.I.R. (32) 1945 Cal. 50), Biswas J. sitting singly reviewed all the authorities and reaffirmed his view that the expression "suit or proceeding" does not include an appeal. In this state of the authorities, particularly in view of the two decisions of Division Bench in the cases of *Prankrishna Mukherjee* v. *Jnanada Roy*, 45 C. W. N. 967 : (A. I. R. (29) 1942 Cal. 47), and *Howrah Jute Mills* v. *Bakshi Sk. Napit*, (Civil Rules 1529 to 1629 of 1940) we are constrained to hold that the present appeal is not liable to be stayed under S. 3, Bengal Non-agricultural Tenancy Act of 1940.

[11] We have already stated that the hearing of the appeal under O. 41, R. 11 was stayed under that Act by an *ex parte* order dated 7th April 1941 which was vacated by another *ex parte* order dated 2nd December 1947. It is remarkable that when eventually the appeal was taken up for final hearing by B. K. Mukherjea J. on 20th July 1948, the respondent did not take any objection to the hearing under S. 3, Bengal Non-agricultural Tenancy Act, and submitted to the order of remand. But in view of the fact that the question now raised before us by Mr. Mukherjee is a question affecting the jurisdiction of the Court, we have allowed him to argue it and decided to give our decision on the merits of his argument.

[12] The result of our decision is that this appeal must be allowed, the judgment and decree of the Court of appeal below are set aside and that of the Munsif restored and affirmed.

[13] In the circumstances of the case we direct that the parties should bear their own costs throughout.

G. N. Das J.—I agree.

R.G.D. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 23 *[C. N. 6.]*

R. C. MITTER AND P. N. MITRA JJ.

Ram Protap Kayan — Defendant—Appellant v. *The National Petroleum Co. Ltd. — Plaintiff — Respondent.*

A. F. O. D. No. 335 of 1944, Decided on 30th June 1949, against decree of Sub-Judge, 4th Court, Zillah 24 Parganas, D/- 26th June 1944.

(a) T. P. Act (1882), S. 53A — Rights of transferor — Section 53-A sanctions enforcement by transferor of his contractual rights against transferee—Exercise of his rights is not dependent upon fulfilment of conditions mentioned in S. 53-A — Unregistered lease of premises for 5 years — Contract partly performed — Lessee bound to vacate possession on expiry of period.

So far as the transferee is concerned, S. 53-A confers a right on him to the extent that it imposes a bar on the transferor. But this is only a right to protect his possession against any challenge to it by the latter contrary to the tenor of the contract or the instrument of transfer. [Para 11]

So far as the transferor is concerned, when the section says that the transferor shall be debarred from enforcing any right against the property other than a right expressly provided by the terms of the contract, by plain implication it sanctions the enforcement by the transferor of a right which has been so provided. And there is obvious justice in this, for if the transferor is to be held to his bargain with the transferee in respect of the property, it is only just that he should be given liberty to enforce his contractual rights against the latter in respect of it. It may be said that this is not the conferment of a right but the saving of an existing right. But whether it is the one or the other, it secures the result of enabling the transferor to enforce his contractual rights against the transferee in respect of the property. [Para 14]

This right of the transferor is not dependent upon fulfilment of all the conditions mentioned in the section. The terms of the section clearly indicate that they cannot be conditions precedent to the enforcement of the transferor's right : they are only conditions precedent to the imposition of the bar against the

transferor and consequently conditions precedent to the accrual of the transferee's right to protect his possession. No doubt, if the transferor wants to enforce against the transferee any right in respect of the property which has been expressly provided by the contract, he must previously have put the transferee in possession in part performance of the contract. And ex hypothesi there is a written contract containing reasonably clear terms as to the transfer, because what the transferor seeks to enforce is a right provided by such a contract :A. I. R. (28) 1941 Bom. 346, *Dissent.* [Para 15]

If this were not so, the transferor's rights would become quite illusory and in fact would cease to be rights at all because they could always be defeated by the transferee by the simple device of refusing to perform his part of the contract. [Para 15]

Where under an unregistered lease for 5 years in respect of certain premises, the lessee takes possession of the premises in performance of the contract and remains in possession for the full period of the agreement, he is bound to vacate the premises on the expiry of the period and his possession becomes wrongful thereafter. The right of the lessor to have the premises returned to him is not dependent upon the willingness of the lessee to restore it. [Para 18]

Annotation: ('45-Com.) T. P. Act, S. 53-A N. 13.

(b) Registration Act (1908), Ss. 2 (7), 17 (d) and 49 — Agreement to lease for 5 years shed and godown which would be provided — Agreement does not operate as present demise and is not lease — Even if deed is lease, it is admissible as proof that acts were done in part performance of it — Deed if available as evidence of contract for S. 53-A, T. P. Act *(Quære).*

An agreement for lease for 5 years in respect of a shed and godown, which merely says that a suitable shed and a godown would be provided on certain lands and does not specify any particular shed or godown, does not operate as a present demise and therefore is not a lease, and, therefore, does not require registration : A. I. R. (6) 1919 P. C. 79, *Foll.* [Paras 19 & 20]

Even if it can be interpreted as creating a present and immediate interest in the premises and therefore requiring registration, where the agreement is sought to be used not only as evidence of the contract for the purposes of S. 53A but also as proof that acts were done in part performance of it, the agreement is admissible under the proviso to S. 49. [Paras 20 & 21]

Quære : Does the proviso to S. 49 permit the document being used as evidence of the contract for the purposes of S. 53-A, T. P. Act, apart from any question of any acts having been done in part performance of it? Or, does it mean that the document can be used as evidence of the contract only when there have been acts done in part performance of it, the proof of the contract being merely an ingredient in the proof that the acts done were part performance of the contract? [Para 21]

Annotation: ('45-Com.) Registration Act, S. 2 (7), N. 5; S. 17 N. 31; S, 49 N. 12.

(c) T. P. Act (1882), Ss. 106 and 107 — Scope of — There is no conflict or contradiction between them. *(Obiter).*

Obiter : Section 107 deals with the creation of a tenancy from year to year by act of parties. Section 106 provides for the case where the lease is for manufacturing purposes but the contract between the parties is silent as to its duration. In such a case the law supplies the omission and enacts that the lease shall be deemed to be a lease from year to year. The attachment of this incident to the lease by operation of law is a very different thing from the creation of a lease from year to year by act of parties. The two sections deal with entirely different matters and there is no conflict or contradiction between the two. [Para 23]

Annotation: ('46-Com.) T. P. Act, S. 106 N. 12; S. 107 N. 1.

(d) T. P. Act (1882), S. 105 — Lease or licence— Test to determine stated — Grant for manufacturing process involving installation of costly machines by grantee— Premises to be returned on expiry of term in same condition in which it was handed over — Alterations with permission of grantor permissible — Grant held lease and not licence. *(Obiter).*

Obiter: If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself. If the contract was merely for the use of the property in a certain way on certain terms while it remained in the possession and under the control of the owner, it is a licence. [Para 26]

Exclusive possession would be taken to have been given if the nature of the acts to be done by the grantee was such as required a right of exclusive occupation. [Para 26]

An agreement in respect of a shed and godown provided that the grantee was to maintain the shed and godown duly and was to return them on the expiry of the term in the same condition in which they were handed over to him and that he could even make alternations in them subject to the consent of the grantor. Costly machineries were to be installed therein by the grantee at his own cost and a regular factory for the manufacture of containers was to be started :

Held that the provisions and the object of the grant pointed to the fact that exclusive possession was to be given to the grantee. The grant, therefore, operated as a lease. [Para 26]

Annotation: ('45-Com.) T. P. Act, S. 105 N. 13, 14. ('46-Man.) Easements Act, S. 52 N. 4.

(e) T. P. Act (1882), S. 53-A — Contract partly performed— Breach of — Suit for damages is not required to be rested on S. 53-A.

Where the contract has been partly performed a suit for damages simpliciter for breach of contract does not require to be rested upon S. 53-A at all : A. I. R. (28) 1941 Bom. 346, *Dissent.* [Para 17]

Annotation: ('45-Com.) T. P. Act, S. 53A N. 13.

Chandra Sekhar Sen, Smriti Kumar Roy Choudhury and Ranjit Kumar Bose—for Appellant.

Paresh Nath Mukherjee and Siti Kantha Lahiri — for Respondent.

P. N. Mitra J. — The suit out of which this appeal arises was commenced by the respondent, the National Petroleum Co. Ltd. against the appellant Ram Protap Kayan for ejectment of the latter from a corrugated sheet shed and godown forming part of premises No. P-2 Pahar-pur Siding Road of the Port Commissioners of Calcutta in King George's Dock. There was also a claim for damages for wrongful occupation which was provisionally laid at Rs. 9400. The respondent's case was that its predecessor-in-interest the National Petroleum Company (hereinafter referred to as the company) entered into business relationship with the appellant, the terms whereof were set out in an instrument of agreement executed by both the parties on

31st March 1934, that one of the terms of the said agreement was that the company would provide for the appellant a suitable shed and godown at a monthly rent of Rs. 50 in which the appellant would fit up his tin manufacturing machines and of which he would remain in occupation for a period of five years and would return vacant possession at the end of it, that in pursuance of the agreement the company let out the shed and godown in suit to the appellant from 1st April 1934, that the period of five years expired on the expiry of the 1st April 1939 and that as the appellant then refused to vacate the premises, he was in wrongful occupation as a trespasser since then.

[2] In his written statement the appellant admitted the letting to him from 1st April 1934. The defence taken by him that is now material was that the agreement, which was unregistered, did not and could not create a lease for a term of five years, and that as the letting to him was for manufacturing purposes, he had in law a tenancy from year to year terminable by six months' notice to quit ending with the year of the tenancy. As no such notice had been served, he continued to be a tenant and could not be regarded as a trespasser.

[3] While the suit was pending in the Court below the premises were requisitioned and taken over by the Government in October 1942. The prayer for ejectment, therefore, became unnecessary, but the prayer for damages remained and called for determination of the principal question which emerged for consideration in the case, viz., whether the appellant was bound to vacate the premises at the end of the term of five years under the agreement of 31st March 1934 or whether he was, in the circumstances of the case, a tenant from year to year whose tenancy was only determinable by six months' notice to quit ending with the year of the tenancy.

[4] The agreement of 31st March 1934 which has been marked as Ex. 2 in the case, was stated to be entered into between the National Petroleum Company and Messrs Gajanand Ram Protap and Company (under which name and style the appellant was carrying on business) for a period of five years. There are fifteen paragraphs in this agreement, but those that deal with the letting to the appellant are paras. 1 and 3 and are in these terms :

"1. The Second Party agrees to pay in full and (return) the documents of all Tin Manufacturing machines purchased by the First Party from Messrs E. W. Bliss and Company, America, as per their Invoice No. 193 dated 15th January 1934, and pay the Custom duty, and Port Charges etc. Having met all payments concerning these machines, the second party will become the absolute owner of the said machinery. The Second Party will fit up the machinery at their cost in a suitable shed to be provided by the First Party on a monthly rental of Rs. 50 (Rupees fifty only) inclusive of all outgoings and taxes; such shed is to be erected and built before the arrival of the machinery by the First Party on the lands leased out to the First Party by the Port Commissioners at King George's Dock."

"3. The shed and godown rented out on a monthly basis for a term of five years, will be duly maintained by the Second Party and returned back on the expiry of the period in the same condition as handed over to the Second Party by the First Party. Any changes that the Second Party may choose to make in the said shed and godown will be subject to the written consent of the first party, Port Commissioners Factory Inspector and Municipal Corporation but such consent shall not be unreasonably withheld."

[5] The second paragraph provided for the purchase by the appellant of a soldering machine which had been ordered by the company from a London firm, and the remaining paragraphs embody the terms of the contract between the parties relating to the manufacture of petrol containers by the appellant and their supply by him to the company. The provisions of some of these paragraphs may briefly be referred to. Thus, para. 5 provided that all empty tins required by the company in its entire business during the continuance of the agreement would be supplied by the appellant from his factory in the shed provided by the company, and, if the demand exceeded the capacity of the factory, from his factory in the town or otherwise as convenient to him. The sixth paragraph dealt with the contingency of dislocation of work in the factory and also provided for the supply of tin plates of suitable size and quality (obviously by the company) from each of which a specified number of tins were to be manufactured by the appellant. Paragraph 8 gave liberty to the appellant to do outside work if the company was not able to place orders to the full extent of the capacity of the factory. By para. 9 the appellant undertook not to do any work for the competitors of the company and not to sell the branded goods to the agents of the company without its express sanction. By para. 10 the appellant undertook to use a soldering composition of 50% lead and 50% Block Tin and to take particular care that the tins manufactured by it might not be leaky and so reflect on the reputation of the company. By para. 14 the manufacturing cost allowance to the appellant was agreed to be ./1/1 (one anna one pie) per four gallon tin delivered to the company at its installation at King George's dock. It is unnecessary to go further into the provisions of the agreement.

[6] The learned Subordinate Judge held that as no particular premises was mentioned in the document and it was simply stipulated that pre-

mises suitable for the purpose of manufacture of tin canisters close to the company's own business concern would be provided, "the agreement could not be considered to be a lease properly so-called." "Nevertheless", he said, "it was an agreement by which the parties were bound. In pursuance of this agreement the premises described in Sch. A (of the plaint) were made over to the defendant." He went on to say that

"if the plaintiff had served six months' notice calling upon the defendant to vacate within the period of five years fixed by Ex. 2 (the Agreement) the plaintiff could not have ejected the defendant as the defendant would have taken shelter under S. 53A, T. P. Act, and also under the terms of Ex. 2. In view of the Agreement the plaintiff could not have ejected the defendant within the period of five years fixed by Ex. 2. In view of the existence of the document the defendant could occupy the premises for a period of five years only. The defendant solemnly undertook to vacate the premises after the expiry of a period of five years. The effect of this agreement has not been nullified by the absence of a formal document creating a lease in favour of the defendant. In my opinion the defendant was bound to vacate the premises in terms of the agreement in Ex. 2."

The learned Judge, therefore, held that the respondent was entitled to recover damages and he gave the respondent a decree for Rs. 8393-5-4 at the rate of Rs. 200 per month from 2nd April 1939 to the end of September 1942.

[7] Before us the appellant has repeated the contention that his tenancy must be deemed to have been a tenancy from year to year, and as it was never terminated by the requisite notice, he continued to be a tenant up to the time the Government took possession of the premises and he was not therefore liable for any damages. He has further contended that even if his possession be held to have been wrongful after 1st April 1939, the measure of the damages should be the rent which was payable by him and not the sum of Rs. 200 per month which has been awarded by the learned Judge. Alternatively, he has contended that the damages should not exceed Rs. 120 per month on the basis of certain data which will be noticed later on in this judgment.

[8] The argument of the appellant with regard to the nature of the tenancy was put in this way. The agreement, Ex. 2 being unregistered, no lease for a term of five years was created, as under S. 107, T. P. Act, a lease for a term exceeding one year can be created only by a registered instrument. But there was a letting to the appellant followed up by payment and acceptance of rent, and the letting was for a manufacturing purpose. Therefore, under S. 106 of that Act the lease must be deemed to be a lease from year to year terminable by six months notice to quit ending with the year of the tenancy, there being no contract to the contrary. The only modification that was made by the operation of S. 53A of the Act in the legal relationship of the parties was that during the continuance of the term of five years the respondent could not eject the appellant from the demised premises by service of six months' notice to quit. But this was really an additional protection afforded to the appellant, which did not fundamentally alter the character of the tenancy as a tenancy from year to year. With the withdrawal of the protection on the expiry of the term of five years the tenancy again became terminable by service of six months' notice to quit.

[9] We are unable to assent to this view of the operation of S. 53A, upon the rights of the parties in the present case. That section which was characterised by Lord Mac Millan in *Mian Pir Bux* v. *Mahomed Tahar*, 61 I. A. 388 : 39 C. W. N. 34 : (A. I. R. (21) 1934 P. C. 235) as a partial importation into India of the English equitable doctrine of part performance, is in these terms :

"Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract : .

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

[10] In form the section imposes a bar on the transferor when the conditions mentioned in the section have been fulfilled—it debars him from enforcing against the transferee any right in respect of the property other than a right expressly provided by the terms of the contract. He is not allowed to take advantage of the fact that the contract, though required to be registered, has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in manner prescribed by law. And in order to obviate any difficulty about proof of the contract or of the instrument of transfer for want of registration, supplementary legis-

lation was enacted amending S. 49, Registration Act.

[11] So far as the transferee is concerned, the section confers a right on him to the extent that it imposes a bar on the transferor. But this is only a right to protect his possession against any challenge to it by the latter contrary to the tenor of the contract or the instrument of transfer; *Probodh Kumar Das* v. *Dantmara Tea Co., Ltd.*, 66 I. A. 293: (A. I. R. (27) 1940 P. C. 1). As Lord Atkin observed in *S. N. Banerjee* v. *Cuchwar Lime and Stone Co., Ltd.*, 46 C. W. N. 374: (A. I. R. (28) 1941 P. C. 128):

"...the words of the section make it quite plain that the section does not operate to create a form of transfer of property which is exempt from registration. It creates no real right; it merely creates rights of estoppel between the proposed transferee and transferor, which have no operation against third persons not claiming under those persons."

[12] Has the transferor any right under the section? It was contended on behalf of the appellant that the question must be answered in the negative in view of the observations made by their Lordships in *Probodh Kumar Das's case*: (66 I. A. 293: A. I. R. (27) 1940 P. C. 1). In that case the facts, shortly stated, were that an agreement to sell the Kaiyachera Tea Estate was executed in favour of the plaintiffs' predecessors on 10th October 1931, who thereupon paid a part of the price and went into possession. The defendant the Dantmara Tea Co. Ltd., however, subsequently had a regular conveyance executed and registered in their favour by the owners and thus acquired the legal title to the property. In those circumstances the plaintiffs brought the suit to have it declared that the Dantmara Tea Co. Ltd. had no right or title to the estate, including the right to sell tea under the export quota allotted to it under the Indian Tea Control Act or to transfer the quota rights to any person. They also sought an injunction. The contention of the plaintiffs was that, notwithstanding that they had not chosen to sue for specific performance of the contract of 10th October 1931, and notwithstanding that they had taken no steps to complete their title, they were nevertheless entitled under S. 53A actively to assert the rights of a proprietor in virtue of the contract of 10th October 1931, and their possession. In repelling this contention Lord MacMillan observed:

"In their Lordships' opinion the amendment of the law effected by the enactment of S. 53A conferred no right of action on a transferee in possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mitter J. in the High Court that 'the right conferred by S. 53A' is a right available only to the defendant to protect his possession'.....The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee. Indeed any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act."

[13] It has been contended that the passage quoted by their Lordships with approval from the judgment of Mitter J. lays down that the section has conferred a right only on the transferee. The context in which the passage occurs in the judgment of Mitter J. (*Dantmara Tea Co., Ltd.* v. *Probodh Kumar Das*, 41 C. W. N 54 at p. 63) and the observations in their Lordships' judgment which precede and follow the quotation make it clear enough however that what the passage lays down and what their Lordships take it to lay down is that the only right conferred on the transferee is the right to protect his possession and not that the section confers a right only on the transferee. Their Lordships were concerned with repelling the assertion of an active title by the transferee. The question of the transferor's right was not a matter which engaged their Lordships' attention at all.

[14] When the section says that the transferor shall be debarred from enforcing any right against the property other than a right expressly provided by the terms of the contract, by plain implication it sanctions the enforcement of a right which has been so provided. And there is obvious justice in this, for if the transferor is to be held to his bargain with the transferee in respect of the property, it is only just that he should be given liberty to enforce his contractual rights against the latter in respect of it. It may be said that this is not the conferment of a right but the saving of an existing right. But whether it is the one or the other, it secures the result of enabling the transferor to enforce his contractual rights against the transferee in respect of the property.

[15] The question that next arises is this: Is this right of the transferor dependent upon fulfilment of all the conditions mentioned in the section? The terms of the section, in our opinion, clearly indicate that they cannot be conditions precedent to the enforcement of the transferor's right; they are only conditions precedent to the imposition of the bar against the transferor and consequently conditions precedent to the accrual of the transferee's right to protect his possession. No doubt, if the transferor wants to enforce against the transferee any right in respect of the property which has been expressly provided by the contract, he must previously have put the transferee in possession in part performance of the contract. And ex hypothesi there is a written contract containing reasonably clear terms as to the transfer, because what the transferor seeks to enforce is a right provided by such a contract. But we cannot agree with the view expressed by Broomfield J. in *Bechardas Damodar* v. *Borough*

Municipality af Ahmedabad, I. L. R. (1941) Bom. 529 : A. I. R. (28) 1941 Bom. 346, that the transferor can "derive no rights from the section which are inconsistent with the conditions subject to which the section comes into operation", the condition insisted on by the learned Judge in the case before him being that the transferee should have performed or be willing to perform his part of the contract. In this view, the transferor's right would become quite illusory and in fact would cease to be rights at all because they could always be defeated by the transferee by the simple device of refusing to perform his part of the contract.

[16] In *Suleman Haji Ahmed Umar* v. *P. N. Patell*, 35 Bom. L. R. 722 : (A. I. R. (20) 1933 Bom. 381), Wadia J. attempted to reconcile the needs of justice with what he thought to be the requirement of the section by holding that it would be sufficient if the transferee had partially performed his part of the contract. Wadia J. might have put his decision upon the surer ground that the transferor's right was not dependent upon any such condition at all.

[17] We are not concerned with the question of correctness of the actual decision of Broomfield J. in *Bechardas's case*, (A. I. R. (28) 1941 Bom. 346 : I. L. R. (1941) Bom. 529) but to the learned Judge's observation that a suit for damages for breach of a contract can never be founded upon this section, it may be rejoined, without disrespect, that a suit for damages simpliciter for breach of contract does not require to be rested upon the section at all.

[18] In the present case the right of the respondent to have the premises returned to it by the appellant on the expiry of the period of five years has been expressly provided by para. 3 of the contract. The appellant was given possession and took possession of the premises in part performance of the contract, and he remained in possession for the full period of the agreement. It would be meaningless to say that the right of the respondent to have the premises returned to it on the expiry of the period is dependent upon the willingness of the appellant to restore it. We agree with the learned Subordinate Judge that the appellant was bound to vacate the premises on the expiry of the period of five years and his possession became wrongful thereafter.

[19] A point was raised that the agreement Ex. 2 was not admissible in evidence for want of registration. As the agreement did not specify any particular shed and godown but merely said that a suitable shed would be provided by the company on the lands leased out to it by the Port Commissioners at King George's Dock. We are of opinion that the instrument did not operate as a present demise. No doubt, under the Indian Registration Act a 'lease' includes an agreement to lease, but as was observed by Lord Buckmaster in *Rani Hemanta Kumari Debi* v. *Midnapore Zemindary Co. Ltd.*, 46 I. A. 240: (A. I. R. (6) 1919 P. C. 79),

'an 'agreement to lease', which a lease is by the statute declared to include, must, in their Lordships' opinion be a document which effects an actual demise and operates as a lease. They think that Jenkis C. J. in the case of *Panchanan Basu* v. *Chandi Charan Misra*, 37 Cal. 808 : (6 I. C. 443), correctly stated the interpretation of S. 17 in this respect. The present agreement is an agreement that, upon the happening of a contingent event at a date which was indeterminate and, having regard to the slow progress of Indian litigation, might be far distant, a lease would be granted. Until the happening of that evant it was impossible to determine whether there would be any lease or not. Such an agreement does not, in their Lordships' opinion, satisfy the meaning of the phrase 'agreement to lease' which, in the context where it occurs and in the statute in which it is found; must in their opinion relate to some document that creates a present and immediate interest in the land."

In the case before their Lordships the question arose with regard to a solenama by which the plaintiff in the suit in which the solenama was filed agreed that if she succeeded in another suit which she had brought to recover certain land other than the land in the compromised suit, she would grant to the defendants a lease of that land upon specified terms.

[20] The agreement Ex. 2, therefore, in our opinion, did not require registration. Even if it can be interpreted as creating a present and immediate interest in the premises and therefore has to be regarded as requiring registration under the Registration Act and under the Transfer of Property Act, we think its admissibility in evidence is saved by the proviso to S. 49, Registration Act, which was added by Act XXI [21] of 1929. That proviso runs as follows :

"Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chap. II, Specific Relief Act 1877, or as evidence of part performance of a contract for the purposes of S. 53A, Transter of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered Instrument."

[21] The expression "as evidence of part performance of a contract for the purposes of S. 53A" is not a very happy one. Sir Dinshaw Mulla in his commentary on the Transfer of Property Act has observed that it "is an elliptical expression which means that the deed is available not only as a contract but as evidence that the acts done are part performance of the contract." Does the proviso permit the document being used as evidence of the contract for the purposes of S. 53A apart from any question of any acts having been done in part performance of it? Or, does it mean that the document can be used as

evidence of the contract only when there have been acts done in part performance of it, the proof of the contract being merely an ingredient in the proof that the acts done were part performance of the contract? It is unnecessary for us to decide this question in the present case, because we consider that the respondent seeks to use the agreement not only as evidence of the contract for the purposes of S. 53A but aslo as proof that acts were done by him in part performance of it for the same purposes. The respondent wants to use the document as evidence that the right which it seeks to enforce is a right which is expressly provided by the contract and is therefore a right which is saved or sanctioned by S. 53A. The respondent also wants to adduce the document in evidence for showing that it let the appellant into possession and let him remain in possession for the full period of the agreement in part performance of the contract. Exhibit 2, therefore, is admissible in evidence.

[22] Two arguments may here be noticed which were advanced by the respondent with a view to repel the appellant's contention that he was a tenant from year to year. In the first place it was argued that S. 106, T. P. Act, must be read as subject to S. 107 of the Act which provides in absolute and unqualified terms that a lease from year to year can be created only by a registered instrument, and so when the former section enacts that in the absence of a contract to the contrary a lease for manufacturing purposes shall be deemed to be a lease from year to year terminable by six months' notice to quit ending with the year of the tenancy, it must be interpreted as referring to a lease for manufacturing purposes which has been created by a registered instrument but which is silent as to its own duration. Section 106 could not have intended, it was argued, to make that a lease from year to year which could not become such a lease by the terms of S. 107; it is not permissible to engraft an exception upon the absolute and unqualified enactment in S. 107 that a lease from year to year can be created only by a registered instrument. The appellant, it was contended, cannot therefore be regarded as a tenant from year to year.

[23] In the view we have taken of the case it is not necessary for us to decide this question. But if it had been, we would not have felt inclined to accede to this contention. Section 107, in our view, deals with the creation of a tenancy from year to year by act of parties. Section 106 provides for the case where the lease is for manufacturing purposes but the contract between the parties is silent as to its duration. In such a case the law supplies the omission and enacts that the lease shall be deemed to be a lease from year to year. The attachment of this incident to the lease by operation of law is a very different thing from the creation of a lease from year to year by act of parties. The two sections deal with entirely different matters and there is no conflict or contradiction between the two which requires that they should be harmonised in the manner suggested by the respondent.

[24] The other argument of the respondent was that the agreement EX. 2 was not providing for the creation of a lease at all, but was merely granting a licence to the appellant to occupy the premises for the purpose of manufacturing tin canisters required for the respondent's business in petroleum products. The agreement, it was argued, was really a contract for the supply of petrol containers by the appellant to the company and embodied the terms on which the containers were to be supplied, and the appellant's occupation of the premises was really required for the performance of the contract and he was, therefore, not a tenant. In support of this contention reliance was placed on the decision of R. C. Mitter J. sitting with Lodge J. in *Corporation of Calcutta* v. *Province of Bengal*, 44 C. W. N. 1128: (A. I. R. (28) 1941 Cal. 60), which was affirmed by the Privy Council in *Corporation of Calcutta* v. *Province of Bengal* 48 C. W. N. 410: (A. I. R. (31) 1944 P. C. 42). In that case the question was whether the premises NO. 4 Theatre Road, which had been acquired for use as the official residence of the Commissioner of the Presidency Division and for which the Commissioner had to pay a certain percentage of his salary as rent, was occupied by the Commissioner as a tenant or as a servant of the Crown, the premises being assessable under cl. (a) of S. 127, Calcutta Municipal Act, in the former case and under cl. (b) of the section in the latter case. His Lordship laid down the principle that if the servant's occupation of the house be ancillary to the performance of his duties, the occupation is qua servant, but if it is unconnected with the employment, it is qua tenant, and his Lordship set out certain tests by which the question was to be determined.

[25] It may be pointed out that this case that the appellant is a licensee has been made before us for the first time. The respondents' definite case in para. 5 of the plaint was that the appellant was in occupation of the premises as its tenant, and the latter EX. A (9) dated 13th April 1939, which was written by the respondent to the appellant after the expiry of the term also made the same case. Apart from this circumstance, we do not think that the principles which govern the determination of the question whether the occupation of the premises

by a person who is a servant is occupation by a tenant or simply as a servant and which have their origin in the special relationship between the parties can be extended to a case like the present where the occupier is an independent contractor who has entered into a business contract with the owner as much in his own interest as in that of the latter. Indeed, the fact that his occupation of the premises would facilitate or make for easier performance of the contract might well be a reason for the appellant to want to have a lease of the premises rather than a licence.

[26] The tests for determining whether a particular instrument has effected a demise or operates merely as a licence, were authoritatively formulated in *Glenwood Lumber Co.* v. *Phillips*, (1904) A. C. 405: (73 L. J. P. C. 62) and *Wells* v. *The Mayor etc. of Kingston-upon-Hull Corporation* (1875) L. R. 10 C. P. 402: (44 L. J. C. P. 257). In the former case Lord Davey, delivering the judgment of the Privy Council, observed:

"If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."

In the latter case Lord Coleridge C. J. held that if the contract was merely for the use of the property in a certain way on certain terms while it remained in the possession and under the control of the owner, it was a licence. These principles were adopted and applied in our Court in *Secretary of State* v. *Karuna Kanta*, 35 Cal. 82: (6 C. L. J. 342 F. B.), *Secretary of State* v. *Bhupal Chandra*, 57 Cal. 655: (A. I. R. (17) 1930 Cal. 739) and *O. C. Ganguly* v. *Kamalpat Singh*, 51 C. W. N. 208: (A. I. R. (34) 1947 Cal. 236). In the case before us the provisions of para. 3 of the agreement to the effect that the appellant was to maintain the shed and godown duly and was to return them on the expiry of the term in the same condition in which they were handed over to him and that he could even make alterations in them subject to the consent of the company point unmistakably to the fact that exclusive possession was to be given and there is no indication anywhere else in the document that the grantor was retaining any possession in or control over the premises. It may be mentioned that the shed and godown covered an area of 11470 sq., feet or over 16 cottahs, and costly machineries were to be installed therein by the appellant at his own cost and a regular factory was to be started there by him for the manufacture of petrol containers. These objects could not be accomplished without exclusive possession of the premises being taken by the appellant. As was held by Blackburn J., in *Roads* v. *Overseers of Trumpington* (1871) 6 Q. B. 56 : (40 L. J. M. C. 35), exclusive possesison would be taken to have been given if the nature of the acts to be done by the grantee was such as required a right of exclusive occupation. We are, therefore, unable to accept the contention that Ex. 2 was providing for a licence and not a lease. (His Lordship then discussed the question of quantum of damages and after discussing the evidence, concluded that the sum of Rs. 8393-5-4 awarded by the Subordinate Judge as damages to the respondent, was not unfair or excessive in the circumstances of the case.)

[27] The result, therefore, is that the appeal fails and must be dismissed with costs.

R. C. Mitter J. — I agree.

V.B.B. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 30 *[C. N. 7.]*

G. N. DAS AND LAHIRI JJ.

Amulya Ratan Mukherjee — *Plaintiff*—*Appellant* v. *Sm. Kanak Nalini Ghose* — *Defendant No. 2 and others, Defendants* — *Respondents.*

A. F. O. D. No. 326 of 1944, Decided on 21st June 1949, against decree of Sub-Judge, 4th Court, 24-Parganas at Alipore, D/- 19th May 1944.

Civil P. C. (1908), O. 32, R. 15 — Mortgage by *L* in favour of *K* — Ex parte decree in suit on mortgage—Property purchased by *A* in auction-sale — During pendency of mortgage suit *L's* son *R* making application for appointment of guardian ad litem but Court proceeding with trial without such appointment on account of *R's* absence on date of hearing of application — Suit by *L's* son *R* for declaration that ex parte decree and auction-sale were not binding on him on account of *L's* insanity and want of appointment of guardian ad litem in suit — Ex parte decree held was void for want of representation of *L* — Upon such pleading prayer for setting aside of decree not necessary—Question of payment of ad valorem court-fee, and bar of S. 42, Specific Relief Act (1877), did not arise—No estoppel on account of plaintiff's application in mortgage suit—Under O. 32 R. 15 proof of absolute insanity not necessary — Proof of mental infirmity held sufficient — Plea of bona fide purchaser being stranger to decree not open to *A* — Court-fees Act (1870), S. 7 (iv) (c) — Specific Relief Act (1877), S. 42—Evidence Act (1872), S. 115.

One *L* executed a mortgage in favour of *K*. *K* brought a suit on the mortgage. The suit was decreed *ex parte* and in execution of the decree the property was brought to sale and purchased by one *A*. Subsequently *R*, son of *L*, brought a suit for a declaration that the *ex parte* decree passed in the mortgage suit and the execution proceedings and the auction-sale were not binding upon him and his title had not been affected by the said decree and sale. The allegations were that after the institution of the suit on the mortgage *L* left his house in a fit of insanity and met his death on the footpath of Calcutta, that though *K* was aware of the disordered condition of *L's* brain he took no steps to have a guardian ad litem appointed in the suit. During

the pendency of the mortgage suit *R* had filed an application alleging that his father became insane and therefore it was necessary to have a guardian ad litem appointed but as *R* was found absent on the date of hearing of the application, the Court proceeded with the trial without the appointment of guardian ad litem :

***Held* that (1) the *ex parte* decree against *L* in the mortgage suit was void for want of representation of *L*. Hence upon that pleading it was not necessary in the present suit for plaintiff *R* to make the prayer for setting aside of the decree and it was enough to ask for a declaration that the said decree did not affect plaintiff's title. Questions of payment of ad valorem court-fee and the bar of S. 42, Specific Relief Act, did not arise at all; [Para 5]**

(2) question of estoppel on account of plaintiff's application in the mortgage suit also did not arise as plaintiff was under no legal obligation to file any application alleging the insanity of his father, far less to prove it; [Para 5]

(3) to bring his case under O. 32 R. 15, Civil P. C., it was not necessary for the plaintiff to prove that *L* was absolutely insane. It was sufficient if the plaintiff proved that *L* was suffering from such mental infirmity as rendered him unfit to protect his own interest; [Paras 8 and 9]

(4) a decree obtained without representation in a case where representation was necessary must be regarded as a decree against a person not a party to the suit and was therefore without jurisdiction and void. The *ex parte* decree obtained against *L* was therefore null and void: 31 All. 372 (P. C.); A. I. R. (2) 1915 Cal. 19 and A. I. R. (24) 1937 All. 29, *Rel. on* ; [Para 11]

(5) as the *ex parte* decree was void *ab initio* all the subsequent proceedings in execution including the auction-sale were also void and hence the plea that a *bona fide* purchaser who is a stranger to the decree does not lose his title to the property on account of the subsequent reversal or modification of the decree was not available to *A*: *Case law relied on.* [Para 12]

Annotation : ('44-Com.) C. P. C., O. 32 R. 15 N. 2 Pt. 1 ; N. 6 Pt. 2; ('44-Com.) Court-fees Act, S. 7 (iv) (c), N. 6 Pt. 1 ; ('46 Man.) Specific Relief Act, S. 42 N. 28 ; Evidence Act, S. 115 N. 24.

***Hiralal Chakravarti and Shyamdas Bhattacharjee* — for Appellant.**

***Diptendra Mohan Ghose and Uma Shankar Sarkar (for No. 2) and Apurbadhan Mukherjee and Bireswar Chattapadhyay (for No. 3)*—for Respondents.**

Lahiri J. — The appellant Amulya Ratan Mukherjee instituted the suit out of which this appeal arises for a declaration that the ex parte decree passed in Title Suit No. 52 of 1940 of the Court of the fourth Subordinate Judge, 24-Parganas and the execution proceedings arising out of it and the auction sale held therein are not binding upon the plaintiff appellant and that the title of the plaintiff has not been affected by the said decree and sale. The subject-matter of the dispute is the pucca ancestral dwelling house of the plaintiff standing on 12 cottah and 13 chattacks of land in mouza Kantalpara police station Naihati. The case of the plaintiff is that his father Lakshmi Narayan Mukherjee borrowed a total sum of Rs. 2400 on the basis of three mortgage bonds on various dates between 1934 and 1937 from defendant 2, Kanak Nalini Ghose. On 9th August 1939, defendant 2 instituted Title Suit No. 52 of 1940 for sale of the mortgage premises for the realisation of her dues from Lakshmi Narayan Mukherjee. In the month of August 1939 Lakshmi Narayan left his house in a fit of insanity and never returned and he met with his death on the footpath of Hari Ghose Street in Calcutta, on 6th February 1942. On account of the disordered condition of the brain of Lakshmi Narayan, the mortgage suit could not be properly defended and although the mortgagee Kanak Nalini was aware of the defect of Lakshmi Narayan, she took no steps to have a guardian ad litem appointed, obtained an *ex parte* decree and in execution thereof brought the mortgaged property to auction sale at which it was purchased by defendant 1, Akhil Chandra Ghose, on 10th January 1942 for a sum of Rs. 5500. This suit was instituted by the plaintiff on 4th March 1942 and it appears that defendant 3, Gour Mohan Kundu, purchased the house from defendant 1 for the same amount by a registered conveyance dated 22nd September 1942 and he was thereafter added as a party to the suit by an order dated 8th January 1943.

[2] The suit was contested by the auction purchaser defendant 1 and also by the purchaser pendente lite defendant 3 principally on the ground that the plea of Lakshmi Narayan's insanity was a mere cloak to give an air of plausibility to the false claim of the plaintiff; that the story of Lakshmi Narayan's death was false, that Lakshmi Narayan was still alive and that Lakshmi Narayan left his house not in a fit of insanity as alleged by the plaintiff but on account of the maltreatment at the hands of the plaintiff and began to live with a concubine. Defendant 1 also raised some pleas in bar, namely that the court-fee paid by the plaintiff was not sufficient in law, that the suit was barred by estoppel and that the suit was barred under S. 42, Specific Relief Act.

[3] All the preliminary issues raised by the defendant were decided by the learned Subordinate Judge against the plaintiff. On the question of court-fees, it was held that the plaintiff having succeeded to the rights and liabilities of his father, should have prayed for setting aside of the *ex parte* decree and should have paid ad valorem court-fees on the value of the decree. As to the bar under S. 42, Specific Relief Act, it was held that it was incumbent on the plaintiff to ask for further relief for setting aside of the *ex parte* decree and as that was not done, the suit was not maintainable under that section. To appreciate the case of estoppel, it is necessary to recite certain facts. It appears that during the pendency of the mortgage suit the plaintiff, Amulya Ratan, filed an application on 9th December 1940 alleging that his father

Lakshmi Narayan Mukherjee became completely insane in or about the first week of July 1939 and had not been heard of since then and in these circumstances it was necessary to have a guardian ad litem appointed. This application is Ex. E. On 15th March 1941 when this application was taken up for hearing, the plaintiff Amulya Ratan was found absent on call and the Court proceeded with the trial without making any appointment of guardian ad litem upon the view that Lakshmi Narayan was not insane. It is said that the failure of the plaintiff to prosecute the application filed on 9th December 1940 brings into operation the principle of estoppel and the plaintiff is precluded by law from challenging the decree that was passed against his father.

[4] On the merits of the case, the learned Subordinate Judge has held that though Lakshmi Narayan died on the streets of Calcutta on or about the date alleged by the plaintiff the evidence adduced by the plaintiff was too meagre and insufficient for a clear finding of insanity and upon that evidence one could not come to a clear conclusion that Lakshmi Narayan became insane in July or August 1939.

[5] We have no hesitation in holding that the decision of the learned Subordinate Judge on all the preliminary issues is vitiated by a total misconception as to the nature of the plaintiff's case. Upon the case made in the plaint, the *ex parte* decree against the plaintiff's father was void for want of representation of Lakshmi Narayan who was alleged to be of unsound mind. Upon that pleading it was not necessary for the plaintiff to make the prayer for setting aside of the decree and it was enough to ask for a declaration that the said decree did not affect the plaintiff's title. So the questions of payment of ad valorem court-fee and the bar of S. 42, Specific Relief Act, did not arise at all. On the question of estoppel, we desire to point out that the plaintiff was under no legal obligation to file any application alleging the insanity of his father, far less to prove it. He was merely an intervener and if the mortgagee chose to proceed with the hearing of the suit without taking steps for the representation of Lakshmi Narayan, she did so at her risk. We cannot see how any question of estoppel arose in these circumstances. There was no change in the position of the mortgagee on account of the representation made by Amulya. The order was also not binding on Amulya inasmuch as he alleged that it was void even against his father, Lakshmi Narayan.

[6] Turning to the merits of the case, we have first of all to consider the circumstantial evidence to determine the value of the oral evidence adduced by the parties. The circumstances which have been proved beyond all doubt are these: (1) Lakshmi Narayan, a resident of Naihati, was a railway servant serving in the Loco Shed of the Eastern Bengal Railway at Cossipore. (2) His wife died in 1920. (3) His youngest son died in 1921 or 1922. (4) Two other sons died in 1925 and 1926 and one of these sons committed suicide. (5) Lakshmi Narayan had a serious attack of typhoid in 1929 which slightly affected his brain. He was on sick leave from 1929 to 1932 and retired prematurely in 1932. (6) Lakshmi Narayan disappeared from his house in August 1939 and was not heard of till he was picked up by the Calcutta Police on the foot path of Hari Ghose Street on 5th February 1942, in an unconscious condition. He was sent to the hospital where he died without regaining consciousness. Certain letters were found in his person which established his identity. Relying on these letters the police informed the Chitpore Loco Shed which in its turn informed Naihati Loco Shed. P. W. 4, Shiba Prosanna Bhattacharjee, an employee of the Naihati Loco Shed, on receipt of the information wrote the letter, Ex. 1 dated 8th February 1942, to Amulya Ratan Mukherjee, the plaintiff, who immediately came to Calcutta, identified the dead body of his father and cremated it on 9th February 1942.

[7] On these facts, Mr. Chakravartti, appearing on behalf of the plaintiff, has argued that the mental agony resulting from a number of bereavements in quick succession adversely affected the mental constitution of Lakshmi Narayan and when that was followed by a severe attack of typhoid in 1929, Lakshmi Narayan became slightly deranged. The derangement gradually developed till in August 1939 Lakshmi Narayan left his house for good to seek shelter in the streets of Calcutta. This, according to Mr. Chakravartti, is sufficient to bring the case within O. 32, R. 15, Civil P. C., which does not require proof of absolute insanity but only proof of mental infirmity which rendered Lakshmi Narayan incapable of protecting his own interests. Mr. Mukherjee appearing for defendant 3 has argued that the abandonment of the protection of home by Lakshmi Narayan in August 1939 was not the result of insanity but the result of the ill-treatment of his son, the plaintiff and he has placed strong reliance upon the admission made by the plaintiff in his cross-examination to the effect that after the disappearance of his father, the plaintiff did not care to inform the police or to advertise in the newspapers. Mr. Mukherjee has also strenuously argued that the plaintiff adduced no evidence about the mental condition of his father during the period of two years and six months which elapsed between Lakshmi Narayan's disappearance and his death and as such the plaintiff is not entitled

to succeed. The story of ill-treatment by the son was alleged by defendant 1 in his written statement in para. 13 and was adopted by defendant 3. It runs as follows:

"For some time past Lakshmi Narayan Mukherjee being disgusted with the maltreatment at the hands of the plaintiff began to live separately from the plaintiff with his concubine at different places and the plaintiff as also the acquaintances of Lakshmi Narayan Mukherjee had all along been in the know of his whereabouts".

Defendant 1 has examined himself as D. W. 2 and in his evidence in Court he does not venture to prove any of the scandalous allegations made in the written statement. On the other hand, D. W. 2 has stated in his evidence that after his retirement Lakshmi Narayan started a cloth shop at Naihati which again is not alleged in the written statement. The only witness who comes forward to prove the story of quarrel between the father and the son, is D. W. 3, Kunjalal Ghose who is brother of defendant 1's tenant and who filed an application for insolvency for his business dealings and who became a zemindar in 1942 after his father's death. We are not at all impressed by the uncorroborated testimony of this witness. We are now left with the omission of the plaintiff to inform the police and advertise in the papers. There may be various motives for not informing the police and not advertising in the press, for example a natural shyness standing in the way of ventilating one's private troubles in the press or before the police. We are not prepared to hold upon these materials that the plaintiff was guilty of ill-treatment of his father to such an extent that his father was compelled to leave the house. Moreover, the story of ill-treatment was not suggested to the plaintiff in his cross-examination.

[8] That Lakshmi Narayan did not completely recover from the effect of typhoid, will appear from the fact that he was on sick leave for about three years from 1929 and that he retired from service in 1932, at least two years before his retirement was due. From the order sheet of Title Suit No. 52 of 1940 which is Ex. 6 in the case, we find that on 14th November 1940 the mortgagee who was a resident of Naihati and as such expected to know everything about Lakshmi Narayan filed an application praying for substituted service of summons upon him, on the allegation that Lakshmi Narayan was trying to avoid summons and this application was granted. On 9th December 1940, as soon as the substituted service of summons had been effected at the last known residence of Lakshmi Narayan, Amulya Ratan filed his application Ex. A alleging that his father had disappeared from home on 5th August 1939 in a fit of insanity and praying for being appointed the guardian ad litem of his father. On that date, there was absolutely no motive for making that application on false allegation as it was not necessary for Amulya to make any application whatsoever. There is a ring of truth in this application which we cannot overlook. The absence of evidence about the mental condition of Lakshmi Narayan from August 1939 to February 1942 is quite natural in the circumstances of this case and we are entitled to infer that the same mental infirmity which prompted Lakshmi Narayan to leave his house in 1939 continued till he met with his death in February 1942. Mr. Mukherjee has further invited attention to Exs. 3 and 3 (a) which are two letters written by Lakshmi Narayan to the Chairman, Naihati Municipality. They undoubtedly show that Lakshmi Narayan was in full possession of his senses but they are dated 8th June 1939. In the case of a man who is suffering from insanity or mental infirmity, it is well known that he sometimes has lucid intervals during which he behaves like ordinary individuals. We are disposed to think that those letters were written during those lucid intervals. On a comparative estimate of the circumstantial evidence we are inclined to accept the plaintiff's argument that Lakshmi Narayan's disappearance in August 1939 was the result of a mental infirmity which rendered him incapable of protecting his own interest and as such required protection under O. 32, R. 15, Civil P. C. The learned subordinate Judge misdirected himself in proceeding upon the view that in order to succeed in this suit, it was necessary for the plaintiff to prove that Lakshmi Narayan was absolutely insane. He lost sight of the second alternative provision in R. 15 which is sufficiently wide to cover a case of this description.

[9] In the background of these circumstances, we have to consider the oral evidence adduced by the parties. The plaintiff has examined as many as six witnesses besides himself to prove various details which go to indicate that Lakshmi Narayan was suffering from mental infirmity. Here again, it is necessary to bear in mind that the plaintiff is not required to prove that Lakshmi Narayan was absolutely insane but only that Lakshmi Narayan was suffering from such mental infirmity as rendered him unfit to protect his own interest. The witnesses on this point are P. Ws. 3, 6, 7, 8, 9, 10 besides the plaintiff who is P. W. 1. There can be no doubt that these witnesses are competent to speak about the mental condition of Lakshmi Narayan being either his friends or neighbours. With regard to P. W. 3 the learned subordinate Judge says that he does not prove anything; we find that he says that Lakshmi Narayan did not answer questions, used to remain silent and if any one asked any ques-

tions he became violent and rude to him and that he used abusive language without any apparent reason — this may not be evidence of absolute insanity, but it is certainly good evidence of mental infirmity. The same remark applies to the evidence of P. Ws. 6, 8 and 9 ; but the most important of witnesses on this point are P. W. 7, Ashutosh Bhattacharjyee and P. W. 10, Kabiraj Nagendra Bhusan Roy. The former is a close neighbour of Lakshmi Narayan and besides being a graduate in law he belongs to a highly respectable family. This witness was disbelieved by the learned Subordinate Judge on the ground that the plaintiff was his family physician. We are unable to take this view. It is impossible for us to hold that a man of the education and social standing of P. W. 7 could perjure himself for his family physician. P. W. 7 proves that if Amulya's patients came to call him, Lakshmi Narayan went to assault them and if the witness asked Lakshmi Narayan about his son, the reply was that Amulya was playing on the verandah. Similarly Kabiraj Nagendra Bhusan Roy proves that Lakshmi Narayan used to talk incoherently and when he was asked about his diet he gave an incoherent answer. We do not see why we should discard this evidence. The trial Court says that the evidence of this witness does not show that Lakshmi was at any time treated for insanity, but that is no ground for rejecting his testimony on the facts proved by him. As against this evidence of the plaintiff, the only witnesses examined by the defendants are D. W. 1 who is the husband of the mortgagee, D. W. 2 who is the auction-purchaser and D. W. 3 who is the brother of the auction purchaser's tenant. Needless to say that we are not disposed to place any reliance upon the evidence of these interested witnesses. It is to be noticed that the mortgagee, the auction-purchaser and all the witnesses examined by the defendants in this case are residents of Naihati and Lakshmi Narayan appears to have been known to them for a pretty long time. In these circumstances the failure of the defendants to produce any independent witness in support of their case also indirectly supports the plaintiff's version.

[10] A dispassionate consideration of the details proved by the witnesses for the plaintiff leads us to the conclusion that the oral evidence on the side of the plaintiff fits in with the circumstances and probabilities of the case and proves beyond reasonable doubt that Lakshmi was certainly suffering from mental infirmity which rendered him incapable of protecting his own interest, and when on top of all this, we find that Lakshmi Narayan left home for good to meet with his death three years later in the streets of Calcutta, we have hardly any doubt that his mental infirmity developed into something bordering on insanity. Instead of taking each item of evidence separately and trying to explain it away on some untenable hypothesis, the learned Subordinate Judge should have tried to ascertain the cumulative effect of the circumstantial details proved by the plaintiff. We are further of the opinion that the learned Subordinate Judge's estimate of the oral evidence was vitiated by a wrong view of the requirements of O. 32, R. 15, Civil P. C. Our conclusion, therefore, is that though Lakshmi Narayan's representation was necessary under O. 32 R. 15, Civil P. C., in Title Suit No. 52 of 1940, he was not, in fact, represented by a guardian ad litem.

[11] The next question is what is the result of this non-representation. Mr. Chakravartti cited before us the case of *Mt. Rashid-un-nisa* v. *Muhammad Ismail Khan*, 36 I. A. 168: (31 ALL. 372 P. C.) where the Privy Council pointed out that an objection as to non-representation is not one falling under S. 47, Civil P. C., and cannot be raised in any execution proceeding inasmuch as the party not represented cannot be deemed to be a party to the suit. It follows from this decision that a decree obtained without representation in a case where representation is necessary must be regarded as a decree against a person not a party to the suit and is therefore without jurisdiction and void. This, however, is a case of non-representation of a minor. The same principle was applied to the case of a lunatic in the case of *Hakimulla* v. *Nobin Chandra Barua*, 20 C. L. J. 291: (A. I. R. (2) 1915 Cal. 19) and by a Division Bench of the Allahabad High Court in the case of *Bondu Mal* v. *Thomas Skinner*, A. I. R. (24) 1937 ALL 29 : (166 I. C. 903). Our conclusion, therefore, is that the ex parte decree obtained by Kanak Nalini against Lakshmi Narayan in Title Suit No. 52 of 1940 was null and void.

[12] The last point raised by Mr. Mukherjee is that defendant 1 is a bona fide stranger purchaser at the auction sale held in execution of the decree in Title Suit No. 52 of 1940 and defendant 3 is a purchaser from defendant 1. In these circumstances, the auction sale cannot, according to Mr. Mukherjee, be set aside even if the decree be found to be void. For this proposition Mr. Mukherjee has relied upon the case of *Chunder Kant* v. *Bissesur Surmah*, 7 W. R. 312, *Rewa Mahton* v. *Ram Kishen Singh*, 13 I. A. 106 : (14 Cal. 18 P. C.), *Nawab Zain-Ul Abdin Khan* v. *Muhammad Asgar Ali Khan*, 15 I. A. 12 :(10 ALL 166 P. C.), *Khiarajmal* v. *Diam*, 32 I. A. 23 :(32 Cal 296 P. C.). The principle that a bona fide purchaser who is a stranger to the decree does not lose his title to the property on account of the subsequent reversal or

modification of the decree is firmly established and cannot be questioned. In the case of Zain-Ul-Abdin, Sir Barnes Peacok in delivering the judgment of the Board observed as follows:

"It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the bona fide purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and *at a time when that decree was a valid decree, and when the order for the sale was a valid order.*"

The last portion of this passage makes it clear that in order to bring a case within this principle one of the conditions that must be fulfilled is that the purchase must be at a time when the decree was a valid decree and the order for sale was a valid order. The case of *Chunder Kant* v. *Bissesur Surmah*, 7 W. R. 312, also illustrates the same principle in the following passage :

"If a sale takes place in execution of a decree *in force and valid at the time of sale*, the property in the thing sold passes to the purchaser."

In *Rewa Mahton* v. *Ram Kishen Singh*, 13 I. A. 106 :(14 Cal. 18 P. C.), the property was sold to a bona fide purchaser at an auction sale held in execution of a decree at a time when the judgment-debtor held another decree for a higher amount against the person who brought the property to sale. The question arose whether an execution levied under these circumstances was a nullity in view of the provision of S. 246 of the Code of 1882 (corresponding to O. 21, R. 18 of the present Code). Sir Barnes Peacock held that the execution was not a nullity and the auction purchaser was protected and observed as follows:

"If the Court has jurisdiction a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which execution issues."

In another passage, it is said that a purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross judgment for a higher amount any more than he would be bound in an ordinary case, to inquire whether a judgment upon which execution issues has been satisfied or not. In *Khiarajmal* v. *Diam*, 32 I. A. 23 :(32 Cal. 296 P. C.) Lord Davey made the following observation at p. 33.

"The Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons, the decree and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside."

Mr. Mukherjee strongly argued that in *Khiarajmal's case*, (32 I. A. 23 : 32 Cal. 296 P. C.), their Lordships of the Judicial Committee took care to point out that they were dealing with a case where the real purchaser was the judgment-creditor and drew our pointed attention to the following sentence:

"Their Lordships are quite sensible of the importance of upholding the title of persons who buy under a judicial sale; but in the present case the real purchaser was the judgment-creditor, who must be held to have had notice of all the facts."

In our judgment, this passage does not in any way limit or modify the general principle enunciated in the earlier part of the judgment to the effect that if a person is not represented in law or in fact in a suit, the sale of his property is without jurisdiction and is null and void. The difference in the rights of an auction purchaser in a case where the execution is merely irregular and a case where the execution is altogether void is illustrated by the two cases of *Malkarjun* v. *Narhari*, 27 I. A 216 :(25 Bom 337 P. C) and *Khiarajmal* v. *Diam*, 32 I.A. 23 :(32 Cal. 296 P. C.). In the former case the order for sale was held to be merely irregular and the purchaser was protected. In the latter case, the execution and also the sale were held to be void. As in the case before us we have come to the conclusion that the ex parte decree obtained against Lakshmi Narayan was *void ab initio* on account of the absence of representation of Lakshmi Narayan we hold that all the subsequent proceedings in execution including the auction sale were also void and the plea of bona fide purchase is not available to defendant 1 or to defendant 3.

[13] The result is that this appeal is allowed. The judgment and the decree of the Court below are set aside and the plaintiff's suit is decreed with costs.

[14] The plaintiff will recover his costs of the trial Court from all the defendants and the costs of this Court from defendants 2 and 3 who appeared to contest the appeal. The plaintiff will get a declaration that the decree passed in Title Suit No. 52 of 1940 and the execution proceeding and sale in connection therewith are not binding against him and that the title of the plaintiff has not in any way been affected by the said decree and sale and the said mortgage suit stands revived.

G. N. Das J. — I agree.

D.H. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 35 *[C. N. 8.]*

HARRIES C. J. AND J. P. MITTER J.

Gul Bahar—Accussed—Petitioner v *W. E. Farquhar —Complainant—Opposite Party.*

Criminal Revn. No. 371 of 1949, Decided on 22nd June 1949.

Penal Code (1860), S. 405 — Tailor refusing to deliver clothes unless payment of tailoring is made —It is not case of criminal breach of trust unless it is shown that clothes were not made out of material supplied and that he had disposed of material —It would be criminal breach of trust if upon payment being tendered, delivery of clothes is refused.

Where a tailor to whom cloth was given by the complainant for preparing shirts out of it, refuses to deliver either the shirts or the cloth to the complainant and claims a lien upon it for the price, he cannot be convicted for criminal breach of trust, unless the complainant establishes that the accused had never worked on the material and had disposed of it in some other way. The defence here might well be true and the shirts withheld for the payment and the accused may have had lien on the shirts. The lien arises even before the tender of delivery of goods. [Paras 5 & 6]

Obiter.—If the shirts are not delivered even after the tender is made of the amount due for making them, then the case of criminal breach of trust might arise. [Para 8]

Annotation: ('46-Man.) Penal Code, S. 405 N. 5,7,9,17.

Moni Mukherji—for Petitioner.

M. Huq and B. L. Ghose—for Opposite Party.

Harries C. J.—This is a petition for revision of an order of a learned Presidency Magistrate convicting the petitioner under s. 406, Penal Code and sentencing him to rigorous imprisonment for two months and to pay a fine of Rs. 200. In default of payment of the fine, the accused was sentenced to undergo a further period of 15 days' rigorous imprisonment.

[2] The petitioner was a tailor and according to the prosecution the complainant entered into a contract with the petitioner whereby he was to provide the petitioner with 300 yards of khaki drill which the petitioner was to use for making shirts for which the petitioner was to obtain a sum of annas ten per shirt. Delivery was to be made within one week. The complainant alleged that though he had delivered the material, the petitioner had refused either to return the material or the shirts if they had been made out of the material.

[3] The defence of the petitioner was that he had done work previously for the complainant for which he had not been paid; further, that he had not been paid for the work of making shirts out of this material. The actual cost of the work of making shirts out of the material supplied which is the subject-matter of this charge is said to be Rs. 57-8-0. According to the petitioner there was a further sum of Rs. 150 due in respect of earlier work.

[4] The learned Presidency Magistrate held that it had not been established that anything was due from the complainant to the petitioner in respect of the earlier work and that finding has not been challenged. It was, however, urged that the petitioner could not be guilty of criminal breach of trust in respect of the material which had been handed over to him to be made into shirts, because he had a lien upon that material for his charges. Admittedly, the complainant did not pay the cost of making these shirts, neither did he at any time tender the amount.

[5] The learned Magistrate seems to have thought that until the goods were delivered or at least until the tender of delivery was made no question of a lien arose. If the complainant could have established that the petitioner had never worked on this material and had disposed of it in some other way a clear case of criminal breach of trust would have been established. But on the facts I am far from satisfied that such was the case.

[6] The defence here might well be true and that these shirts were being withheld because payment was not being tendered. Upon the materials before the Court the petitioner might well have a lien on these goods and if he had a lien quite obviously he could not be held to be dishonestly retaining these goods or be held to have dishonestly converted them to his own use. There is to my mind a very real doubt in this case and that being so the conviction cannot be maintained.

[7] In the result therefore this petition is allowed; the conviction and sentences are set aside and the petitioner is acquitted. He need not surrender to his bail and his bail bond is discharged.

[8] I might mention that if tender is made of the amount due for making these shirts and they are not delivered then a case of criminal breach of trust might well arise.

J. P. Mitter. — I agree.

R.G.D. *Petition allowed.*

A. I. R. (37) 1950 Calcutta 36 *[C. N. 9.]*

R. P. MOOKERJEE AND DAS GUPTA JJ.

Abdoola Haroon & Co. — *Petitioners* v. *Corporation of Calcutta*—*Opposite Party.*

Criminal Revn. No. 679 of 1948, Decided on 13th May 1949.

(a) Calcutta Municipal Act (III [3] of 1923), S. 421 (2)— Order passed by Magistrate under section—Order is judicial — High Court has jurisdiction to revise order under S. 435, Criminal P. C. (Per *Mookerjee J.*; *Das Gupta J.* contra) — Criminal P. C. (1898), S. 435.

Per *Mookerjee J.* — It will be improper to interpret S. 421 on an analogy of S. 420 upon the mere fact that as the persons named in the latter section are authorised to destroy the articles on the spot it must be presumed that orders passed under S. 421 must be of a similar nature. The emergency which exists and the extreme expedition with which action has to be taken in the case of perishable articles in a case under S. 420 are not present when the article is not of a perishable nature. The Legislature takes due note of the difference and provisions, fundamentally different, are promulgated If the article is not destroyed under S. 420 the seizing officer is enjoined to take the articles to a Magistrate immediately after such seizure. All that can be said is that the enquiry to be made by the Magistrate is of a summary nature and a detailed and long drawn out trial is not envisaged; but that is not by itself sufficient to make the order passed merely an executive one. Even if it be held that the procedure laid down and the orders to be passed under S. 420 were ministerial or executive in character that will be no ground for holding that the procedure before the

Magistrate under S. 421 was of a similar nature. Further, under S. 421 (2) the Magistrate has to pass the final order only after using his descretion. which cannot but be a judicial discretion. From this point of view also, the order passed by the Magistrate under S. 421 (2) must be considered to be a judicial order. [Paras 18 & 34]

Also, the expression "if it appears to the Magistrate" as the opening words of S. 421 (2) cannot be taken to vest such Magistrate with unlimited powers with a discretion not to hold a proper enquiry or to make the order passed an administrative or ministerial order only. Even though there is no direct provision that a formal notice is to be given to the party before any action is taken either under sub s. (2) or sub-s. (3) of S. 421 the Magistrate is bound to give notice before he arrives at a decision. [Paras 33 & 44]

Therefore, on a reading of the provisions contained in S. 421, and interpreting the section as a whole and the context in which it appears, there is no escape from the conclusion that the order passed by a Magistrate under S. 421 (2) is a judicial order and the High Court has jurisdiction to exercise revisionary powers under S. 435, Criminal P. C. in respect of such order: 33 Cal. 287 ; A. I. R. (12) 1925 Cal. 1251 ; A. I. R. (14) 1927 Cal. 509 ; (1899) 2 Q. B. 286 and (1893) 1 Q. B. 679, *Disting.* ; 42 C. W. N. 731 and A. I. R. (27) 1940 Cal, 213, *Ref.* [Paras 44, 65]

Per *Das Gupta J. (contra)* — The mere fact that a Magistrate acts under S. 421 of the Act, does not make his order amenable to the jurisdiction of the High Court. A Magistrate may have executive as well as judicial function to perform, and whatever functions a Magistrate has to perform under a statute are not necessarily judicial. The Magistrate acting under S. 421 (2) is just an alternative to the several Corporation officers or a Councillor or an elderman acting under S. 420, and the law does not require the Magistrate to issue any notice, take any evidence, or hear any party before passing any order under S. 421 (2). Therefore the Magistrate acting under S. 421 (2) is an executive officer and not a Court, and his order for destruction is an administrative, and not a judicial order. The High Court has, therefore, no judisdiction to revise the order passed by a Magistrate under S. 421: (1899) 2 Q. B. 286 and (1893) 1 Q. B. 679, *Rel. on* ; A. I. R (27) 1940 Cal. 213 ; 42 C. W. N. 731 ; 7 C. W. N. 27 ; 33 Cal. 287; A. I. R. (12) 1925 Cal. 1251 and A. I. R. (14) 1927 Cal. 509, *Disting.* [Paras 76 and 84]

Annotation : ('46-Com.) Cr. P. C., S. 435, N. 7.

(b) Calcutta Municipal Act (III [3] of 1923), S. 531 — Magistrate appointed under, is criminal Court within S. 6, Criminal P. C. *(Per Mookerjee J.)* —Criminal P. C. (1898), S. 6.

Per *Mookerjee J.*— A Municipal Magistrate appointed under the provisions of S. 531 is a criminal Court within the meaning of S. 6, Criminal P. C.: A. I. R. (12) 1925 Cal. 1251, *Foll.* [Para 7]

Annotation : ('49-Com.) Cri. P. C., S. 6, N. 4 Pt. 2.

(c) Calcutta Municipal Act (III [3] of 1923), S. 531 — Municipal Magistrate, Calcutta, is subordinate to High Court *(Per Mookerjee J.)* — Criminal P. C. (1898), S. 435.

Per *Mookerjee J.* — The Municipal Magistrate, Calcutta, if he is acting in a judicial capacity, is a Court subordinate to the High Court. [Para 9]

Annotation: ('46-Com.) Criminal P. C., S. 435, N. 8.

(d) Calcutta Municipal Act (III [3] of 1923), S. 420—Conditions precedent for attracting section stated. *(Per Mookerjee J.)*

Per *Mookerjee J.* — The conditions precedent for attracting S. 420 are, (1) that article, whether perishable or not, is allowed or consented to by the owner to be immediately destroyed; or (2) if the article be of a perishable nature the person named and authorized by the section may destroy the article even without the consent of the owner;(3) in either case the person taking action must be of opinion that immediate destruction is necessary in the interest of public health. [Para 16]

(e) Criminal P. C. (1898), S. 6— Judicial act—No provision for issue of notice to party affected or for being heard — This is not sufficient to convert judicial act into executive one— Party must be deemed entitled to get opportunity of being heard — Ex parte order may be revoked at instance of party prejudiced thereby — Test to determine if act is judicial or not is exercise of judicial discretion — *(Per Mookerjee J.)*

Per *Mookerjee J.*— If an act is otherwise found to be a judicial act, the absence of specific provisions either for the issue of notice to the party affected or for being heard in recognition of the fundamental right will not be sufficient to convert the judicial act into an executive one. On the other hand, the party must always be deemed to be entitled to get an opportunity of being heard even if the statute does not specifically provide for the same. The only exception will be when there is a clear direction that no notice need be given or that the *ex parte* order is made revisable at the instance of the party affected. Similarly, if an order is otherwise found to be an executive one, the mere fact that there is a provision for allowing a hearing to the party concerned will not by itself make it a judicial one. Even where there are specific provisions permitting *ex parte* orders of a judicial nature, it is also another fundamental principle of natural justice that such orders may be revoked at the instance of any party prejudiced thereby and the Court has inherent power to give such directions as the justice of the case may require. It is further incontrovertible that even the absence of specific provisions in the statute does not authorise the Magistrate to proceed *ex parte* and without offering an opportunity to the party concerned to be heard in his defence. Such an absence of provisions cannot also be taken by itself to be sufficient to make the order a ministerial one. On the other hand, one of the infallible tests applied by Courts to determine whether an act is merely ministerial or judicial is to ascertain whether the public officer or body had to exercise a judicial discretion: *Case law discussed.* [Paras 20, 24 to 26]

Annotation : ('49 Com.) Cr. P. C., S. 6, N. 2.

(f) Calcutta Municipal Act (III [3] of 1923), S. 421 (2) —"If it appears" —Meaning of — Expression is used in its wider sense as signifying that which is made clear by evidence or is clear to comprehension —*(Per Mookerjee J.)*.

Per *Mookerjee J.* — In one sense the word "appear" may refer to that which is seen by the eye, but it is also used in its broader sense as signifying that which is made clear by evidence or is clear to the comprehension when applied to matters of reasoning or opinion. Not only the section itself as a whole but the setting in which it appears in the particular statute, will determine the particular interpretation to be put on this phrase. What the intention of the Legislature is has to be ascertained from the case taken as a whole and also with an eye to reasonableness. As the expression 'if it appears' is used in the wider sense in other parts of the Act and is also used as an alternative to 'in the opinion' there is no escape from the conclusion that in S. 421 it has also been used in that wider sense. The more so, as there is no doubt so far as S. 421 (3) is concerned: (1899) 1 Q. B. 751, *Disting.* ; (1893) 3 Ch. 483, *Ref.* [Paras 30 to 32]

(g) Calcutta Municipal Act (III [3] of 1923), S. 421 (2)—Order for destruction of article seized— Order is penal one—*(Per Mookerjee J.)*.

Per *Mookerjee J.*—A preventive step may, in its very nature, be a penal one. To prevent the owner of the article from exposing it for sale and thus to protect public health, the article may be seized or destroyed. Seizing it, pending further decision as to its disposal, is merely preventive but a direction for destruction, by whichever authority it may be, is penal. The order for destruction is a penal one and is in the nature of confiscation of the goods and it is actually so. [Para 38]

(h) Interpretation of Statutes — Court cannot depart from intention of Legislature —Two constructions possible – Court may adopt more reasonable one—(Per *Mookerjee J.*).

Per *Mookerjee J.*—No Court is entitled to depart from the intention of the Legislature as may be ascertained from the language of the Act only because it is thought either unreasonable or inconvenient. But where two constructions are open the Court may adopt the more reasonable of the two: (1882) 7 A C. 694; (1901) A. C. 102 and (1882) 9 Q. B D. 648, *Rel. on.* [Para 42]

(i) Calcutta Municipal Act (III [3] of 1923), S. 363 — Offence is committed when structure is raised without sanction or in deviation of order passed by Corporation—*(Obiter)* – (Per *Mookerjee J.)* —Calcutta Municipal Act (III [3] of 1923), S 364.

(Obiter) Per *Mookerjee J.* — Under the Calcutta Municipal Act, it is not always the case that an offence is not committed until there is a disobedience of an order of demolition passed by the Magistrate. The offence, on the other hand, may have been committed when the structure was raised without the necessary sanction or in deviation of an order passed by the Corporation. The jurisdiction of the Municipal Magistrate is invoked when an offence has in the opinion of the Corporation already been committed. What the Magistrate is required to consider is whether the offence has been so committed: A. I. R. (12) 1925 Cal. 1251, *Foll.*; A. I. R (14) 1927 Cal. 509, *Dissent.* [Para 50]

(j) Calcutta Municipal Act (III [3] of 1923), S. 421 (2)—Whether particular foodstuff is injurious to public health — Question is one of fact — *(Per Mookerjee J.).*

Per *Mookerjee J.*— The question whether the particular tinned foodstuff is or is not injurious to public health is a question of fact which must be determined on the evidence adduced in the case. [Para 67]

(k) Calcutta Municipal Act (III [3] of 1923), S. 421 (2) – Magistrate need not examine each of tins seized — How many tins should be examined depends upon facts of each case.

It cannot be urged that the Magistrate must examine each and every particle of the foodstuffs or each and every one of the tins seized in order to condemn the whole lot. How many tins have to be examined in any particular case must depend upon the facts in each case: A. I. R. (27) 1940 Cal. 213, *Ref.* [Para 71]

N. K. Basu and Pasupati Ghose—for Petitioners.

Sir S. M. Bose, Advocate-General and J. M. Banerjee—for the Crown.

Debabrata Mukerjee and Sunil Kumar Basu—for Corporation of Calcutta.

R. P. Mookerjee J.—This is an application in revision against an order under S. 421, Calcutta Municipal Act passed by the Municipal Magistrate directing the destruction of certain tinned jam, marmalade etc., belonging to the petitioners defendants and at their cost, on the finding that the seized stock was unfit for human consumption.

[2] Proceedings out of which the present rule arises were initiated on a complaint, under S. 421, Calcutta Municipal Act, hereafter referred to as the Act, filed by a Food Inspector of the Calcutta Corporation. The allegation was that the entire lot of jam, marmalade etc., packed in tins, which were stored at 30 Park Lane, Calcutta, had been found on examination to be unwholesome, unsound and unfit for human consumption. Some of the tins had been seized by the Corporation Officer while the remaining quantity of the stock was kept under seal. As required under said S. 421 the seized articles were produced before the Magistrate for inspection, enquiry and necessary orders.

[3] After the filing of the complaint notice was given to the petitioners defendants. The defence as set out was that the defendant company had purchased the stock in question from the Government of India, as being the surplus stock of tinned food which had been brought out by the U. S. A. Military Authorities. The stock as purchased consisted of 8 lbs. tins and the defendants subsequently found out that such tins were too big for ordinary customers. Steps were accordingly taken to have the jam repacked in smaller 20 oz. tins. The contents were reprocessed before being recanned. Such recanning and subsequent sale in the open market continued from February to November 1947. At the request of the Department of Agriculture and the Central Government, the Director of Public Health, West Bengal, had some of the same tins examined in the Public Health Laboratory for ascertaining whether the contents were fit for human consumption. Before the submission of the final report of analysis the Health Officer of the Corporation visited the godown at 30, Park Lane and had the stock seized and sealed as stated already. The seizure report was sent to the Municipal Magistrate by the Food Inspector who had accompanied the Health Officer. The final report submitted by the Director of Public Health Laboratory bears the date 6th December 1947—a 4 days after the filing of the complaint before the Municipal Magistrate. The report indicated that there were no signs of deterioration of the contents and that after culture no organisms of three named varieties could be isolated.

[4] In course of the hearing before the Municipal Magistrate the Health Officer of the Calcutta Corporation as also some of the officers including the Food Inspector and a representative of the Corporation Laboratory were examined on behalf of the prosecution. The defence examined a number of witnesses. On the conclusion of the enquiry the stock seized was declared by the Magistrate under S. 421 (2) of

the Act to be unfit for human consumption and was directed to be destroyed at the cost of the petitioners defendants. This rule has been obtained by the petitioner against the orders for destruction passed by the Magistrate.

[5] A preliminary objection has been raised before us by the Advocate-General on behalf of the Government of West Bengal. It is urged that orders passed by a Magistrate under S. 421 (2) of the Act are in an executive capacity being merely ministerial and administrative directions and in any view the Magistrate did not act as a Court subordinate to the High Court. Accordingly, this Court has no jurisdiction to exercise revisionary powers under S. 435, Criminal P. C.

[6] The order complained of has been passed by a Municipal Magistrate appointed under S. 531 of the Act and the relevant portion of that section is in the following terms :

"The Local Government may appoint one or more Magistrates for the trial of offence against (a) this Act, and (b) the Rules or Bye-laws made thereunder."

[7] A Magistrate appointed under the provisions of this section is a criminal Court within the meaning of S. 6, Criminal P. C.: *Ram Gopal* v. *Corporation of Calcutta*, 52 Cal. 962 at p. 969 : (A. I. R. (12) 1925 Cal. 1251). It should also be stated that the Magistrate who passed the order in this particular case was acting not only as a Municipal Magistrate but as the Additional Chief Presidency Magistrate, Calcutta, and he has signed the order as such.

[8] The fact, however, that the order is passed by a criminal Court, does not finally determine the question whether an order passed by that Court is revisable by the High Court. It is well known that a Magistrate has to discharge duties which are at times judicial and at other ministerial or administrative. On certain occasions and under special statutory provisions, a Magistrate or a Judge may be vested with jurisdiction not as Court but as *persona designata*. It is, therefore, necessary to determine whether the order passed by the Magistrate under S. 421 of the Act is one in a judicial capacity and as a Court subordinate to the High Court.

[9] There is no doubt that the Municipal Magistrate, Calcutta, if he is acting in a judicial capacity, is a Court subordinate to the High Court. The only question is whether the order complained of is a judicial order or .merely a ministerial or administrative one. This question has to be decided principally on reference to the provisions of S. 421 of the Act. Reliance, however, has been placed, on behalf of the Government, not only on other provisions ofthe Calcutta Municipal Act but on different other Acts as well, of India and England. It may be stated at once that decisions on the interpretation of other statutes generally give very little help to the Court. In the words of Lord Esher M. R. in *R.* v. *Commissioner of Income-tax*, (1888) 22 Q B. D. 296 at p. 307 "we cannot use the interpretation of one statute in construing another not made with the same intent." Decisions as to whether the High Court has jurisdiction to interfere with the order by a Magistrate under particular statutes, dependent as they must be on the special provisions of those statutes in question, will generally be of little assistance unless it is possible to deduce that any principle had been laid down by them. Neither the particular provisions in those other statutes nor the context in which they appear are exactly in the same terms as the one now before us.

[10] This is why that in *Municipality of Ahmedabad* v. *Jumna Punja*, 17 Bom. 731 or in *Abdul Samad* v. *Corporation of Calcutta*, 33 Cal. 287: (3 Cr. L. J. 211) or in *Chunilal Dutt* v. *Corporation of Calcutta*, 34 Cal. 341: (4 Cr. L. J. 408) or in *re Dilsukhram Hurgovindas*, 9 Bom. L. R. 1347: (6 Cr. L J. 425) or in *Rajani Khemtawalli* v. *Pramatha Nath* 37 Cal. 287 : (11 Cr. L. J. 113) or in *re Dinbai Jijibhai Khambata*, 43 Bom. 864: (A. I. R. (6) 1919 Bom. 93 : 20 Cr. L. J. 702), it was either held specifically that the Magistrates were under the respective statutes acting as Courts subordinate to the High Court or that the Court might insist that where in the exercise of the authority vested in the Magistrate discretion is to be used that discretion must be judicial discretion. While *in the matter of Rahaman Sarkar*, 10 Beng. L. R. App. 4 : (18 W. R. Cr. 67), or *Corporation of Calcutta* v. *Keshab Chandra Sen*, 8 C. W. N. 142 or *Sarat Chandra* v. *Corporation of Calcutta*, 37 Cal. 384: (11 Cr. L. J. 183) or *Vijiaraghavalu Pillai* v. *Thangaroya Chetti*, 38 Mad. 581 : (A. I. R. (2) 1915 Mad. 360: 15 Cr. L. J. 693) and *Husan Ali* v. *Emperor*, 47 Cal. 843 : (A. I. R. (7) 1920 Cal. 635), the Courts held that the Magistrates were not acting judicially as a Court but in an administrative capacity. In *Osman Munshi* v. *Kader Pramanik*, 33 C. W. N. 836: (A.I.R. (16) 1929 Cal. 768: 31 Cr.L.J. 441), Suhrawardy J. held that an order passed by a Sub-Divisional Magistrate under the Bengal Alluvian Act (B. C. V. 1920) directing certain huts erected on a disputed *char* to be sold and for crediting the amount received was an executive and not a judicial order. Graham J. on the other hand held that the order being one passed by the Collector in his capacity as such the High Court had no jurisdiction to deal with it in the exercise of its criminal jurisdiction. In *Masoon Ali Khan* v. *Ali Ahmed Khan*, 55 ALL. 1008: A.I.R. (20) 1933 ALL. 764) and *Jagmohan Surajmul* v. *Venkatesh*

Gopal, 35 Bom. L. R. 89: (A.I.R. (20) 1933 Bom. 105), the Magistrate was held to be acting as *persona designata*.

[11] It is no use multiplying instances. Reference to the decisions above mentioned and many others show that the decisions had varied according to the particular provisions contained in the statutes in question.

[12] There is no direct decision on S. 421, Calcutta Municipal Act. For determining whether the Magistrate in passing an order under this section acts in a judicial capacity or merely as an executive officer we shall, in the first instance, proceed to consider the provisions of this section and the setting in which this section is placed.

[13] In Part 5, Calcutta Municipal Act, dealing with Public Health, Safety and Convenience, occurs Chap. 28 which deals with "Food and Drugs" and there are four sub-divisions in this Chapter. Sections 405 to 416 are under the sub-head "Sale of Food and Drugs," Ss. 417 to 421 appear under the sub-head "Inspection, Seizure and Destruction of Food and Drugs," Ss. 422 to 425 are under the sub-head "Analysis of Food and Drugs." The last S. 426 is under another sub-head dealing with the vesting of condemned food or drug in the Corporation.

[14] The sections which have been particularly referred to in course of the arguments before us are Ss. 420, 421 and 426. They are in the following terms:

S. 420. "(1) When any animal, food, drug, utensil or vessel is seized under S. 419, it may, with the consent of the owner or the person, in whose possession it was found, be forthwith destroyed; or

if such consent be not obtained, then, if any food or drug so seized is of a perishable nature and is, in the opinion of the Executive Officer, the Health Officer or any Councillor or Alderman, unsound, unwholesome or unfit for human food or medicine, it may likewise be destroyed.

(2) The expenses incurred in taking any action under sub-s. (1), shall be paid by the person in whose possession such animal, food, drug, utensil or vessel was at the time of its seizure."

S. 421. (1) Any animal, food, drug, utensil, or vessel seized under S. 419, which is not destroyed in pursuance of S. 420 shall, subject to the provisions of S. 419, sub-s. (3) be taken before a Magistrate as soon as may be after such seizure.

(2) If it appears to the Magistrate that any such animal is diseased, or that any such food or drug is unsound, unwholesome, or unfit for human food, or for medicine, as the case may be or is adulterated, or that any such utensil or vessel is of such kind or in such state as is mentioned in S. 419, sub-s. (2) or is used for preparing manufacturing or containing such food or drug he shall cause the same to be destroyed, at the expense of the person in whose possession it was at the time of its seizure or to be otherwise disposed of by the Corporation so as not to be capable of being used as human food or medicine.

(3) If it appears to the Magistrate that any such animal is not diseased or that any such food or drug is not unsound, unwholesome or unfit for human food, or for medicine, as the case may be, or is not adulterated, or that any such utensil or vessel is not used for preparing, manufacturing, or containing the same, the person from whose shop, or place the animal, food, drug, utensil or vessel was taken shall be entitled to have it restored to him, and it shall be in the discretion of the Magistrate to award him such compensation not exceeding the actual loss —which he has sustained, as the Magistrate may think proper."

"*S. 426.* When any authority directs, in exercise of any powers conferred by this chapter, the destruction of any food or any drug or the disposal of the same so as to prevent its being used as food or medicine, the same shall thereupon be deemed to be the property of the Corporation."

[15] We must be careful to remember that the orders in the present case have been passed under S. 421 and not under S. 420 as the articles in question were not of a perishable nature. Reference to sections other than S. 421, is relevant primarily for the purpose of appreciating the difference, if any, between the provisions contained in S. 421 and the other sections, particularly between those of Ss. 420 and 421 of the Act.

[16] Section 420 authorises immediate destruction of animal, food or drug if the same is in the opinion of certain officers of the Corporation or of any Councillor or Alderman, to be unwholesome or unfit for human consumption. If the persons named be of opinion that the article is unfit for human consumption and *only if that article be of a perishable nature*, destruction may be directed by the Officer immediately. There is no provision giving the owner of the article any right or opportunity to stop such destruction by those persons. The conditions precedent for attracting S. 420 are (1) that the article, whether perishable or not, is allowed or consented to by the owner to be immediately destroyed, or, (2) if the *article be of a perishable nature* the person named and authorized by the section may destroy the article even without the consent of the owner; (3) in either case the person taking action must be of opinion that *immediate destruction is necessary* in the interest of public health.

[17] If the destruction of the article be not consented to by the owner and if the article be not of a perishable nature the persons named in S. 420, have no jurisdiction to destroy it in the exercise of the plenary powers given under that section. In that event the condemned article has to be taken to a Magistrate presumably because there is no such pressing necessity for an immediate order for destruction. The powers of the Magistrate are detailed in sub-ss. (2) and (3) of S. 421. If the Magistrate is of opinion that the article is unfit for human consumption he shall cause the same to be destroyed.

[18] Great reliance is placed upon the provisions of S. 420 of the Act and it is argued by

way of analogy that if an order for destruction passed under S. 420, so far as perishable articles are concerned, is shown to be an administrative or executive order by the different persons mentioned in that section, orders passed under S. 421, in respect of non-perishable articles also, must be of a similar nature. But at the very outset it is to be noticed that there is a fundamental difference between the provisions of the two sections, as regards extreme urgency in one and its absence in the other, the person authorised to direct destruction, the procedure to be followed, the nature of property affected, and the provision for release order, if any, after seizure. It is not necessary for our present purpose to examine in detail the question whether orders passed under S. 420 and the steps taken thereunder are merely administrative or executive in character. Under S. 420, if the destruction is with the consent of the party concerned, no question as to the character of the orders passed or action taken arises. If the article is of a perishable nature, authority is given to the persons named to destroy the same provided in their opinion it is unfit for human consumption, and whether after such destruction the party has any cause of action or not, is also not necessary for us to determine now. If, on the other hand, the article is not of a perishable nature, the persons named have only the authority to seize it and send it to the Magistrate for a decision whether it is deleterious and unfit for human consumption ; and if so, to direct its destruction but if not, to direct its return and to assess the amount of compensation. It is thus patent that the Legislature makes a clear distinction between perishable and non-perishable articles. It will be improper to interpret S. 421 on an analogy of S. 420 upon the mere fact that as the persons named in the latter section are authorised to destroy the articles on the spot it must be presumed that orders passed under S. 421 must be of a similar nature. The emergency which exists and the extreme expedition with which action has to be taken in the case of perishable articles in a case under S. 420 are not present when the article is not of a perishable nature. The Legislature takes due note of the difference and provisions, fundamentally different, are promulgated. If the article is not destroyed under S. 420 the seizing officer is enjoined to take the articles to a Magistrate immediately after such seizure. All that can be said is that the enquiry to be made by the Magistrate is of a summary nature and a detailed and long drawn-out trial is not envisaged ; but that is not by itself sufficient to make the order passed merely an executive one. Even if we held that the procedure laid down and the orders to be passed under S. 420 were ministerial or executive in character that will be no ground for holding that the procedure before the Magistrate under S. 421 was of a similar nature.

[19] It is next argued that one of the sure tests for determining whether a particular order is a judicial order or not, is to enquire whether the statute provides for the issue of a notice to the party affected or for giving him a hearing before such an order is passed. If there is no such clear provision in the statute, as in the case now before us, we are asked to conclude *simpliciter*, that the Magistrate could have passed the order without even affording the party aggrieved an opportunity to be heard and, therefore, this order must be deemed to be a ministerial or administrative order. Reference is in this connection made by way of comparison to some of the other provisions in the Calcutta Municipal Act, as appearing in other chapters, particularly to the provisions affecting construction and demolition of buildings within the Municipal limits (vide Ss. 363 and 381).

[20] This in my view is not the correct approach to the question. If an act is otherwise found to be a judicial act the absence of specific provisions either for the issue of notice to the party affected or for being heard in recognition of the fundamental right, will not be sufficient to convert the judicial act into an executive one. On the other hand, the party must always be deemed to be entitled to get an opportunity of being heard even if the statute does not specifically provide for the same. The only exception will be when there is a clear direction that no notice need be given or that the *ex parte* order is made revisable at the instance of the party affected. Similarly, if an order is otherwise found to be an executive one, the mere fact, that there is a provision for allowing a hearing to the party concerned, will not by itself make it a judicial one.

"It is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice any party, must not be finally made unless he has been afforded an opportunity to be heard." *Ajant Singh* v. *F. T. Christian*, 17 C. W. N. 862 : (16 I. C. 567). See also *In re Hammersmith's Rent Charge*, (1849) 4 Ex. 87 : (19 L. J. Ex. 66), *Mena Juddi Biswas* v. *Toam Mandal*, 39 Cal. 881 : (15 I. C. 176) and *R.* v. *Saddler's Co.*, (1863) 10 H. L. C. 404 : (32 L. J. Q. B. 337).

[21] The Judicial Committee had occasion to consider the question as to the test to be applied for determining whether an order by the Commissioners under the Crown Lands Alienation Act, 1868, was purely ministerial or not.

"If an exercise of judgment is required to determine whether or not a man is entitled to lands by reason of compliance with the provisions of the Act, it is difficult

to see why less judgment should be required in determining, what concerns him quite as much, whether or not he has forfeited them by non-compliance."

Their Lordships

"do not desire to be understood as lying it down that the Commissioner, in conducting such an enquiry, is bound by technical rules relating to the admission of evidence, or by any form or procedure, provided the enquiry is conducted according to the requirements of substantial justice. These requirements are well known to our law, and have been enunciated in many cases bearing some resemblance to, though not identical with, the present." *James Dunbar Smith* v. *Queen*, (1878) 3 A. C. 614 at p. 623.

Sir Robert Collier refers with approval (at page 624) to the observation by Bailey J., in *Capel* v. *Child*, (1832) 2 C. & J. 558 at p. 588; (111 L. J. (N. S.) Ex. 205).

"Is it not a common principle in every case, which is in itself the character of judicial proceeding, that the party against whom the judgment is to operate shall have an opportunity of being heard?" See also *Rex* v. *Archbishop of Canterbury*, (1859) 1 E. and E. 545 at 559 : (28 L. J. Q. B. 154).

[22] In *Cooper* v. *Board of Works for the Wandsworth District* (1863) 14 C. B. (N. S.) 180 (32 L. J. C. P. 185), although the Metropolis Local Management Act empowered the District Board to alter and demolish a house, where the builder had neglectd to give notice of his intention to build seven days before proceeding to lay or dig the foundation, the Board were, nevertheless, unable to execute that power without first giving the person guilty of the omission an opportunity of being heard. Earle C. J. definitely lays down that the principle is applicable even in proceedings not strictly judicial :

"I fully agree that the Legislature intended to give the District Board very large powers indeed, on the qualification I speak of has been recognised to the full extent. It has been said that the principle that no man will be deprived of his property without an opportunity of being heard is limited to a judicial proceeding. I do not quite agree to that. The law I think has been applied to many exercises of power, which in common understanding would be not at all more judicial proceedings than would be the act of the District Board in ordering the house to be pulled down."

[23] The principles enunciated have been made applicable not only when a person is performing a judicial function but even if the function is not of a judicial nature. The party concerned must be given a hearing in the sense required by the elementary principles of natural justice.

[24] Even where there are specific provisions permitting *ex parte* orders of a judicial nature, it is also another fundamental principle of natural justice that such orders may be revoked at the instance of any party prejudiced thereby and the Court has inherent power to give such directions as the justice of the case may require. *Tasliman* v. *Hanihar*, 32 Cal. 253 : (9 C. W. N. 81 F.B.); *Tikait Ajant Singh* v. *F. T Christian*, 17 C. W. N. 862 at p. 864 : (16 I. C. 567).

[25] It is further incontrovertible that even the absence of specific provisions in the statute does not authorise the Magistrate to proceed *ex parte* and without offering an opportunity to the party concerned to be heard in his defence. Such an absence of provision cannot also be taken by itself to be sufficient to make the order a ministerial one.

[26] On the other hand, one of the infallible tests applied by Courts to determine whether an act is merely ministerial or judicial is to ascertain whether the public officer or body had to exercise a judicial discretion. Of the various authorities, I need only refer to the clear enunciation of the principle by Lord Esher M. R. in *Partridge* v. *General Council of Medical Education*, (1890) 25 Q. B. D. 90 at page 96: (59 L. J. Q. B. 475) :

"Is giving a special direction to the registrar under that section merely a ministerial act, to be done without the exercise of any discretion at all? I do not think so. I think it is clearly discretionary. Now it appears to me that it is a true proposition to say that, when a public duty is imposed by Act of Parliament upon a body of persons, which duty consists in the exercise of a discretion, it cannot be said that the exercise of that discretion is a merely ministerial act. If what the defendants did cannot be considered to have been merely ministerial, then I think for the purpose of the question, whether they are protected from an action, it must be considered as judicial."

[27] In the case now before us there can be no question that, even if the argument advanced on behalf of the Government about the duty cast on the Magistrate under S. 421 (2) be accepted there is no doubt that the Magistrate has to pass the final order only after using his discretion, which cannot but be a judicial discretion. From this point of view also the order passed by the Magistrate under S. 421 (2) must be considered to be a judicial order.

[28] Special emphasis is laid by the Advocate General on the opening words of sub-s. (2) of S. 421:

"If it appears to the Magistrate . . . he shall cause the same to be destroyed at the expense of the person in whose possession it was at the time of seizure."

[29] It is contended that the expression "if it appears" indicates that the Magistrate is neither to give any notice to the party concerned nor to hold any enquiry but may proceed to pass an order basing the same on his personal opinion after a visual examination only. Apart from the question whether it is either practicable or feasible for the Magistrate to arrive at a decision without any assistance from either of the parties, viz., the corporation and the person from whose custody the articles are seized, it may be stated at once that the question whether the orders passed by the Magistrate are judicial or ministerial ones must rest not on one clause

only but on an interpretation of S. 421 taken as a whole.

[30] In one sense the word "appear" may refer to that which is seen by the eye, but it is also used in its broader sense as signifying that which is made clear by evidence or is clear to the comprehension when applied to matters of reasoning or opinion.

[31] The expression 'if it appears' is used at various places in the Calcutta Municipal Act as among others in Ss. 259 (1), 272, 338 and 344, and from the context in each case it is clear that the expression is used in the broader sense as indicated above. This clause is used at least at three places in Chap. 28, in Ss. 419 (2), 421 (2) and 421 (3). That which "appears" in S. 419 (2) to the Health Officer and others as unwholesome or unfit for human food is described in the next S. 420 (1) as being so "in the opinion" of those officers. It is manifest that the Legislature was using the expressions "if it appears" and "if in the opinion of" as mutually interchangeable. According to the accepted rules of interpretation, if an ordinary expression like 'if it appears' is used in the wider sense in other parts of the same Act and is also used as an alternative to 'in the opinion' there is no escape from the conclusion that in S. 421 it has also been used in that wider sense. The more so, as there is no doubt so far as S. 421 (3) is concerned.

[32] The word "appear" or "appearing" is one of frequent use in judicial proceedings and is sometimes used in statutes referring to them as meaning

"clear to the comprehension, when applied to matters of opinion or reasoning and satisfactory or legally known or made known when used in reference to facts or evidence."

Various expressions of a similar import are used in the statutes and if reference be made to the Code of Criminal Procedure only we may notice the use of expression "if it appears" in Ss. 169, 170, 173 (3), 209 (1), "sees reason to believe" in S. 186 (1), "if he finds" in S. 209 (1), "if" or "unless the Magistrate is satisfied" in Ss. 210 (1) and 218 (1) or "if he thinks fit" in Ss. 219 (1) and 260 (1) (c). In each one of these cases the conclusion to be arrived at by the Magistrate, etc., is after the exercise of judicial discretion and on a proper appreciation of the materials placed before him. I do not overlook the opinion expressed by the English Court in *Robinson* v. *Corporation of Sunderland (No. 2)*, (1899) 1 Q. B. 751 at p. 757 : (68 L. J. Q. B. 330) where in considering a statute (S. 36 of the Public Health Act, 1875) that:

"if a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet,"

the Court observed :

"The words 'appear to such authority' are obviously put in for the purpose of making the local authority the judges on the question whether the house is without a sufficient water-closet."

It is sufficient to observe that it was not merely on the expression ' appear to such authority " that the decision in this case and in similar other ones was arrived at. Reference was made to the opportunity—which the party had, at the earlier stage, as held in *Attorney-General* v. *Hooper*, (1893) 3 Ch. 483 : (63 L. J. Ch 181), to raise objection and to lead evidence but had neglected to avail of it and more particularly to the provisions for an appeal as under S. 268 of that Act against this summary decision. Not only the section itself as a whole but the setting in which it appears in the particular statute, will determine the particular interpretation to be put on this phrase. What the intention of the Legislature is has to be ascertained from the case taken as a whole and also with an eye to reasonableness.

[33] It has already been pointed out that the test to be applied as under Ss. 420 and 421, Calcutta Municipal Act in the case of a *perishable article* is altogether different from the one necessary when the article is *non-perishible*. It is only after a proper enquiry is held, the Corporation and the other party are heard, that it may "appear to the Magistrate" as to whether the particular non-perishable article is fit to be condemned or not The emergency and plenary powers as contained in S. 420 are attracted, even when the owner is not a consenting party, but it is limited to the destruction of articles of a perishable nature only. The reason is that in the case of a perishable article orders have to be passed on the spot and a decision can be made in a very large majority of cases by a mere look, touch or smell of the thing. But it may not very often be possible for a person to declare off-hand, if the article is not of a perishable nature, that it is liable to be condemned. The facts of this case now before us show unmistakeably that it was impracticable and impossible for the Magistrate to record an opinion, without material assistance from the Corporation and the party, as to whether the food contained in a large stock of closed tins was either fit for human consumption or not. The extreme urgency which exists in the case of a perishable article is also not present here. The persons named in S. 420 are not, on these grounds, given the authority to destroy such articles on the spot. They are required to bring them before an independent person, the Magistrate, so that he may examine the opinion held by the Corporation Officer and others on the merits and how can he do so without

holding an enquiry before arriving at the proper decision? Even if it may be said that the enquiry to be made by the Magistrate is to be of a summary nature and a detailed and long investigation is not contemplated that cannot alter the character of the enquiry or the nature of the orders passed. The expression "if it appears to the Magistrate" as the opening words of S. 421 (2) cannot be taken to vest such Magistrate with unlimited powers with a discretion not to hold a proper enquiry or to make the order passed an administrative or ministerial order only. It is worthy of note that the Calcutta Municipal Act contains no provisions for the party affected by an order, even though improper and unsustainable, to apply for any relief elsewhere. There are no provisions similar to those as found in Ss. 268 or 308, Public Health Act, 1875 (38 and 39 Vict. C. 55).

[34] A further provision, as is to be found in sub-s. (3) of S. 421, places the matter beyond any doubt. The Magistrate acting under S. 421, sits in judgment over the opinion and decision of the Corporation Officer or Councillor and acts as an appellate or a revising authority. It is open to the Magistrate not to accept the case as made by the Corporation and in that event provision is made for the restoration of the articles to the party from whose custody they had been taken. Further, the Magistrate is to exercise his discretion, which no doubt must always be a judicial discretion, to award, to the party under certain circumstances, such compensation for the loss as he might have sustained. Now, is it possible for the Magistrate to arrive at a correct decision without giving both the Corporation and the party concerned an opportunity of being heard? Moreover, how is the Magistrate to ascertain the amount payable without having heard the party aggrieved? Further, if a decision is arrived at about the quantum of compensation it cannot be suggested that that part of the order is binding on the party as an executive order. It had been conceded before us that the order, if any, allowing compensation is a judicial order. The decision by the Magistrate under S. 421 (3) has to be made, whether for return or for compensation, immediately after he comes to the conclusion under sub-s. (2) of that section that the opinion of the Corporation cannot be accepted. How is the party to be heard at this stage if he had not been intimated from before and is ready with the evidence, if required?

[35] Under ordinary canons of interpretation a section is to be taken as a whole. The intention of the Legislature, as to the nature of the authority exercised by the Magistrate, or the character of the order passed, is to be determined with reference to the section as a whole. It is not only impracticable but also unwarranted if the provisions are so interpreted so as to have laid down that the functions of the Magistrate so far as condemning the article is concerned are to be deemed to be executive in nature but the order for compensation, if allowed, will be a judicial one.

[36] Under S. 420 there is no necessity for any provision for the return of the articles to the party from whose custody they might have been taken and no question further arises either for assessing compensation for damages incurred by the party or for awarding the same.

[37] A distinction was attempted to be made between preventive and penal steps as provided in the Act. It was suggested that a penal order may be a judicial order but a preventive order may not be. Further, the preventive portion of the order is to be passed very expeditiously and introduction of judicial procedure will defeat the very purpose of the provisions.

[38] In the first place a preventive step may, in its very nature, be a penal one. To prevent the owner of the article from exposing it for sale and thus to protect public health, the article may be seized or destroyed. Seizing it, pending further decision as to its disposal, is merely preventive but a direction for destruction, by whichever authority it may be, is penal. The order for destruction is a penal one and is in the nature of confiscation of the goods and it is actually so. The decision by the competent authority that an article is unfit for human consumption has the effect under S. 426, Calcutta Municipal Act to transfer the ownership to the Corporation. The order for destruction when passed is really when ownership of the article has vested in the Corporation.

[39] The argument based upon urgency and expedition so far as applicable under S. 420 loses force to some extent at least when the order is one under S. 421 the reason again being that in one case the article is perishable and in the other non-perishable. Unless there be specific provisions abrogating the necessity of service of notice in giving a hearing to the party affected, it cannot be presumed when a penal order is to be passed that no hearing need be given or that the penal order itself is merely a ministerial order by a Magistrate.

[40] From the interest of public health also the Corporation should not be compelled to take the decision by the Magistrate as final and conclusive, as it must be, if the same be deemed to be a ministerial order. If the opinion by the Corporation Officers is not accepted by the Magistrate illegally or without any inquiry it is only proper that the Corporation should have

an opportunity of having the matter treated as an order by a Court subordinate to the High Court.

[41] Section 488 of the Act provides for the penalties which may be imposed for certain offences under the Act. Section 407, with S. 421 in Chap. XXVIII of the Act, indicates the nature of the offence by sale, storing etc., of any of the articles mentioned therein. For goods or drugs destroyed under S. 421 a person may be convicted under S. 488 of the Act. There is no doubt that if a person is fined under S. 407 read with S. 488 of the Act the order passed by him is in his judicial capacity and as a Court acting under the High Court. But it is argued that the order for destruction under S. 421 is not a judicial order but is a ministerial direction given by the self-same Magistrate which cannot be revised by the Court. It is permissible for the Corporation to proceed, for the destruction of a particular article, under S. 421 (2) only or along with the same under S. 407 read with S. 488 of the Act. The penalty which may be imposed on a person for the sale, storing, etc., of food and drugs, etc., is of a two-fold nature—one by a direction for destruction under S. 421 (2) and the other by an imposition of a fine under S. 488. The undoubted position is that the order under S. 488 is revisable by the High Court and this Court may, in that connection, come to the conclusion that the procedure followed for condemning the article was illegal or that it had not been proved that the article was unfit for human consumption which could be condemned. It seems to be rather strange that a proceeding in which two different orders are passed will, for certain purposes be considered to be in course of judicial proceedings and for other purposes executive. The anomaly which will arise on such interpretation if accepted, is that the person aggrieved, even if he succeeds, against an order passed under S. 407 read with S. 488, the only relief that he would be entitled to will be that the fine cannot be imposed. But when the Court comes to the conclusion that the articles could not have been condemned an order passed under sub-s. (2) of S. 421 would become wholly untenable. The party would in equity, and legally also, be entitled to an order in terms of sub-s. (3) of S. 421. If we are to accept the interpretation as put on behalf of the Government and the Corporation that orders passed under S. 421 (2) are merely executive orders manifest injustice and incongruities will follow in certain cases.

[42] There is no doubt that no Court is entitled to depart from the intention of the Legislature as may be ascertained from the language of the Act only because it is thought either unreasonable or inconvenient. But where two constructions are open the Court may adopt the more reasonable of the two. *Countess of Rothes* v. *Kirkcaldy and Dysart Waterwork Commissioners*, (1882) 7 A. C. 694 at p. 702 ; *Cooke* v. *Charles A. Vogeler Co.*, (1901) A. C. 102 : (70 L. J. K. B. 181) ; *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.*, (1882) 9 Q. B. D. 648.

[43] In my view the language used in the relevant section indicates that the Magistrate is to exercise a judicial function. Even if it be contended that two constructions are possible I would accept the one which is more reasonable and in consonance with natural justice.

[44] In the view expressed above, even though there is no direct provision that a formal notice is to be given to the party before any action is taken either under sub s. (2) or sub-s. (3) of S. 421 the Magistrate is bound to give notice before he arrives at a decision. It cannot also be contended that an order passed by a Magistrate under S. 421 (2) could be deemed to be merely a ministerial order against which the party aggrieved cannot move this Court. The proposition that all actions taken by the Magistrate under S. 421 (2) of the Act are merely of a ministerial or executive nature is fundamentally opposed to all notions of justice and canons of fairness. On a reading of the provisions contained in S. 421, and interpreting the section as a whole and the context in which it appears, there is no escape from the conclusion that the order is a judicial order.

[45] I have discussed the question as to the nature of the order passed under S. 421 on the basis of the language used in the Act without any reference to the authorities which were cited before us and which were based on provisions other than one the now before us. As indicated already, there is no direct decision on S. 421 of the Act covering the point now raised. But I would now consider the authorities to which reference had been made before us.

[46] We may in the first instance consider those decisions which have been referred to and arise out of other provisions of the Calcutta Municipal Act.

[47] In those decisions, whether under S. 421 or other provisions where the jurisdiction of the High Court was presumed and there is no actual decision on the point now raised need not be considered.

[48] The question of jurisdiction appears to have been raised for the first time in *Abdul Samad* v. *Corporation of Calcutta*, 33 Cal. 287: (3 Cr. L. J. 211). This was an application in revision against an order passed by the Municipal Magistrate for demolition for infringement of building rules and the order was one passed under S. 449, Calcutta Municipal Act (Bengal

Act III [3] of 1899 now repealed, (the corresponding section under the new Act being Ss. 363 and 364). It having been urged on behalf of the corporation that the High Court had no jurisdiction, sitting in revision, before they could deal with the order that had been made. Woodroffe and Mookerjee JJ. indicated that the then General Committee had under the section a discretion, as also the Magistrate, when the matter was brought before him. As the Magistrate had a discretion either to make or revise the order under S. 449 of the said repealed Act, the discretion so vested could only be exercised in a judicial manner. This would give the High Court jurisdiction to entertain an application in revision and the order complained of was actually revised. Although the section in question was not the one which is now before us, but the principle similar to the one enunciated by Lord Esher M. R. in *Partridge* v. *General Council of Medical Education*, (1890) 25 Q. B. D. 90 : (59 L. J. Q. B. 475), already referred in an earlier part of the judgment, was applied for testing whether an order was in the nature of a judicial order or not.

[49] In *Ram Gopal* v. *Corporation of Calcutta*, 52 Cal. 962 : (A. I. R. (12) 1925 Cal. 1251), another case arising out of the building Regulations (Ss. 363 and 364 of the present Calcutta Municipal Act, Bengal Act III [3] of 1923) a question was specifically raised as to the jurisdiction of the High Court to entertain an application in revision against an order under S. 363 of the said Act. Sanderson C. J. held (Panton J. agreeing) that the Municipal Magistrate, appointed under S. 531 of the Act for the trial of offences under the said Act, is a criminal Court and the order of the Magistrate was a judicial order revisable by the High Court whether in the exercise of criminal or civil jurisdiction.

[50] In a later case, however, *Krishen Doyal* v. *Corporation of Calcutta*, 54 Cal. 532:(A. I. R. (14) 1927 Cal. 509 : 28 Cr. L. J. 407), where the only question which arose for decision was, whether in a proceeding pending before the Municipal Magistrate for an order for the demolition of an unauthorised structure, the owner of the said unauthorised construction was or was not an accused person. The question being answered in the negative, such a person was held as not exempted from the administration of oath under S. 342 (4), Criminal P. C. This Court seemed to have been of the view that so long as there was no disobedience to the order of demolition passed by the Magistrate, there was no offence. Suhrawardy and Cammiade JJ. distinguished the clear and unequivocal decision by Sanderson C. J. as being an *obiter* only. I respectfully agree with the decision as given in the earlier case. It was not an *obiter* but a decision which was necessary for the disposal of the matter—the Court, before it could interfere with the order passed by the Magistrate, had to decide whether the former had jurisdiction to entertain the petition in revision. It is not necessary for us to consider whether the limited and distinct question which came up for decision in *Krishen Doyal* v. *Corporation of Calcutta*, 54 Cal. 532: (A. I. R. (14) 1927 Cal. 509 :28 Cr. L. J. 407), was correctly decided. When the proper occasion comes it may be necessary to reconsider the position laid down. Without going into the details it may just be indicated that under the Calcutta Municipal Act, it is not always the case that an offence is not committed until there is a disobedience of an order of demolition passed by the Magistrate. The offence, on the other hand, may have been committed when the structure was raised without the necessary sanction or in deviation of an order passed by the Corporation. The jurisdiction of the Municipal Magistrate is invoked when an offence has in the opinion of the Corporation already been committed. What the Magistrate is required to consider is whether the offence had been so committed.

[51] The three decisions referred to above arose out of S. 363 of the Act and it may be argued that the provisions of that section are materially different from those found in S. 421 of the Act. Accordingly these cases are no direct authority for the proposition that an order passed by a Magistrate under S. 421 (2) is an order passed by him in a judicial capacity and that he is a Court subordinate to the High Court. But there is a clear Bench decision, so far as the legal position of the Municipal Magistrate, who is also acting as the Presidency Magistrate of Calcutta, to the effect that he is a Court subordinate to the High Court. For determining the test for differentiating a judicial order from a ministerial one, *Abdul Samad* v *Corporation of Calcutta*, 33 Cal. 287 : (3 Cr. L. J. 211) is of some assistance But strictly speaking there being no direct authority on S. 421 of the Act, we had proceeded to interpret the section as it stands and have already come to a conclusion as stated already.

[52] As regards provisions in other statutes, similar to the one in S. 421, Calcutta Municipal Act, reference need be made only to S. 13, Bengal Food Adulteration Act (Bengal Act VI [6] of 1919). The language used and the procedure laid down is almost similar to those in S. 421 of the Act. In a number of cases the High Court had interfered in revision against orders passed by the Magistrate under S. 13, Bengal Food Adulteration Act. The two of the recent decisions are *Benarasi Lal Marwari* v. *Chair-*

man, *Asansole Municipality*, 42 C. W. N. 731 and *Sachi Nandan* v. *Chairman, Midnapore District Board*, 44 C. W. N. 173 : (A. I. R. (27) 1940 Cal. 213 : 41 Cr. L. J. 582). In both these cases the Magistrate had in the same proceedings passed orders for destruction or forfeiture as also orders on the basis that an offence had been committed under S. 6 of the same Act. Whether the order is passed under S. 6 or S. 13 of the said Act, the foundation must be on a decision whether the article is to be condemned or not. The anomalous position which would arise on one part of the proceedings being considered to be ministerial while the other is accepted as judicial has already been referred to. Although the question of the jurisdiction of the High Court was not specifically raised and decided in either of these two cases these are apposite instances which show what difficulties and anomalies would have ensued had the two parts of the proceedings been treated differently.

[53] Reference has now to be made to some of the English decisions on which principally the learned Advocate-General rested his argument. Reference is made in these decisions to Ss. 116 and 117, Public Health Act 1875 (38 and 39 Vict. C. 55). This old statute has been modified in many important particulars and we shall have to refer to one of the more recent statutes which are now in force. Sections 116 and 117 of the 1875 Act were in the following terms:

"*S. 116.* Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal carcase, meat, poultry, game, flesh, fish, fruit vegetables, corn, bread, flour or milk exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of men, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk appears to such medical officer or inspector to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice.

S. 117. If it appears to the justice that any animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal, carcase or fish or piece of meat, flesh or fish, or any poultry or game, or for the parcel of fruit, vegetables, corn, bread or flour or for the milk so condemned, or, at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months.

The justice who, under this section, is empowered to convict the offender may be either the justice who may have ordered the article to be disposed of or destroyed, or any other justice having jurisdiction in the place."

[54] Section 308, Public Health Act, 1875, entitles the party aggrieved to bring the same question for a decision by the justice for further consideration. These proceedings are by way of a claim for compensation and most of the authorities cited before us were at the stage when proceedings had been started under S. 308 which runs as follows:

"*S 308.* Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers: and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of twenty pounds, the same may at the option of either party be ascertained by and recovered before a Court of summary jurisdiction."

[55] In the first place it is to be noticed that S. 117 deals with merely articles of a perishable nature and instead of giving any authority to certain officers, as under S. 420, Calcutta Municipal Act for immediate destruction, under the English Statute direction has to be obtained from a justice. The test of extreme urgency and promptitude applies to actions under S. 117 of the English Act as the justice has to deal with articles of a perishable nature. Observations in decisions on S. 117 are more apposite if at all, to a case coming under S. 420 and not S. 421, Calcutta Municipal Act. If we overlook this primary distinction between Ss. 420 and 421, Calcutta Municipal Act on the one hand and S. 117, English Act on the other we are apt to be misled.

[56] There is another very important aspect which we cannot lose sight of. Under the English Act even in the case of a perishable article the emergent orders which may be passed by the justice are not final. Further opportunity is afforded to the aggrieved party to have the question, whether the goods ought to have been condemned or not, brought at a subsequent stage before another Tribunal. Under such circumstances the English Courts have interpreted the orders passed under S. 117 in a particular way. There are material points of difference between S. 117, English Act and S. 421, Calcutta Municipal Act; the two statutes are moreover, conceived on different principles and the setting in which the particular sections appear in the two statutes are fundamentally different. It is not only undesirable but we would not be justified in applying stray observations from the decisions of the English Courts for interpreting altogether different provisions

which are to be found in the Calcutta Municipal Act.

[57] Although the correct view would be not to rely upon these decisions but as great emphasis had been laid on behalf of the Government we may proceed to consider some of the more important authorities cited before us.

[58] In *Walshaw* v. *Brighouse Corporation*, (1899) 2 Q B. 286 : (68 L. J. Q. B. 828), the question arose not at the stage when the meat was destroyed but at a later stage when compensation was claimed under S. 308, Public Health Act by the party aggrieved by reason of the seizure of the meat. What the Court of Appeal was called upon to consider was the extent of the powers and authority of an arbitrator under S. 308, Public Health Act. The observations made in connection with the interpretation of Ss. 116 and 117, Public Health Act, 1875, must be taken as influenced by the provisions of S. 308 of which there is no counter-part in the Calcutta Municipal Act. It was found that the order of condemnation passed under S. 117 was revisable by the arbitrator. No question arose as to whether the ordinary Court would have had jurisdiction to revise the order passed by the justice under S. 117, if that order had been moved against. The only question was that there being a special provision as contained in S. 308 of that Act, vesting the arbitrator with certain powers, whether the order previously made under S. 117 would be binding on the arbitrator or not. The Court of Appeal found that the arbitrator was not bound by the earlier order as regards the unsoundness of the meat. One of the reasons given, on consideration of the special provisions of English Act that the order passed under S. 117 was an administrative order not a judicial order, is of very little assistance for deciding the case now before us.

[59] The procedure to be followed by the justice when passing an order under S. 117 came up for consideration in *In re Bater & Birkenhead Corporation*, (1893) 1 Q. B. 679: (62 L. J. M. C. 107). In that case also the matter came up before the Court after fresh proceedings had been started under S. 308. The question was as to how the compensation payable under S. 308 was to be ascertained. During the proceedings under S. 117, the owner of the meat had attended and given evidence in defence of the meat. Was he entitled to be reimbursed so far as the cost incurred by him for appearance through the S. 117 proceedings ? The Court held that he was entitled to be repaid the cost reasonably incurred by him in attending before the justice and resisting the condemnation of the meat. Charles J. observes at p. 684 :

"It is said that the attendance was not the ordinary and natural consqeuence of the act of the Inspector in seizing the meat. I am unable to agree to that contention. A man who knew, as the appellant did, that the Magistrate would be invited to destroy as unfit for the meat which he believed, and could prove to be not unwholesome or unfit for human food, would naturally attend before the Magistrate, although he was neither summoned nor bound to do so, for registering the destruction of the meat. It was perfectly natural and right for the appellant in my opinion, to go before the Magistrate with his witnesses. But then it is said that the Magistrate had no power to hear of him or his witnesses. No case decides that. No doubt Field J. in *White* v. *Redfern*, (1880) 5 Q. B. D. 15 : (49 L. J. M. C 19) and in *Vinter* v. *Hind*, (1883) 10 Q. B. D. 63 : (52 L. J. M. C. 93) says that the Magistrate need not hear the owner if he likes to refuse to do so; but no case goes so far as to say that the Magistrate has no power to listen to the owner of the meat. Although he is not entitled to be heard, the Magistrate may hear him. If he thinks fit, and on his attendance before the Magistrate, if a charge were formulated against him under S. 117, Public Health Act, with a view to his committal to prison, the Magistrate would have power, I think, to hear and determine the charge, then and there, and would have jurisdiction over the cost of the witnesses under S. 18 of 11 and 12 Vict. C. 43. That however was not done. The Magistrate was asked to condemn the carcase, and he very properly heard the evidence tendered by the owner of the caracase, although he was not bound to do so, and in the result he declined to make the order condemned the meat."

[60] The owner of the meat had declined to take the meat so released and the Court rightly held that he could not have refused to take it back.

[61] The provisions in the 1875 [Act] were so interpreted holding that the Magistrate, though not bound, could allow the owner to adduce evienced and also be heard. The position has now been made clear by the Food and Drugs Act, 1938, (1 and 2 Geo. VI, C. 56). Under S. 10 of this Act it is now provided that when officers seizing the articles or food bring it before the justice of peace, if he attends before him upon the application for his condemnation "be entitled to be heard and to call witnesses." This provision confirms the right of the owner to adduce evidence and the law in *Bater's case*, (1893-1 Q. B. 679 : 62 L. J. M. C. 107) is made a part of the statute withdrawing the discretion of the Magistrate. It has been pointed out that ordinarily the owner appears and the Magistrate requires his assistance in determining whether the article should be condemned or not.

[62] In the case above mentioned as also in other decisions of the English Courts emphasis is laid on the emergency of the order. This emergency the Legislature in Bengal takes due note of and makes the necessary provision in S. 420, Calcutta Municipal Act. There is no such emergency in an enquiry under S. 421, Calcutta Municipal Act. It is only when the food or drug

is not of a perishable nature the Corporation is bound to take it before the Magistrate. Under the English law, even in the case of perishable articles, no officer of the local body is authorised to destroy the same as in the Calcutta Act. But he must take it to the justice for exercise of the summary power, subject to the revisionary powers as contained in S. 308 of the old 1875 Act. This summary power is given under the Calcutta Act to the different persons mentioned in S. 420.

[63] It would be a wrong analogy to apply these English decisions for the interpretation of S. 421 of the Calcutta Act merely because perishable articles have under the English statute to be taken before a Magistrate and non-perishable ones under the Calcutta Act.

[64] In our view the English decisions referred to cannot be of any assistance or be used as authority in support of the contention that the orders passed by the Municipal Magistrate under S. 421, Calcutta Municipal Act is not a judicial order.

[65] The preliminary objection raised must be overruled. We therefore proceed to consider the case on the merits.

[66] In this part of the case it may be stated at once that the petitioner has failed to show that there has been any error of law or miscarriage of justice committed by the Magistrate.

[67] The question whether the particular tinned foodstuff is or is not deleterious and injurious to public health is a question of fact which must be determined on the evidence adduced in the case.

[68] Reliance is placed on the report submitted by the Director of Public Health Laboratory on 6th December 1947, indicating that there were no indications of deterioration of the contents of the tins examined and that after culture no organism of certain varieties could be isolated. It is also urged that when there are a very large number of tins the examination of some only could not in law be justified as sufficient to condemn the whole lot.

[69] If any complaint can be made against the procedure adopted by the Magistcate it is against the long-drawn enquiry which was undertaken by him. After notice to the party concerned, the Court proceeded to examine on the basis of the evidence laid before it the allegations.

[70] The report by the Director of Public Health is only one of the many pieces of evidence which the Magistrate had before him. The examination by the Director was only of particular specimen sent to him whereas before the Magistrate the examination was of a larger number of specimens both by the Corporation experts as also the witnesses brought by the owner. The opinion given by the Director is in no way conclusive and binding on the Magistrate. It was open to him to consider the evidence as adduced and come to a decision. No complaint can be made about the procedure adopted by the Magistrate.

[71] With regard to the other question as to the number of the specimens examined before the Magistrate it cannot be argued that he must examine each and every particle of the foodstuffs or each and every one of the tins. Liberty was given to the opposite party for putting all such samples as he wanted to be examined by the witnesses on behalf of the Corporation. Moreover, even the representative from Mazdas, who had been called by the petitioner had expressed, during his cross-examination, that many of the tins contained unwholesome food. How many tins have to be examined in any particular case must depend upon the facts in each case. In *Sachinandan* v. *Chairman, Midnapore District Board*, 44 C. W. N. 173: (A. I. R. (27) 1940 Cal. 213 : 41 Cr. L. J. 582), sample taken from one tin out of 25 tins of mustard oil, all being of the same brand and forming part of one consignment, was held to be sufficient in the eye of law to make the forfeiture order with regard to the whole of the consigment. In the case now before us, the original 20 oz. tins were repacked after being reprocessed. A very large number of smaller tins after being reprocessed were found to contain unwholesome food. For the further reasons given by the Magistrate I do not see any reason for disagreeing that the whole lot should be condemned. I have myself gone through the evidence as adduced before the Magistrate and I have no doubt that the conclusion arrived at by him is the only one possible.

[72] The provisions contained in this part of the Calcutta Municipal Act are provisions for the safety of public health and no risk can or should be taken in this matter. In the interest of public health and in view of the provisions in the Act the order passed by the Magistrate is unassailable.

[73] In this view this rule must be discharged and the order passed by the Municipal Magistrate affirmed.

[74] **Das Gupta J.**—On 2nd December 1947 Haran Ch. Saha of the Calcutta Corporation, on inspection of a stock of jams stored by the petitioner Messrs. A. Hasan & Co. in a godown at 30 Park Lane, seized a number of tins and sealed the remainder of the stock. He produced the tins that were seized by him before the Municipal Magistrate, Calcutta, and prayed

for an order for destruction, under S. 421, Calcutta Municipal Act, of the tins produced before him and also the stock sealed in godown. The Magistrate issued notices on the proprietor, manager and others of the petitioner company, and on consideration of oral and documentary evidence that was produced by both sides and examination of some tins, came to the conclusion that the entire stock was unwholesome and unfit for human consumption, and ordered the destruction of the entire stock under S. 421 (2), Calcutta Municipal Act, referred to hereafter as the Act.

[75] The first question for decision, in considering the present petition calling for our interference with this order of destruction, in the exercise of our powers of revisional jurisdiction under S. 435, Criminal P. C., is whether the Magistrate acting under S. 421 (2), Municipal Act is a "Court" within the jurisdiction of this Court. The Advocate-General, appearing for the Government of West Bengal, contends that the Magistrate acts as an executive officer under S. 421, Calcutta Municipal Act, and not a Court and the order passed by him is an administrative order and not a judicial order. If this contention be correct, it is obvious, this Court has no jurisdiction to interfere with the order passed in the present proceedings.

[76] It is indisputable that the mere fact that a "Magistrate" acts under S. 421 of the Act, does not make his order amenable to the jurisdiction of this Court. Common sense and authority tell us with one voice that a Magistrate may have executive as well as judicial function to perform, and that whatever functions a Magistrate has to perform under a statute are not necessarily judicial. One of the earliest Indian decisions on this point is reported in *In the matter of Rahman Sarkar*, 10 Beng. L. R. App. 4: (18 W. R. C. R. 67), where it was held that the order of a Magistrate under the Police Act appointing some persons as special constables was an executive act, with which the High Court could not interfere. In *Hasanali* v. *Emperor*, 47 Cal. 843 : (A. I. R. (7) 1920 Cal. 635), it was held that a District Magistrate in granting or refusing an application to take the name of a person out of the register, in which it had been entered under the provisions of S. 5, Criminal Tribes Act, does not perform any judicial function, that his functions are administrative, and that the High Court is not entitled to interfere with such an order. In *Vijayaraghavalu Pillai* v. *Theagoroya Chetti*, 38 Mad. 581 : (A. I. R. (2) 1915 Mad. 360), the Madras High Court had to consider whether they had any power to revise the order of a Magistrate allowing an application to declare that the inclusion of the petitioner before the Court as a candidate for municipal election by the President of the Madras Corporation was illegal. The learned Advocates for the petitioner conceded there that the petition did not lie under S. 439, Criminal P C., but contended that under the Charter Act, the High Court was competent to revise the order. The Court rejected this contention, holding that the Magistrate in this instance was not a Court of law.

[77] When we turn to S. 421 of the Act, the first thing we notice is that the law does not require the Magistrate to issue any notice on any party, or to examine any witness.

[78] Section 421 runs thus :

"(1) Any animal, food, drug, utensil, or vessel seized under S. 419 which is not destroyed in pursuance of S. 420 shall, subject to the provisions of S. 419, sub-s. (3), be taken before a Magistrate as soon as may be after such seizure.

(2) If it appears to the Magistrate that any such animal is diseased, or that any such food or drug is unsound, unwholesome, or unfit for human food, or for medicine, as the case may be, or is adulterated, or that any such utensil or vessel is of such kind or in such state as is mentioned in S. 419, sub-s. (2), or is used for preparing, manufacturing or containing such food or drug, he shall cause the same to be destroyed at the expense of the person in whose possession it was at the time of its seizure or to be otherwise disposed of by the Corporation so as not to be capable of being used as human food or medicine.

(3) If it appears to the Magistrate that any such animal is not diseased or that any such food or drug is not unsound, unwholesome, or unfit for human food, or for medicine, as the case may be, or is not adulterated, or that any such utensil or vessel is not used for preparing, manufacturing, or containing the same, the person from whose shop or place the animal, food, drug, utensil, or vessel was taken shall be entitled to have it restored to him, and it shall be in the discretion of the Magistrate to award him such compensation, not exceeding the actual loss which he has sustained, as the Magistrate may think proper."

It is abundantly clear from the words "if it appears to the Magistrate . . . ." and the absence of any words requiring any enquiry to be made, or any notice to be issued, that the Magistrate may by just looking at the food produce, be satisfied that it is unwholesome or unfit for human food, or is adulterated, and if he is so satisfied, he shall cause the same to be destroyed. If what is produced before him is an animal, and by merely looking at it he is satisfied that it is diseased, he shall cause the same to be destroyed. It is useful to notice in this connection that some other sections of the Calcutta Municipal Act which entrust the Magistrate with the performance of functions other than the trial of offences, contain clear provisions that notice should be issued on parties concerned, and enquiry held. In S 363 under which a Magistrate may, on the application of the Corporation, make an order directing demolition or alteration

of structures, it is provided that the Magistrate shall not make any such order

"without giving the owner or occupier of the building to be so demolished or altered full opportunity of adducing evidence and of being heard in his defence."

[79] Section 381, which empowers the Magistrate to prohibit the use of buildings for human habitation, provides that the Magistrate shall serve a notice on the owner or occupier of the building *of being heard in the Court*, and hold *such inquiry as he thinks fit to make*.

[80] A comparison of these provisions with those of S. 421 of the Act brings home forcibly the deliberate care with which the Legislature omitted from S. 421 the requirement of the Magistrate giving any notice to any party or hearing any evidence, or holding any enquiry, before passing an order of destruction.

[81] It is helpful in this connection to consider the scope and purpose of Chap. XXVIII of the Act, in which chapter, S. 421 occurs. Part V of the Act contains the provisions concerning "the Public Health, Safety and Convenience." Chapter XXVIII is one of the seventeen chapters in this Part, and is about Food and Drugs, which is obviously a very important matter if not the most important matter, for the purpose of "Public Health." Of the 22 sections comprising this chapter Ss. 405 to 416 are with regard to the sale of food and drugs ; 417 to 421 with regard to inspection, seizure and destruction ; 422 to 425 are as regards the analysis of food and drugs, while S. 426 provides about the restoring of condemned food or drug in the Corporation. Some of the first twelve sections (405 to 416) provide for the licensing of sellers of food etc., while some prohibit the sale of adulterated food, or of food which is not of the prescribed standard of purity, or of "diseased animals or unwholesome articles intended for human food." Contravention of these prohibitions are punishable, and the penalties are laid down in S. 488. Obviously, however, preventive action is even more necessary than penal steps if the sale of unwholesome food is to be stopped. Sections 417 to 421 are designed for the purpose of this preventive action. Section 417 gives the Health Officer of the Corporation power to inspect places where unlawful slaughter of animals or sale of flesh is suspected ; S. 418 enjoins the Corporation to provide for inspection of animals, food and drugs intended for human consumption ; S. 419 gives the Health Officer or any person authorised by him power to inspect and examine, any animal, food, or drug intended for human consumption, and to seize any such animal or any such food or drug that appears to him to be unsound, unwholesome or unfit for human food or to be adulterated. Sections 420 and 421 are the two sections provided for destruction; S. 421 has already been set out.

[82] Section 420 runs thus :

"When any animal, food, drug, utensil, or vessel is seized under S. 419, it may, with the consent of the owner or the person in whose possession it was found, be forthwith destroyed ; or if such consent be not obtained, then, if any food or drug so seized is of a perishable nature and is, in the opinion of the Executive Officer, the Health Officer and Assistant or District Health Officer or any Councillor or Alderman unsound, unwholesome or unfit for human food or medicine, it may likewise be destroyed. The expenses incurred in taking any action under sub-s. (1) shall be paid by the person in whose possession such animal, food, drug, utensil, or vessel was at the time of its seizure."

Two things appear clear from this analysis. The first is that the Legislature thought that both preventive action before sale and penal action after sale were necessary to secure the desired result—the protection of public health against unwholesome food etc. The second is that the preventive measures viz., seizure and destruction were to be taken very speedily. That is why under S. 419, officers may inspect and seize *at any time by day or by night*, and under S. 420, if consent of the owner or the possessor was obtained, destruction may take place *forthwith* ; even if consent was not obtained, and the article be food or drug which is perishable, it may be *likewise* destroyed, if the Executive Officer, or Health Officer, and Assistant or District Health Officer or Councillor or Alderman, consider it unwholesome. Where action is not taken under S. 420, food or drug etc., seized *shall* be taken to a Magistrate *as soon as possible after seizure*, and if it appears to him unwholesome, he *shall* cause it to be destroyed. If anything is clear from the above, it is the importance the Legislature attached to the urgency of speedy action. This alone precludes the possibility of any intention of the Legislature that the procedure of Courts of law for judicial determination should be followed, and explains why, unlike Ss. 363 or 381, S. 421 contains no provision for issuing any notice, or holding any enquiry, or hearing any evidence.

[83] It is also clear that the Magistrate under S. 421 is in the cases of perishable articles of food or drug only an alternative authority to the Executive Officer, the Health Officer or Assistant or District Health Officer, or Councillor, Alderman; but his functions under S. 421 (2) are fundamentally the same as the functions of the above-mentioned officers under S. 420. No person would dream of characterising the action taken by any of these officers "judicial action" ; if the same action is taken by a Magistrate, who has not got to follow any different procedure, how can it become judicial action ?

[84] These conclusions that the Magistrate acting under S. 421 (2) is just an alternative to the several corporation officers or a Councillor or an Alderman acting under S. 420, and that the law does not require the Magistrate to issue any notice, take any evidence, or hear any party before passing any order under S. 421 (2) make inevitable the further conclusion that the Magistrate acting under S. 421 (2) is an executive officer and not a Court, and his order for destruction is an administrative, and not a judicial order. This Court has, therefore, no jurisdiction to revise the order passed by a Magistrate under S. 421 (2), Calcutta Municipal Act.

[85] Different considerations may arise as regards an order passed under S. 421 (3) of the Act, awarding compensation, but these do not in my opinion affect present problem; viz., whether an order under S. 421 (2) of the Act is a judicial or an administrative order.

[86] I have approached the question as a *res integra*, for, as far as I could find out, there is no Indian decision as regards the nature of the order under S. 421 (2), Calcutta Municipal Act or any similar provision of any other Municipal Act of India. Two cases under the Food Adulteration Act, where orders under somewhat similar provision as embodied in S. 13 of that Act came before this Court are *Sachinandan* v. *Chairman, Midnapore District Board*, 44 C. W. N. 173 : (A. I. R. (27) 1940 Cal. 213 : 41 Cr. L. J. 582) ; *Banarasi Lal* v. *Chairman, Asansole Municipality*, 42 C. W. N. 731. In neither of these cases, however, was the question of this Court's jurisdiction raised or decided. It has to be noticed that in both these cases, the order for destruction or forfeiture was passed by the Magistrate in the same proceeding in which some person was being tried for an offence under S. 6, Food Adulteration Act, so that the scope of an argument that the Magistrate in passing the order under S. 13 was not a Court was considerably reduced. In *Chunder Kumar Biswas* v. *Municipal Corporation, Calcutta*, 7 C. W. N. 27, an order for destruction of damaged rice passed by a Magistrate under S. 505 of the old Calcutta Municipal Act was set aside by this Court in its criminal revisional jurisdiction; but here also the question whether the Court has such jurisdiction was not raised or decided. A large number of cases were cited before us on S. 363 of the Municipal Act. In only three of these, was the question of jurisdiction raised. In 1903, this was raised in *Abdul Samad* v. *Corporation of Calcutta*, 33 Cal. 287, but no decision, was recorded. In fact, there is no discussion at all in the judgment of this point. In *Ramgopal* v. *Corporation of Calcutta*, 52 Cal. 962 : (A. I. R. (12) 1925 Cal. 1251), it was held that this Court had jurisdiction to revise such an order as the Magistrate acting under S. 363 was a criminal Court or at least a civil Court. Two years later, in *Krishen Doyal* v. *Corporation of Calcutta*, 54 Cal. 532 : (A. I. R. (14) 1927 Cal 509 : 28 Cr. L. J. 407), it was held by Suhrawardy and Cammiade JJ. that the Criminal Procedure Code did not apply to proceedings under S. 363, Municipal Act, and that the observation of Sanderson C. J. in *Ramgopal Goenka's case* : (52 Cal. 962 : A. I. R (12) 1925 Cal. 1251) that the Criminal Procedure Code did apply to such proceedings, was *obiter*, and not binding as an authority. It is not necessary for us to consider this question however; for supposing we are bound by authority to hold that a Magistrate acting under S 363 of the Act is a criminal Court, that authority is of no assistance for the decision of the question whether the Magistrate acting under S. 421 (2) of the same Act is a Court, for as already pointed out, the terms of S. 363 are substantially different from those of S. 421.

[87] Of more assistance are some English decisions, in which though the question whether the Court has jurisdiction to interfere with an order passed for the destruction of goods was not in terms raised, the question whether such an order under S. 117, Public Health Act is a judicial order or not, and whether it is necessary to hear witnesses, before passing an order for destruction came up for consideration.

[88] Section 117 runs thus :

"If it appears to the Justice that any animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, flour or milk so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man, and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal carcase or fish or piece of meat, flesh, or fish, or any poultry or game, or for the parcel of fruit, vegetables, corn, bread or flour or for the milk so condemned, or, at the discretion of the Justice, without the infliction of a fine, to imprisonment for a term of not more than three months.

The Justice who under this section is empowered to convict, the officer may be either the Justice who may have ordered the article to be disposed of or destroyed, or any other Justice having jurisdiction in the place."

It is clear that the function of the Magistrate under the first part of S. 117 is just the same as that of the Magistrate under S. 421, Calcutta Municipal Act. In *Walshaw* v. *Brighouse Corporation*, (1899) 2 Q. B. 286 : 68 L. J. Q. B. 828) where the Magistrate condemned the meat under S. 117, Public Health Act, and the arbitrator held that the meat was sound, an argument that the decision of the Magistrate was a judicial decision was negatived. The observation of

Vaughan Williams L. J. reported at p. 292 may be noticed. After stating that there can be no doubt that the arbitrator acted within his jurisdiction in finding that the meat was sound and the finding cannot be disputed by anyone interested, he proceeds :

"I understood at one time in the argument that it was meant to be suggested that there had been a judicial order condemning the meat and determining its soundness. In my judgment the order for condemnation of the meat under S. 117 is nothing of the kind."

The question came up in another form in *Bater's case*, (1893) 1 Q. B. 679 : (62 L. J. M. C. 107). Meat belonging to the appellant was seized by the Borough Inspectors under S. 116, Public Health Act, and carried before a justice. The appellant attended and brought evidence to show that the meat was sound. The Justice, after hearing the evidence, refused to condemn the meat. The appellant declined to receive it back. One of the questions which arose for decision was whether the appellant was entitled to be repaid the costs incurred by him, in appearing before the Magistrate and bringing evidence to show that the meat was not unfit. The Court decided that he was so entitled, and there was nothing to stop the Magistrate from hearing evidence. It was observed, however, that it was entirely the Magistrate's discretion to hear any evidence or not. "The procedure by which the condemnation of meat takes place," it was observed "is no doubt to some extent anomalous, since it may take place behind the back of the owner, or if he is present without his being heard at all."

[89] These observations of the English Courts on the provision of S. 117, Public Health Act fortify me in the conclusion I have arrived at on a consideration of the provisions of S. 421, Municipal Act that the Magistrate acting under S. 421 (2) is not a Court but is an executive officer and that his order is an administrative order and not a judicial order.

[90] I agree that the rule be discharged.

V.R.B. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 53 *[C. N. 10.]*

G. N. DAS J.

Bholanath Chatterjee and another —Defendants—Petitioners v. *Chandra Shekhar Bhattacherjee—Plaintiff — Opposite Party.*

Civil Rule No. 165 of 1949, decided on 2nd September 1949, from order of Munsif, Dubrajpur (Birbhum), D/- 20th September 1948.

Arbitration Act (1940), S. 39 (1) (vi)—Objections to filing of award — Decision overruling them — Appeal lies though decision also directs decree to be passed in terms of award.

An appeal lies against decision overruling objections to the filing of an award under S. 39 (1) (vi). The fact that by the same order the Court also directed a decree to be passed in terms of the award does not take away the right of the aggrieved party to file an appeal in accordance with the provisions of S. 39: A. I. R. (35) 1948 Pat. 207, *Rel on*; A. I. R. (1) 1914 Cal. 899 and A. I. R. (28) 1941 Cal. 202, *Ref.* [Paras 1 and 2]

Lala Hemanta Kumar and Sudhir Kumar Dutt — for Petitioners.

Baidyanath Bannerjee and Profulla Kumar Chatterjee — for Opposite Party.

Order.— This rule was obtained by the defendant against an order of the Munsiff of Dubrajpur, District Birbhum, dated 28th September 1948. By the said order the learned Munsiff overruled certain objections taken by the defendant to the filing of the award made on a reference through the intervention of the Court and also directed that a decree be drawn up in terms of the award. The petitioner in this case did not file an appeal under S. 17, Arbitration Act because it is stated before me there was no ground for such an appeal. The complaint of the petitioner is against the order of the Munsiff overruling his objections to the filing of the award. An appeal lies against such a decision, under S. 39 (1) (vi), Arbitration Act. It is not disputed on behalf of the petitioner that ordinarily such an appeal was competent. What is contended for is that the appeal was not competent in this case because by the same order which overruled his objections to the filing of the award the learned Munsiff directed a decree to be passed in terms of the award.

[2] In my opinion the fact that by the same order the Munsiff overruled the objections to the filing of the award and also directed a decree to be passed in terms of the award does not take away the right of the aggrieved party to file an appeal in accordance with the provisions of S. 39. This view is supported by the decision in the case of *Sheocharan Mahton* v. *Samchar Mahton*, A. I. R. (35) 1948 Pat. 207 : (26 Pat. 115). Before the enactment of the Indian Arbitration Act 1940, under the analogous provision of the Code of Civil Procedure where an appeal lay against an order filing or refusing to file an award under S. 104 (f), Civil P.C., in cases where the arbitration was not through the intervention of the Court, the mere fact that the objections to the filing of such an award were overruled by one and the same order by which a decree was also passed in terms of the award did not preclude the party aggrieved by such an order from availing himself of the right of appeal which he had under S. 104 (1)(f), Civil P. C. (*See* the cases of *Kshetra Nath* v. *Ushabala Dasi*, 18 C.W.N. 881 : (A. I. R. (1) 1914 Cal. 899) and *Troilokya Nath* v. *Sukumar Bose*, 44 C. W. N. 1034 : (A. I. R. (28) 1941 Cal. 202).)

[3] The petitioner's remedy was therefore to prefer an appeal against the order complained

of before the proper Court. This rule is accordingly discharged with costs, hearing fee one gold mohur.

[4] This order will not however stand in the way of the petitioner preferring any appeal which he may choose to file against the order of the proper Court.

V.B.B. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 54 *[C. N. 11.]*

G. N. DAS J.

Kunja Behari Barman and others—Judgment-debtors—Petitioners v. *Mritunjoy Prosad Roy Choudhury and others — Opposite Party.*

Civil Rules Nos. 345 and 346 of 1949, Decided on 1st September 1949, against order of Addl. Dist. Judge, Alipur, D/- 10th January 1949.

(a) Bengal Agricultural Debtors Act (VII [7] of 1936), S. 37A(2)—Question of limitation depending on date when possession was delivered to certificate holder—Question is one of fact and cannot be raised at late stage.

Where the question of limitation depends on the date when possession was delivered to the certificate holder, it is essentially a question of fact and ought not to be allowed at a late stage, for example, before the District Judge after the case has gone back to him on remand by the High Court. [Para 11]

(b) Bengal Agricultural Debtors Act (VII [7] of 1936), S. 37A (2)—Limitation applicable to parties added is governed by S. 22, Limitation Act—Application under S. 37A filed within time against certificate holders—Lessees of latter impleaded beyond period of limitation—As against lessees, proceedings held commenced on date on which they were impleaded—Limitation Act (1908), Ss. 22 and 29.

Bengal Act II [2] of 1942 which inserted S. 37A in the Bengal Agricultural Debtors Act is a local and special Act and the period of limitation applicable would, under S. 29 (2) (a) of the Limitation Act, be governed, as regards parties added, by S. 22, Limitation Act. [Para 11]

Where, therefore, an application under S. 37A, to which all the certificate holders were made parties, was made within one year of the date on which S. 37A, came into force, but, on objection being raised by the certificate holders, their lessees were impleaded after more than a year when S. 37A came into force:

Held that in so far as the lessees were concerned the proceedings must be deemed to have commenced on the date on which they were impleaded. [Para 11]

Annotation ('42-Com.) Lim. Act, S. 29, N. 3, Pt. 3a.

(c) Bengal Agricultural Debtors Act (VII [7] of 1936), S. 37A (2)— Application under S. 37A—Names of present occupiers need not be stated therein—Addition of lessees beyond period of limitation does not attract bar of limitation—Limitation Act (1908), Ss. 22 and 29.

In order that an application under S. 37A may be an effective application all that is necessary is to mention the names of the decree-holder and the landlord and the mortgagees who may come within S. 37A (4) of the Act. It is not necessary to state in the petition under S. 37A the names of the alleged present occupiers or of the under-raiyats. The addition of the lessees of the certificate holders at a date beyond the period mentioned in S. 37A (2) of the Act does not therefore attract the bar of limitation. [Para 11]

Annotation: ('42-Com.) Lim. Act, S. 22, N. 15, Pt. 5.

S. K. Das and Binode Behari Haldar — for Petitioners.

Chandra Sekhar Sen and Jajneswar Mozumdar— for Opposite Party.

Order.—These two Rules are at the instance of the applicants under S. 37A, Bengal Agricultural Debtors Act. The facts are shortly these : The petitioners are agricultural tenants under the Bhowanipur Wards Estate the proprietors whereof are opposite parties Nos. 1 to 8 represented by the Manager, Court of Wards. The petitioners held two tenancies and rents having fallen into arrears at the instance of the Bhowanipur Wards Estate two certificates for rent were issued and in execution of these certificates the two tenancies were brought to sale on 24th January 1938. Possession through Court was taken on 17th June 1939. Section 37A, Bengal Agricultural Debtors Act was inserted by Bengal Act, II [2] of 1942, and came into force by a Notification on 18th June 1942. On 4th June 1943 two applications which have given rise to the present revision cases were filed by the debtors under S. 37A of the Act. These two applications were registered as Cases Nos. 625 (S) of 1943 and 626 (S) of 1943 of the Special Debt Settlement Board of Diamond Harbour. The parties impleaded in these applications were the disqualified proprietors, namely opposite parties Nos. 1 to 8, represented by the Manager, Court of Wards. On an objection raised by the Manager, Court of Wards, opposite parties Nos. 6 and 7 who are two of the disqualified proprietors were added as parties to the application, on 7th September 1945. These two opposite parties filed an objection on the ground that they were lessees under the Wards Estate, the leases having become operative on 16th August 1939, that is, before the relevant date mentioned in S. 37A of the Act. On 24th November 1945 the Special Debt Settlement Board dismissed the applications solely on the ground that the certificate-holder who was the auction-purchaser was not in possession on or after relevant date, that is, 20th December 1939. The other objections raised were overruled by the Debt Settlement Board. Against the order of the Debt Settlement Board the petitioners took two appeals to the Appellate Officer. These were numbered as Debt Settlement Board Appeals Nos. 132 of 1945-1946 and 134 of 1945-1946. On 27th June 1946 the Appellate Officer allowed these appeals. Against the order of the Appellate Officer four petitions in revision were filed before the District Judge, two of these were filed by the Court of Wards being numbered as 150 of 1946 and 152 of 1946. Two other petitions which were filed by opposite

parties Nos. 6 and 7 were numbered as 151 of 1946 and 153 of 1946. By an order dated 23rd September 1947, the District Judge allowed all these petitions being of the opinion that the leases in favour of opposite parties Nos. 6 and 7 were completed on 16th August 1939 and as such the applications under S. 37A could not be maintained. Against the order of the District Judge the petitioners filed only two petitions in this Hon'ble Court. On these petitions two Rules were issued by Mukherji J., being numbered as Civil Revision Cases Nos. 2067 of 1947 and 2068 of 1947. It appears that in the petitions which were filed in this Court the number of the corresponding revision petitions before the District Judge was given respectively as 150 of 1946 and 151 of 1946. The corresponding numbers of the appeals before the Appellate Officer were given as 132 of 1945-46 and 134 of 1945-46. It would appear, therefore, that in the petitions filed there was a mistake in not putting down the numbers of all the revision cases which were filed before the District Judge but the number of the appeals which were filed before the Appellate Officer was correctly given in both the petitions. These revision cases came on for hearing before Mukherji J. By his order dated 29th June 1948 the learned Judge allowed these applications. In the course of his judgment it was observed that the real point for decision was not when sanction of the Board of Revenue was obtained to the grant of the two leases in favour of opposite parties Nos. 6 and 7 but when there was a completed agreement for a lease. The Rules were accordingly made absolute and the cases were sent back to the learned District Judge for disposal according to law and in accordance with the directions contained in the judgment. The learned Assistant Government Pleader who appeared on behalf of the Court of Wards did not then raise any objection that there was an omission in the revision petitions to mention the correct numbers of the corresponding revision petitions before the District Judge. The whole case was heard on the merits and as I have already observed an order in favour of the present petitioners was made by the learned Judge.

[2] After the matter was received back on remand by an order dated 10th January 1949 the learned Additional District Judge was of the opinion that the leases in favour of opposite parties Nos. 6 and 7 were not completed before 7th July 1940, that is, still after the relevant date. The learned Additional District Judge, however, went on to observe that the applications of the petitioners before the Debt Settlement Board were barred by limitation, opposite parties Nos. 6 and 7 having been added as parties to the proceedings after the lapse of the period of one year mentioned in S. 37A (2) of the Act. Against the order of the learned Additional District Judge the debtors moved this Court and obtained two Rules which are numbered as 345 and 346 of 1949.

[3] Mr. S. K. Das appearing on behalf of the petitioners has contended that the learned Additional District Judge was not entitled to go beyond the order of remand made by this Court and his finding on the question of limitation was therefore uncalled for and the learned Additional District Judge should have dismissed the petitions which were filed before him by the Court of Wards and by opposite parties Nos. 6 and 7.

[4] Before I deal with this contention it is necessary to consider two preliminary objections raised on behalf of the Court of Wards by the learned senior Govt. Pleader appearing on behalf of the Court of Wards.

[5] The two preliminary objections are : (1) that no order can be passed in these revision cases because the names of opposite parties Nos. 6 and 7 appear in the revision petitions as Wards of Court represented by the Manager, Court of Wards, and not in their personal capacities, notices of the Rule were however served on them. It would appear however that in the earlier revision cases, viz. 2067 and 2068 of 1947 opposite parties were described in the same way as they are in the present revision cases. No objection was raised at the time as regards the incorrect description of the opposite parties. When the matter went back before the District Judge no grievance was made that the opposite parties had no opportunity of placing their cases before the Court. The whole case including the defence of the opposite parties Nos. 6, 7 has been heard at all stages of this litigation.

[6] In these circumstances I am not inclined to accede to a technical objection like this which would not advance the course of justice.

[7] (2) The second objection is that in mentioning the numbers of the revision cases before the District Judge the petitioners have omitted to mention revision cases Nos. 152 and 153. This mistake also appears in the earlier revision cases but the correct numbers of the appeals before the Appellate Officer have been given in the present petitions and they were also given correctly in the earlier revision cases. If the correct numbers of the Debt Settlement Board cases and the correct numbers of the appeals before the Appellate Officer are mentioned, in my opinion, this Court is entitled to consider all the cases which were filed at the instance of the present petitioners and the Court of Wards Rules of procedure are meant not for the purpose of hindering justice. The records were and are now before the Court and I do not feel pressed to

deny the petitioners the appropriate relief simply on the ground that somebody entrusted to draft the petitions made mistake in putting down two numbers on the revision petitions. If necessary, I would have allowed the petitioners to amend the present petitions but in my opinion this is not necessary as the correct numbers of the proceedings before the Debt Settlement Board and before the Appellate Officer have been correctly given.

[8] The two preliminary objections raised on behalf of the Court of Wards must therefore be overruled.

[9] As regards the merits the learned Additional District Judge has found that the leases in favour of opposite parties Nos. 6 and 7 were completed on 7th July 1940. This finding is based on two important pieces of evidence, viz., the memorandum of the Manager, Court of Wards, dated 15th April 1940 which clearly shows that the leases were not completed on that date and a challan dated 7th July 1940 depositing the requisite amount. The finding of the Additional District Judge is therefore correct on the materials before him.

[10] The learned Senior Government Pleader, however, contends that this is not the relevant question for enquiry under S. 37A of the Act. The relevant enquiry is whether the certificate holder was in possession on the relevant date that is on 20th December 1939 This point again was not raised by Assistant Government Pleader before Mr. Justice Mukherjee when the learned Judge heard Civil Revision Cases Nos. 2067 and 2068 of 1947. But quite apart from this, it would appear from the record that it was assumed before Mukherji J. that possession followed the conclusion of the agreement. As the agreement was not completed till 7th July 1940, the possession of the lessees, opposite parties Nos. 6 and 7 did not begin till after that date. This contention on behalf of the opposite parties must therefore be overruled.

[11] The only other question which remains for discussion is the question of limitation. As I have already indicated the question of limitation was not raised at any previous stages. It was, however, after the case had gone back on remand that the learned Additional District Judge thought that the application under S. 37-A was barred by the special limitation contained in S. 37-A (2). Before I deal with this point, I may point out that the learned Additional District Judge was clearly wrong in thinking that the question of limitation in the present case is a pure question of law. Under S. 37 A (2) an application is to be filed within one year of the date when the relevant Act being Act II [2] of 1942 came into force or when possession was delivered to the certificate holder. The learned Additional District Judge seemed to think that the latter date synchronised with the former, an assumption for which there was no foundation in the records. The question of limitation may depend on the date when possession was delivered to the certificate holder. This is essentially a question of fact and in my opinion Mr. Das was right in contending that the question of limitation ought not to have been allowed to be raised at that late stage. But apart from this ground let us see the validity or otherwise of the objection raised by the Court of Wards. I have already said that S. 37-A came into force on 18th June 1942. The application under S. 37-A was filed within time on 4th June 1943. To this application the certificate holders were all made parties. On objection being raised by the certificate holders that they have granted leases to opposite parties Nos. 6 and 7 the latter were impleaded on 7th September 1945 which is more than a year from the date when S. 37-A came into force. It is contended that as opposite parties Nos. 6 and 7 were added as parties on 7th September 1945 the proceedings as against them must be deemed to have commenced on that date. This contention is correct. Act II [2] of 1942 is a local and special Act and the period of limitation applicable would, under S. 29 (2) (a), Limitation Act, be governed, as regards parties added, by S. 22, Limitation Act. In so far as opposite parties Nos. 6 and 7 are concerned, the proceedings must be deemed to have commenced on that date. The question, however, remains whether the application under S. 37-A was a competent application in the absence of the alleged lessees. Rule 77 (a) of the Rules framed by the Local Government under the Agricultural Debtors Act prescribes a form for filing an application under S. 37-A. This is Form 19A, Appendix A of the revised form states that the names of certain persons have to be mentioned in different columns. Column 3 requires the applicant to state the names and addresses of the decree-holder or the certificate holder. Column 9 requires the applicant to state the names and addresses of the under-raiyats in occupation of the land at the date of sale. Column 10 requires the applicant to mention the names of the present occupiers of land and the date from which and the title under which the occupants are in possession. Columns 11 and 12 require the applicant to mention the names of the landlord and mortgagees who may come within S. 37-A (4) of the Act. Rule 77 (bb) requires notice of the application to be served only on the decree-holders landlords and the mortgagees but not on the under-raiyats or the present occupires whose names and addresses are to be mentioned in Columns 8 and 10.

[12] In the above circumstances it is obvious that in order that an application under S. 37-A may be an effective application all that is necessary is to mention the names of the decree-holder and the landlord and the mortgagees who may come within S. 37-A (4) of the Act. It was not necessary to state in the petition under S. 37 A the names of the alleged present occupiers or of the under-raiyats. The addition of the alleged lessees, opposite parties Nos. 6 and 7 at a date beyond the period mentioned in S. 37-A (2) of the Act does not attract the bar of limitation. The reasons given by the learned Additional District Judge, for allowing the petitions before him cannot, therefore, be sustained.

[13] The result, therefore, is that these rules must be made absolute, the order of the Additional District Judge set aside and the applications under S. 37-A, Bengal Agricultural Debtors Act are allowed.

[14] The petitioners are entitled to their costs in these rules the hearing-fee being assessed at two gold mohurs in each case.

V.R.B. *Rules made absolute.*

A. I. R. (37) 1950 Calcutta 57 *[C. N. 12.]*

SEN J.

Gopesh Chandra Pal and another—Accused —Petitioners v. *Nirmal Kumar Das Gupta—Complainant—Opposite Party.*

Criminal Revn. No. 504 of 1949, Decided on 12th August 1949.

(a) Penal Code (1860), S. 409—Banker—Persons working in bank are not bankers.

Persons working in a bank are not bankers. Therefore S. 409 has no application in respect of an alleged criminal breach of trust by such persons. [Para 3]

Annotation : (46-Man.) Penal Code, S. 409, N. 3.

(b) Criminal P. C. (1898), Ss. 253 (2) and 403—Rule obtained for quashing proceedings discharged as not pressed — Subsequent application under S. 253 (2) is not barred—S. 403 has no application.

Where the rules obtained for quashing certain criminal proceedings are not pressed and, therefore, discharged, there is no decision given on the merits and there is nothing in the Criminal P. C. which would prevent the petitioners from applying thereafter for a discharge under S. 253 (2), before the trial Magistrate. There is no such thing as *res judicata* in criminal trials. The only section which lays down a principle which resembles the principle underlying the doctrine of *res judicata* is S. 403, but that section has no application whatsoever to the case in question. [Para 4]

Annotation : ('46 Man.) Criminal P.C., S. 253, N. 4; S. 403, N. 8 and 13.

(c) Penal Code (1860), Ss. 409 and 405— Entrustment – Deposit in bank –. There is no entrustment — Relationship between bank and customer is that of creditor and debtor.

Section 409 presupposes entrustment. When a person opens a current account in a bank, there is no question of entrustment. The relationship between the bank and the customer is one of creditor and debtor. Hence there can be no case against a bank or its officers for committing an offence under S. 409 in respect of the money deposited by a customer: A. I. R. (28) 1941 Cal. 713 and A. I. R. (34) 1947 P. C. 44, *Rel. on.* [Para 5]

Annotation : ('46-Man.) Penal Code, S. 405, N. 3; S. 409, N. 3.

(d) Penal Code (1860), S. 403 — Cheque wrongly dishonoured—No misappropriation — Remedy lies in civil and not criminal Court.

If a cheque is dishonoured, that does not connote misappropriation. The remedy for a cheque being wrongfully dishonoured lies in the civil Court. This is not a matter which is to be tried by a criminal Court. [Para 6]

Annotaton : ('46-Man.) Penal Code, S. 403, N. 3; S. 405, N. 5.

(e) Criminal P. C. (1898), S. 253 (2) — Bank officers sought to be prosecuted for wrongfully dishonouring cheque — Case held fit for discharge of accused under S. 253 (2).

Where the officers of a bank were sought to be prosecuted in a criminal Court under S. 409, Penal Code, for wrongfully dishonouring a cheque :

Held, that no case of criminal nature could be made out against them and it was a fit case for acting under S. 253 (2) and discharging the accused before evidence was taken. [Para 5]

Annotation : ('46-Com.) Criminal P. C., S. 253, N. 6.

G. Gupta Bhaya and Chintaharan Roy— for Petitioners.

Pritibhusan Barman and Nalin Chandra Banerjee —for Opposite Party.

Order. — This is a rule obtained against an order passed by Sri K. C. Banerjee, Police Magistrate, Alipore, rejecting the application by one Gopesh Chandra Pal for being discharged in certain proceedings under S. 409 read with S 120B, Penal Code.

[2] The facts briefly are as follows: The complainant Nirmal Kumar Das Gupta opened a current account with the Mahaluxmi Bank. He issued a cheque in favour of Messrs. Dunlop Rubber Company on the Bank for the sum of Rs. 2000 odd on 6th September 1948. On 9th September 1948, the complainant Nirmal Kumar Das Gupta received a telephone message from Messrs. Dunlop Rubber Company that the cheque had been returned by the Bank on the ground that the signature differed. Upon this the complainant went and saw the accountant of the Bank whose name is Lalit Sen and it is alleged that Lalit Sen told him that he should sign the cheque again and that there would be no trouble. The complainant signed the cheque again and it was presented on 11th September 1948 but payment was again refused, this time on the ground that the Bank was not functioning owing to a strike by the employees. The statement of the complainant is that these excuses for not meeting this cheque were false and frivolous and the Bank was trying to gain time for an application to the High Court under

the Companies Act and he alleged that on 11th September 1948 Gopesh Chandra Pal the Managing Director, Rajani Dutt, the Chief Accountant and Lalit Sen, the Accountant, misappropriated his money dishonestly. This is stated in Para. 8 of the petition of complaint. In Para. 11 of the petition of complaint, it is stated that the Managing Director and the Accountant abetted Rajani Dutt in the commission of the offence of misappropriation punishable under S. 403, Penal Code and also of the offence of misappropriation punishable under S. 409, Penal Code. The complainant was examined by the learned Magistrate and in the last few lines of the examination his statement is recorded thus : "The said Bank as represented by the accused cheated me and also committed criminal breach of trust."

[3] I have been at pains to mention these matters in detail in order to show that the complainant had a very hazy notion of who had cheated him or who had misappropriated his money. In one paragraph he says that all the accused persons misappropriated his money and in another paragraph he says that of the accused two of them abetted the other and finally in his initial statement he says that the Bank cheated him and committed criminal breach of trust. Upon this complaint being made, summonses were issued against Gopesh Chandra Pal, the Managing Director, and Lalit Sen, the Accountant, under S. 409 read with S. 120B, Penal Code. Here, again, I would point out that the learned Magistrate had a very vague idea of the meaning of S. 409, Penal Code. Section 409, Penal Code deals with criminal breach of trust by a public servant or by a banker, merchant, factor, broker, attorney or agent. Now, neither of these persons against whom summonses were issued were public servants, nor were they bankers. They were persons working in a bank and persons working in a bank are not bankers. Therefore S. 409, Penal Code has absolutely no application to this case. After the accused appeared a Rule was obtained from this Court for quashing the proceedings against them. On the date of hearing of the Rule learned advocate appearing for the two petitioners stated that he was instructed not to proceed with the Rules. Upon that statement being made my learned brother Blank J. passed an order "The Rules are accordingly discharged." Thereafter the petitioners moved the trial Magistrate praying that they may be discharged under S. 253 (2), Criminal P. C., on the ground that no offence had been disclosed against them in the petition of complaint or the initial statement. The learned Magistrate refused the prayer and the present Rule has been obtained against that order.

[4] On behalf of the complainant learned advocate contends that the previous Rules having been discharged it was not competent for the petitioners to move the trial Court, nor was it competent for them to obtain a Rule from this Court. He contends that the grounds upon which a discharge has been claimed before the learned Magistrate are almost identical with the grounds given for the issue of the present Rule. In my opinion this preliminary objection should fail. The Rules which were obtained were not pressed and no decision of the Court was given on the merits. There is nothing in the Code of Criminal Procedure which would prevent the petitioners from applying for a discharge under S. 253 (2), Criminal P. C., before the learned Magistrate. There is no such thing as *res judicata* in criminal trials. The only section which lays down a principle which resembles the principle underlying the doctrine of *res judicata* is S. 403, Criminal P. C., but that section has no application whatsoever to the present case. There may have been many grounds for learned Advocate appearing before Blank J., for not pressing the applications. I do not propose to go into the question why learned Advocate was instructed not to proceed with the Rules. The fact that he did not proceed with the Rules does not in my opinion debar the petitioners from moving the Magistrate for an order of discharge if such an order were permissible in the circumstances of this case.

[5] I shall now consider whether the learned Magistrate was right in refusing to discharge the petitioner. The learned Magistrate says that the statements in paras. 8 and 9 in the petition of complaint are almost conclusive for the purpose of making out a case *prima facie* under S. 409 read with S. 120B, Penal Code. I have dealt with this matter in the earlier part of my judgment and I have held that S. 409, Penal Code, has no manner of application to the facts of this case. The learned Magistrate goes on to say further that it is premature to order a discharge without hearing the evidence in the case. In my opinion the learned Magistrate is wrong in this view. If ever there was a case for acting under S. 253 (2), Criminal P. C., and for discharging the accused at the earliest stage of the proceedings before evidence is taken this case is one of them. It should be remembered that when a person opens a current account in a bank, there is no question of entrustment. The relationship between the bank and the customer is one of creditor and debtor. The bank is free to use the money deposited by the customer or constituent in any way it likes and is not bound to keep the money apart. No bank can ever function if it was obligatory on it not to touch the money of

a person who makes a deposit in its current account. The bank is liable to pay the money to the customer when called upon but until called upon to pay it the bank is entitled to utilise the money in investment and in other ways for earning profit therefrom. On this ground also it is quite clear that there can be no case against the Bank or any of its officers for committing an offence under S. 409, Penal Code. Section 409, Penal Code, presupposes an entrustment and in the present case there was no entrustment. For this view I would refer to the case of *S. Pakrashi* v. *Emperor*, 45 C. W. N. 1071 : (A. I. R. (28) 1941 Cal. 713) and also to the case of *Attorney General of Canada* v. *Attorney-General to the Province of Quebec*, 51 C. W. N. 427: (A. I. R. (34) 1947 P. C. 44).

[6] The main point for consideration is whether any money was entrusted to the persons who have been brought up for trial before the Magistrate. Obviously there was no such entrustment and there could not be any such entrustment. The money was paid into the Bank and not to these persons. It was not suggested that the money was handed over to either of these persons and that they put the money into their pockets. Learned Advocate for the complainant contended that the ingredients of an offence punishable under S. 403 read with S. 120B, Penal Code, have been disclosed in the petition of complaint and in the initial statement of the complainant. Here, again, I must differ from this view. There is nothing in the petition of complaint or in the initial statement to show that there has been any misappropriation by the accused persons. If a cheque is dishonoured, that does not connote misappropriation. The remedy for a cheque being wrongfully dishonoured lies in the civil Court. This is not a matter which is to be tried by a criminal Court. It is curious that the learned Magistrate has issued summons against Gopesh Chandra Pal and Lalit Sen. If there is any allegation which, if true, would establish their guilt, then Rajani Dutt would, it seems to me, be the chief villain of the piece because he is the person who made the endorsement on the intimation slip that the signature differed Why he was left out I find it difficult to appreciate. Be that as it may, I am of opinion that on the facts stated in the petition of complaint and in the statement made in the initial deposition of the complainant no case of a criminal nature has been made out against either of the accused persons Gopesh Chandra Pal and Lalit Sen. Lalit Sen has not moved this Court against the order of the learned Magistrate. The present Rule has been obtained by Gopesh Chandra Pal only. This Court however has the power to act *suo motu* under S. 439, Criminal P. C., and in disposing of the case of Gopesh Chandra Pal I have also taken into consideration the case of Lalit Sen. They both stand on the same footing so far as the question whether a criminal case has been made out by the complainant is concerned.

[7] In these circumstances I discharge both the accused Gopesh Chandra Pal and Lalit Sen and make this Rule absolute.

V.B.B. *Accused discharged.*

A. I. R. (37) 1950 Calcutta 59 *[C. N. 13.]*

R. P. MOOKERJEE J.

Mritunjoy Das — Defendant 2 — Appellant v. *Sm. Sabitrimoni Dasi—Plaintiff — Respondent.*

A. F. A. D. No. 1918 of 1945, Decided on 11th August 1949, against decree of 1st. Addl. Dist. Judge, Zillah Midnapore, D/- 29th June 1945.

(a) Civil P. C. (1908), O. 41, R. 4 — Scope and applicability of — Rule 4 applies only where lower Court's decree proceeds on common ground.

Order 41, R. 4 applies only where the lower Court's decree proceeds on a common ground to all the defendants and not where the appellate Court wishes to proceed on a common ground and reverse or modify the decree appealed from in favour of all the defendants, even though some of the defendants may not be before the appellate Court : 14 W. R. 130, *Foll.*; 20 All. 8 and 22 All. 386, *Ref.* [Para 8]

Annotation : ('44 Com.) Civil P. C., O. 41 R. 4 N. 3 Pt. 2.

(b) Civil P. C. (1908), O. 41, R. 4—Order of abatement recorded—Rule 4 does not apply—(*Obiter*).

(*Obiter*)—Where there is already an order of abatement recorded by the appellate Court, R. 4 is not attracted. [Para 10]

Panchanan Ghose and B. N. Dutt—for Appellant.
Bhola Nath Roy—for Respondent.

Judgment. — Defendant 2 is the appellant in this Court and this appeal arises out of a suit for specific performance of contract. The plaintiff's case was that Uttar Manikpur Hitakari Bank, which is represented in these proceedings through its Secretary, had agreed to sell certain lands to the plaintiff under certain conditions. That offer was accepted but the Bank did not accept the amount and the property was sold by the Bank to defendant 1. Hence the suit for specific performance.

[2] Defendant 1, the subsequent transferee from the Bank, filed a written statement denying all allegations of collusion with the Bank or its officers and further pleaded that he was a *bona fide* purchaser for value without notice of the alleged previous contract with the plaintiff. Defendant 2 filed a separate written statement alleging that the plaintiff did not fulfil her part of the contract, time was of the essence of the contract, and denying all the other allegations made about collusion and other statements. The

learned Munsif decreed the suit in part directing defendant 2 to execute and register a kobala in favour of the plaintiff in respect of the property in suit within a particular date and in default, the kobala was to be executed by the Court at the costs of defendant 2. An appeal was taken against this decision by defendants 1 and 2 before the Court of the District Judge. A cross-objection was filed by the plaintiff with a prayer that defendant 1 should also be directed to execute and register the kobala jointly with defendant 2.

[3] Two points were raised before the learned District Judge. The first with regard to the fact whether there was any contract of a sale as asserted by the plaintiff and if so, whether the plaintiff had fulfilled her part of the contract entitling her to specific performance of the said contract. The second point taken up for consideration by the Court was whether the trial Court erred in not directing the execution of the kobala by defendant 1 jointly with defendant 2. The first point was found against the appellant and the appeal was dismissed. With regard to the second point, the Court allowed the cross-objection directing both defendants 1 and 2 to execute the kobala.

[4] A second appeal has been filed by defendant 2, the Secretary of the Uttar Manikpur Hitakari Bank making the plaintiff as also defendant 1 respondents to the appeal. During the pendency of this appeal in this Court, defendant 1 died and no steps were taken within 90 days by the appellant for bringing the heirs on the record. Subsequently, the appellant obtained a Rule from this Court (C. R. 1202 (S) of 1947) to show cause why the abatement should not be set aside and the heirs of defendant 1 brought on the record. This Rule came up for hearing on 19th February and was discharged. An application for setting aside the abatement and for substituting the heirs of the deceased respondent 2, was rejected. The further contention on behalf of the petitioner appellant that the heirs of the deceased respondent might be added as party respondents to the appeal was also disallowed.

[5] On behalf of the respondents a preliminary objection had been taken to the competency of the present appeal. It is contended that the appeal having abated, so far as defendant 1 is concerned, the present appeal is not properly constituted and ought to be dismissed.

[6] On behalf of the appellant Mr. Ghose contends that under O. 41, R. 4, Civil P. C., it is competent for this Court at this stage to hear the appeal and to give relief even to the dead defendant against the heirs of respondent 2, against whom the appeal has already abated. Rule 4 will be attracted only if "the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants". As indicated already, defences as put forward by the two defendants were not identical. Defendant 1 had rested his case particularly, if not wholly, on the plea that he was a *bona fide* purchaser for value without notice of the earlier transaction. Defendant 2, on the other hand, contested the claim of the plaintiff to obtain specific performance, because the plaintiff has failed to do or perform her part of the contract.

[7] Mr. Ghose argues that the common ground on which both the defendants could and did resist the claim of the plaintiff was that the suit as framed impleading the Uttar Manikpur Hitakari Bank as being represented by its Secretary, was bad in law. The suit is not maintainable against the Secretary but ought to have been brought against the Bank registered under the Co operative Societies Act.

[8] Under rule 4, the decree appealed from must proceed on a ground common to the defendants, but in this particular case the ground which is proposed to be urged in this Court, as being the common ground to all the defendants, does not find any place in the judgment of the lower Court far less being a ground on which the judgment was based. The view has been consistently held in this Court ever since the decision in the case of *Protab Chunder Dutt* v. *Kurbanissa Bibee*, reported in 14 W. R. 130, that the relevant provision of the Code of Civil Procedure does not empower an appellate Court to exercise the power with which it proposes to base its own decision is common to all the defendants, but only when it also finds that the decision of the lower Court has proceeded on such common ground. It may be noted in passing that S. 337 of the Code then in force, was in terms similar to R. 4 of O. 41 of the present Code. At p. 131 Dwarkanath Mitter J observed as follows:

"Section 337 of the Code of Civil Procedure says, it is true, that an Appellate Court may, on the appeal of one defendant only, reverse the entire decree of the lower Court in favour of all the defendants; but that very section says that this power can be exercised only 'when the decision of the lower Court has proceeded upon a ground common to all the defendants.' In the present case, the decision of the Munsif did not and could not proceed upon a ground common to all the defendants. The defences set up by them were altogether different from one another and whilst the plaintiff was bound to prove his bill of sale as against the defendant, Abedoonissa, he was under no such obligation so far as the other defendants were concerned. The issue as to whether that bill of sale is a genuine instrument or not was laid down by the Munsif, it is true, but that issue had been raised by the defendant Abedunnissa alone, and she was the only party interested in its adjudication. Defendant 2 had nothing whatever to do with it, for his defence was that he was

entitled to hold possession of the lands in question as a tenant of the plaintiff."

The separate defences filed in the present suit also indicate the different nature of the defence as put forward by the two defendants. It is only when the decree appealed against has proceeded upon a common ground to all the defendants, that is, when the Court below has made a decree against several defendants upon a finding which applies equally to all of them, that under the relevant provisions any one of the defendants may appeal against the whole decree and the appellate Court may reverse or modify that decree in favour of all the defendants, even though some of those defendants may not be before the Court (vide *Puran Mal* v. *Krant Singh*, 20 ALL. 8 : (1897 A. W. N. 154) and *Chajju* v. *Umrao Singh*, 22 ALL. 386 : (1900 A. W. N. 120).

[9] On the facts of the present case, there is no escape from the conclusion that the ground which the appellant wants to urge in this Court as being a common ground for defendants 1 and 2 was not urged or made the basis of the decision of the Court below. Rule 4 cannot, therefore, be attracted.

[10] It is not necessary in view of this decision to go into the other points affecting the applicability of R. 4 of O. 41, Civil P. C. When there is already an order of abatement recorded by the Court, it has been decided in some earlier decisions that R. 4 cannot be attracted (vide *Protap Chandra* v. *Durga Charan*, reported in 9 C. W. N. 1061 and *Naimuddin Biswas* v. *Maniraddin*, reported in 32 C. W. N. 299 : (A. I. R. (15) 1928 Cal 184).)

[11] I must, therefore, hold that the appeal having abated against the heirs of the deceasad defendant 1, defendant 2 is not competent to maintain this appeal. The appeal is accordingly dismissed with costs. Leave to appeal under cl. 15, Letters Patent was asked for and refused.

V.S.B. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 61 *[C. N. 14.]*

SEN J.

Express Dairy Ltd. — Appellant v. *Corporation of Calcutta — Respondent.*

Criminal Appeal No. 104 of 1949, Decided on 10th August 1949.

(a) Criminal P. C. (1898), Ss. 242 and 342 — Accused being company — Court not absolved from following provisions of Ss. 242 and 342 — If company is represented by agent such agent to be taken as accused.

As a Company is merely a juridical person, the charge cannot be explained to the Company itself nor can the company personally make a plea. The Company cannot be personally examined in accordance with the provisions of S. 342. By reason of these circumstances however the Court is not absolved from following the provisions of Ss. 242 and 342. If the Company is represented by agent, then it is the duty of the Court to follow the provisions of Ss. 242 and 342 as if such agent were the accused. [Para 3]

Annotation: ('46-Com.) Criminal P. C., S. 242, N. 1, 2; S. 342 N. 2, 17.

(b) Criminal P. C. (1898), Ss. 242 and 342 — Failure to observe — Entire trial vitiated — Defect not curable under S. 537 — Criminal P. C. (1898), S. 537.

Failure to observe the provisions of Ss. 242 and 342 would vitiate the entire trial, and the errors are not curable with the help of the provisions of S. 537: A. I. R. (14) 1927 Cal. 196, *Rel. on*; A. I. R. (34) 1947 P. C. 67, *Disting.* [Paras 5 & 6]

Annotation: ('46-Com.) Criminal P. C, S. 242 N. 8, Pt. 1; S. 342, N. 35 Pt. 1.

B. Das and Surathi Mohan Sanyal — for Appellant.
Prafulla Coomar Banerjee — for the Crown.
Debabrata Mukherjee and Sunil Kumar Basu — for Respondent.

Judgment. — This is an appeal by the Express Dairy Limited against an order of conviction passed by Sri N. K. Ghose, Municipal Magistrate, Calcutta, convicting the Company of having committed an offence punishable under S. 407 read with S. 488, Calcutta Municipal Act. In short, the company was charged with storing for sale adulterated milk. The company has been sentenced to pay a fine of Rs. 500. Various defences were taken in the Court below. On the merits the defence was that the milk was not adulterated and in support of that various points were raised regarding the method of the examination of the milk.

[2] Having regard to the decision at which I have arrived, it would not be proper for me to consider the merits of the case. Mr. Das appearing on behalf of the company points out to me that there was no examination of the company in accordance with the provisions of S. 342, Criminal P. C. He further points out that the provisions of S. 242, Criminal P. C., were not also observed. On these grounds he says that the whole trial has been vitiated. His argument is that by virtue of the provisions of S. 5, Criminal P. C., the offence with which the Company has been charged should have been tried in accordance with the provisions of the Code of Criminal Procedure. On behalf of the Corporation Mr. Mukherjee contends that there has been substantial compliance with the provisions of the Code of Criminal Procedure and that the accused has not been prejudiced by anything done by the learned Magistrate. On behalf of the Crown Mr. Banerjee adopts the contentions raised by Mr. Mukherjee. A further argument placed by them is that it is not possible to follow the provisions of Ss. 242 and 342, Criminal P. C. inasmuch as the accused was merely a juridical person and not an actual person. That being so,

they contended that there could be no personal examination of the Company under S. 342, Criminal P. C., nor could there be any explanation given regarding the offence charged to the company personally in accordance with the provisions of S. 242, Criminal P. C.

[3] There can be no doubt that as the Company is merely a juridical person, the charge could not be explained to the Company itself nor could the Company personally make a plea. It is also obvious for the reasons stated above that the Company could not be personally examined in accordance with the provisions of S. 342, Criminal P. C. The question which arises is whether by reason of these circumstances the Court was absolved from following the provisions of Ss. 242 and 342, Criminal P. C. In my opinion the Court was not so absolved. The Code provides in S. 205 for the appearance of an accused by his pleader. The word 'pleader' does not necessarily mean a lawyer engaged to argue the case but it includes an agent duly empowered to answer all questions on behalf of the accused. Now, in this case it was possible for the Company to be represented by somebody and indeed no other means of appearance were possible. If the Company was represented by what I may term its agent, then it was the duty of the Court to follow the provisions of Ss. 242 and 342, Criminal P. C., as if such agent were the accused. In the present case the Company authorised a lawyer to defend the case, but it is not at all clear that the lawyer was an agent of the Company for all purposes; that is to say, it is not quite clear that the lawyer was given the right to do all such things as the Company could have done if it were a physical being. From the record it appears that one Mr. Calloden, the Manager of the Shop in Lindsay Street where the milk was seized, appeard on the date fixed for the trial. To neither of them was the charge explained in accordance with the provisions of S. 242, Criminal P. C. I shall assume for the moment that Mr. Calloden was empowered to do all things which the Company could have done and that he was a physical embodiment of the juridical person which was the Company. If that be so, it was the duty of the Court to state to Mr. Calloden the particulars of the offence of which he was accused and to ask him if he had any cause to show why the Company represented by him should not be convicted. This is clearly laid down in S. 242, Criminal P. C., which is in the following terms:

"When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a formal charge."

Nothing of the kind was done by the learned Magistrate. What he has stated is as follows:

"Mr. N. B. Guha appears with Mr. Calloden, Sales Manager of Express Dairy Co., Ltd., and denies the charge and says R. N. Sharma does morning duty and looks after sales at the time, etc."

It is very difficult to understand what the learned Magistrate means. Was he reproducing the statement of Mr. Guha or of Mr. Calloden? I am unable to decide this question. I find that the learned Magistrate has made no attempt to follow the Code of Criminal Procedure. He seems to be oblivious of the provisions of S. 5, Criminal P. C. There is nothing in the record to show that the offence was ever explained either to Mr. N. B. Guha or to Mr. Calloden, nor is it possible to find out who denied the charge. It is clear, therefore, that the provisions of S. 242, Criminal P. C., have not been followed.

[4] I now turn to the consideration of the question whether the provisions of S. 342, Criminal P. C., have been followed. It is admitted on behalf of the respondent and the Crown that there has been no examination of anybody in accordance with the provisions S. 342, Criminal P. C.

[5] The next question for decision is whether the failure to observe these provisions of the Code would vitiate the trial, or whether these errors were of such a nature that they are curable with the help of the provisions of S. 537, Criminal P. C., on the ground that the accused has not been prejudiced by these errors of procedure. It has been held by this Court that the failure to observe the provisions of S. 242, Criminal P. C., vitiates the entire trial; *see* the case of *Gopal Krishna* v. *Matilal Singh*, 54 Cal. 359: (A. I. R. (14) 1927 Cal. 196: 28 Cr. L. J. 155). It has also been held in a long series of decisions that failure to observe the provisions of S. 342, Criminal P. C., also vitiates a trial. It has been contended by learned Advocate appearing on behalf of the Corporation that the recent decision of the Judicial Committee in the case of *Pulukuri Kottaya* v. *King-Emperor*, 51 C.W.N. 474: (A.I.R. (34) 1947 P. C. 67: 48 Cr. L. J. 533), has really done away with these decisions and he contends that having regard to this decision it should be held that these errors are curable by invoking the aid of S. 537, Criminal P. C. In my opinion the decision of the Privy Council has not decided that these decisions of the Indian Courts are incorrect. In the case before the Judicial Committee the question involved was whether the denial of the right given to an accused person by the proviso to S. 162, Criminal P. C., amounted to an illegality which vitiated the entire trial. The Judicial Committee held that failure to give the accused the benefit of the proviso to S. 162 of the Code

was a serious matter, but that in the particular circumstances of that case the error was curable by S. 537, Criminal P. C., inasmuch as the accused had not been prejudiced. It did not deal directly with the provisions of Ss. 242 and 342, Criminal P. C. In passing, however, their Lordships made certain observations which are to be found at p. 479 of the aforesaid report. I may mention in this connection that Mr. Pritt appeared on behalf of the accused and contended that the error committed by the Crown was incurable. He argued that a breach of a direct and important provision of the Code of Criminal Procedure could not be cured and that it must lead to the quashing of the conviction. Their Lordships remarked that this argument found some support in two cases namely in the case of *Tirkha* v. *Nanak*, 49 ALL. 475 : (A.I.R. (14) 1927 ALL. 350 : 28 Cr. L. J. 291) and *In re Madura Muthu Vannian*, 45 Mad. 820 : (A. I. R. (9) 1922 Mad. 512 : 24 Cr. L. J. 124) in which the view was expressed that any failure to examine the accused under S. 342, Criminal P. C., was fatal to the validity of the trial and could not be cured under S. 537 of the Code. Their Lordships then expressed the opinion that the argument of Mr. Pritt was based on too narrow a view of the operation of S. 537, Criminal P. C. They did not say that the failure to observe the provisions of S. 342, Criminal P. C. was curable under S. 537 of the Code if it could be shown that it did not prejudice the accused; nor did they anywhere say that failure to observe the provisions of S. 242, Criminal P. C. was curable under S. 537 of the Code if the error did not cause prejudice to the accused. I do not think therefore that this case is of much help to the respondent. The decisions regarding the effect of the non-observance of the provisions of Ss. 242 and 342, Criminal P. C. therefore remain unshaken.

[6] I would further add that I am quite unable to appreciate how, S. 537, Criminal P. C., can ever apply to a case where the provisions of S. 342 of the Code have not been observed. If an accused person is convicted without the observance of the provisions of S. 342 of the Code it would amount to a conviction of a person without properly hearing his defence. In India the accused is not permitted to give evidence and the provisions of S. 342 of the Code which give an opportunity to the accused to place before the Court in his own words his explanation regarding the facts appearing against him and to place before the Court in his own words what his defence is. This is a very important and fundamental right. Before a Court can find a person guilty it should hear what that person has to say. The failure to examine the accused under S. 342, Criminal P. C., deprives the accused of the right to place his entire defence before the Court and it amounts to a fundamental error in a criminal trial, an error which cannot in my opinion be cured by the provisions of S. 537, Criminal P. C. on the ground that there was no prejudice to the accused.

[7] As regards the failure to observe the provisions of S. 242, Criminal P. C. I have already said that this Court has decided that the failure vitiates the entire trial and nothing has been said against this decision by the Judicial Committee. As it is a decision of a Division Bench of this Court I am bound to follow it and no other reason is necessary to be given for holding that the trial is vitiated by reason of the non-observance of the provisions of S. 242, Criminal P. C.

[8] Having regard to what has been said above I hold that the entire trial has been vitiated. The order of conviction and sentence are set aside and the case is sent back for retrial *de novo* by Sri S. P. Chatterjee, Municipal Magistrate, in the light of the observations made above.

[9] Mr. Das on behalf of the company undertakes that the company shall appoint a person to represent it at the trial for all purposes as if he were the company itself.

D.H. *Conviction set aside; retrial ordered.*

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* A. I. R. (37) 1950 Calcutta 63 *[C. N. 15.]*

G. N. DAS AND GUHA JJ.

Jamuna Prosad—Defendant 2—Appellant v. *Motilal Santhalia, Plaintiff and others—Respondents.*

A. F. A. D. No. 1426 of 1945, Decided on 9th August 1949, against decree of Dist. Judge, Malda, D/- 29th March 1945.

(a) Interpretation of Statutes—History of enactment can be gone into, if there is doubt in wording of particular section.

In construing any Act of the Legislature, the verbal construction of the particular section in question, if it be plain and simple, must govern the Court in arriving at its conclusion. If there be any doubt or difficulty in the wording of the particular section in question an enquiry is permissible into the history of the enactment and any supposed defect in the former legislation on the subject which it wanted to cure: (1889) 24 Q. B. D. 213, *Ref.* [Para 14]

✠ (b) Civil P. C. (1908), O. 21, R. 73 — Purchase by pleader of decree-holder is hit—Purchase is not nullity but only voidable.

A purchase at auction sale in execution of a decree by a pleader of the decree-holder is hit by O. 21, R. 73: *Case law considered.* [Paras 21 and 26]

But the purchase is not a nullity but only voidable. The rule is intended for the benefit of the decree-holder and the judgment-debtor and may be waived by them without any infringement of public right or policy. [Paras 29, 30]

Annotation : ('44-Com.) Civil P. C., O. 21, R. 73, N. 2.

(c) Interpretation of Statutes— Non-compliance with statute, when amounts to illegality and irregularity, stated—Tests to distinguish illegality from irregularity, stated.

It cannot be affirmed as a proposition of universal application that non-compliance with every imperative provision of law renders the proceedings a nullity. The question depends on the nature, scope and object of the particular provision which has been violated. It is difficult sometimes to distinguish between an irregularity and a nullity, but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity : 35 Cal. 61 (F.B.), *Rel. on.* [Para 28]

Rajendra Bhusan Bakshi, Gopal Chandra Ghose and Sibakali Bagchi—for Appellant.

Chandra Sekhar Sen and Khitindra Kumar Mitter—for Respondents.

Das J.—This appeal is at the instance of the defendant and is directed against the judgment and decree dated 29th March 1945 passed by Mr. P. P. I. Vaidyanathan, learned District Judge, Malda, affirming on appeal the judgment and decree dated 17th November 1944 passed by Mr. S. C. Chakravarty, learned Subordinate Judge, Malda decreeing the plaintiff's suit.

[2] The plaintiff's case was that the disputed property appertained to 2 jamas held by the defendants under Sadek Reja. The latter instituted a suit for rent and recovered a decree. In execution of the decree, the property was put up to sale and was purchased by Charu Chandra Sarkar, pleader of the decree-holder on 26th March 1940. The judgment-debtor's application for setting aside the sale failed. The auction purchaser Charu Chandra Sarkar took possession through Court on 31th December 1940 and later sold the property to the plaintiff on 16th December 1942. The plaintiff having failed to get possession, instituted the present suit for declaration of title and for possession.

[3] Defendant 2 who contested the suit, pleaded that the plaintiff's vendor did not acquire any title by his auction purchase in view of the provisions of O. 21. R. 73, Civil P. C.

[4] Both the Courts below overruled the defence and decreed the plaintiff's suit. Defendant 2 has preferred this appeal.

[5] Mr. Bakshi appearing on his behalf, has reiterated the ground taken in the Courts below and has contended that the prohibition contained in O. 21, R. 73, Civil P. C. hereinafter called the Code, applies to a pleader of the decree-holder and makes the sale a nullity.

[6] I may point out at the outset that no case of fraud on the part of the decree-holder has been proved in this case.

[7] The validity of the contention depends on the interpretation of O. 21, R. 73 of the Code, which runs as follows :

"No officer or other person having any duty to perform in connection with any sale, shall, either directly or indirectly, bid for, acquire, or attempt to acquire any interest in the property sold."

[8] The corresponding S 292 of the Code of 1882 did not contain the words "other person."

[9] The old S. 292 was construed in the case of *Alagiri Sami* v. *Ramnathan*, 10 Mad. 111, to exclude a Vakil, on the ground that a Vakil cannot be regarded as an officer having any duty to perform in connection with the sale.

[10] As a legal practitioner is an officer of the Court only in a limited sense, the view taken in the Madras case may be supported on that ground.

[11] The further question viz., whether a pleader has any duty to perform in connection with the sale, has to be carefully considered bearing in mind the principle underlying the section and the intention of the legislation.

[12] In the Transfer of Property Act which was also enacted in 1882, we find in S. 136, an express prohibition as regards legal practitioners buying or trafficking in actionable claims.

[13] The principle underlying both the sections is that persons contemplated therein should not be even exposed to the suspicion that in the discharge of their duties, their conduct might be influenced by any personal consideration.

[14] In construing any Act of the Legislature the verbal construction of the particular section in question, if it be plain and simple, must govern the Court in arriving at its conclusion. If there be any doubt or difficulty in the wording of the particular section in question an enquiry is permissible into the history of the enactment and any supposed defect in the former legislation on the subject which it wanted to cure : *Queen* v *Bishop of London*, (1889) 24 Q. B. D. 213 at pp. 224, 225.

[15] I now proceed to construe the section bearing in mind the principle underlying the section and the above rule of construction.

[16] The main question is whether a pleader is a "person who has any duty to perform in connection with the sale". These words were construed in *Shiam Lal* v. *Girraj Kishore*, 49 ALL. 292 : (A. I. R. (14) 1927 ALL. 76), to be "intended to prohibit all those persons who have anything to do with the machinery of the sale or having any interest in the result of the sale." This view is consistent with the collocation of the rules preceding R. 73.

[17] If this be the correct view of the relevant words in R. 73, it is difficult to say that the duty of the pleader of the decree-holder ends with the obtaining of the order for sale, as was supposed in *In re a Pleader*, I. L. R. (1946) Mad. 521 : (A. I. R (33) 1946 Mad. 245: 47 Cr. L. J. 708 F. B.).

[18] Even after the order for sale is made, the pleader has to see that the sale proclamations

is duly served, that the sale is held on a day when the bids may be favourable to the decree-holder. He has to apply for and obtain leave to bid on behalf of the decree-holder. He may pray for a resale under certain circumstances. In cases under Chap. XIV, Ben. Ten. Act, he has to exercise the option given to the decree-holder under S. 165 of the Act. He is therefore not wholly unconnected with the machinery of the sale.

[19] It has been suggested that the words "any person who has any duty to perform in connection with the sale" refer to the persons entrusted with the holding of the sale, e. g., an auctioneer, bailiff, etc. This would have the effect of narrowing down the scope of the rule and would be inconsistent with the purpose of the rule and would not prevent the mischief the rule was intended to guard against. The decree-holder has been put under a limited ban from bidding at sale under R. 72. If his pleader is left unrestricted, it would leave the door wide open for evasion of R. 72. Moreover, the decree-holder's pleader is in a fiduciary position towards the decree-holder, and, the principles enunciated in *Nugent* v. *Nugent*, (1908) 1 Ch. 546: (77 L. J. Ch. 271) which was applied by this Court in *Jiteswari Dasi* v. *Sudha Krishna*, 59 Cal. 956 : (A. I. R. (19) 1932 Cal. 672), viz., that a person in a fiduciary position having special means of knowledge actual or probable ought not to be allowed to buy or bid for the property without the leave of the Court and that nobody ought to be allowed to get into a position where his interest conflicts with his duty, should be kept in view in construing the section.

[20] The decree-holder's pleader settles the terms of the sale-proclamation and conducts the entire litigation on behalf of the decree-holder, he has special means of knowledge. He is in a position of confidence and should not allow himself to be placed in a position where his personal interest may conflict with his duty towards his client.

[21] In my opinion, a purchase by a pleader of the decree-holder is hit by O. 21 R. 73 of the Code.

[22] Coming to the decisions, we have a decision in *Kamakhya Dutt Ram* v. *Shyam Lal*, A. I. R. (16) 1929 Oudh 285: (4 Luck. 635), where the purchase by a decree-holder's pleader was upheld. No reasons are given for the conclusion. On the other hand, the decision in *Sunderbai* v. *Bapuna*, A. I. R. (16) 1929 Nag. 305 : (116 I. C. 65), seems to prefer the opposite view. The decision in *Shiam Lal* v. *Girraj Kishore*, 49 ALL. 292 : (A. I. R. (14) 1927 ALL. 76), did not decide the position of a pleader. The decision in *In re a Pleader*, I.L.R. (1946) Mad. 521 : (A. I. R. (33) 1946 Mad. 245 : 47 Cr. L. J. 708 F. B.), following the earlier case in *Alagirisami* v. *Ramanathan*, 10 Mad. 111, takes a contrary view. The judicial decisions are thus not uniform.

[23] In *Subharayudu* v. *Kottayya*, 15 Mad. 389, the decree-holder successfully challenged a secret purchase by his pleader. The point now under consideration did not require a decision. Their Lordships quote with approval the following passage from *Greenlaw* v. *King*, (1840) 3 Beav. 49: (10 L. J. Ch. 129) :

"The question is not whether there was fraud or no fraud, but whether the Court will permit a person standing in the fiduciary and confidential situation in which *B* was, to make himself an interested party in the very transaction which he as trustee was bound most vigilantly to superintend."

[25] The case of *Nundeeput Mahta* v. *Alexander Shaw*, 13 W. R. 209 (at p. 214) (S.B.) on which Mr. Bakshi relied was a case of a joint purchase by the decree-holder and a pleader of the judgment-debtor under suspicious circumstances, and did not touch the present question. The case of *Aghorenath Chakravarty* v. *Ram Chandra Chakravarty*, 23 Cal. 805, was one where a purchase by a pleader for the judgment-debtor was held to enure for the benefit of the judgment-debtor on the principle that

"it would be acting in violation of all rules of equity and good conscience if we were to hold that the defendant is entitled to maintain his purchase to the detriment of the plaintiff."

The above cases illustrate the anxiety of the Courts to maintain the purity of the sales in auction. On similar grounds S. 66 of the Code forbids benami purchases at court sales.

[26] The effect of the above decisions supports the view taken by me that a purchase at the auction sale by a pleader of any of the parties is liable to be set aside, as being in contravention of O. 21, R. 73 of the Code.

[27] This leads us to consider whether an auction purchase which is hit by O. 21 R. 73 makes the sale void or voidable.

[27a] Mr. Bakshi contends that the use of word *shall* makes the prohibition mandatory and renders the sale a nullity.

[28] This broad contention is supported neither by principle nor by authority. It cannot be affirmed as a proposition of universal application that non-compliance with every imperative provision of law renders the proceedings a nullity. The question depends on the nature, scope and object of the particular provision which has been violated. In *Holmes* v. *Russell*, (1841) 9 Dowl. 487, which was quoted with approval in *Ashutosh Sikdar* v. *Beharilal Kirta na*, 33 Cal. 61 at p. 72 : (6 C. L. J. 320 F. B.) Coleridge J., observed as follows:

"It is difficult sometimes to distinguish between an irregularity and a nullity, but the safest rule to deter-

mine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity, if he cannot, it is a nullity."

[29] The rule now in question is intended for the benefit of the decree-holder and the judgment-debtor and may be waived by them without any infringement of public right or policy.

[30] Judged in the light of the above principles, the purchase by a pleader of the decree-holder is not a nullity but is merely voidable.

[31] This conclusion is also supported by the fact that a purchase by the decree-holder whose position cannot be worse than that of his pleader, is only voidable in the absence of a leave of the Court under R. 72.

[32] In this view, the purchase by Charu Chandra Sarkar which was unsuccessfully challenged by the judgment-debtor, is binding on the defendant and the plaintiff has acquired a good title by his purchase from Charu Chandra Sarkar.

[33] The only contention raised in the appeal fails. The appeal must therefore be dismissed with costs.

Guha J.—I agree.

R.G.D. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 66 *[C. N. 16.]*

BLANK AND LAHIRI JJ.

Golam Rahman and others—Accused—Appellants v. *The King.*

Criminal Appeal No. 138 of 1948, Decided on 12th August 1949.

(a) Criminal P. C. (1898), Ss. 234, 239 (d)—In furtherance of object of conspiracy to cheat, accused persons forging large number of thumb impressions on pay sheets—Limitation in S. 234 held did not apply.

Where in furtherance of the dominant object of the conspiracy to cheat, the accused persons were alleged to have forged a large number of thumb impressions on pay sheets and for these specific acts of forgery, charges under S. 467, Penal Code on 116 counts were framed against accused *G*, on 105 counts were framed against accused *M* and on 15 counts were framed against accused *A*:

Held that the case came under cl. (d) of S. 239 and that in such a case the limitation as to the number of offences contained in S. 234. Criminal P. C. did not apply: A. I. R. (25) 1938 P. C. 130, *Foll.* [Para 15]

Annotation: ('46-Com.) Criminal P. C., S. 239 N. 7.

(b) Criminal P. C. (1898), S. 235—Charges absolutely clear and unambiguous—Accused not to be deemed to be prejudiced by mere plurality of counts.

Where the charges are absolutely clear and unambiguous and strictly in conformity with S. 233, Criminal P. C. the accused cannot be deemed to have been prejudiced merely by the plurality of counts. Where the accused committed 116 offences of forgery in pursuance of the conspiracy to cheat:

Held that one trial for all the different counts set out with sufficient clearness and precision was less prejudicial and less embarrassing from the point of view of the defence: A. I. R. (12) 1925 Cal. 341, *Ref.* [Para 16]

Annotation: ('46-Com.) Criminal P, C. S. 235 N. 5, Pt. 2.

(c) Criminal P. C. (1898), S. 196A (2)—Cognisable offence punishable with imprisonment for two years or upwards—Subsidiary acts which are non-cognizable offences also alleged—Sanction not necessary.

If the object of the conspiracy is a cognisable offence punishable with imprisonment for two years or upwards no sanction is required under S. 196A (2). There is difference between the object of a conspiracy and the means adopted to achieve that object and if the object is not hit by S. 196A (2) it does not matter whether that object is sought to be attained by non-cognizable offences. The mere fact that the subsidiary acts, which are means to the achievement of the principal object of the conspiracy, are non-cognisable offences will not attract the operation of S. 196A (2) provided the principal or "dominant" object falls outside its scope. Where the principal object was to cheat which was a cognisable offence punishable with imprisonment for 7 years, the case does not fall within the mischief of S. 196A (2) and the fact that in the charge of conspiracy it is also alleged that for the purpose of cheating the accused committed forgeries of thumb impressions which are offences under S. 467, Penal Code and non-cognisable offences does not attract S. 196A (2): A. I. R. (26) 1939 Bom. 129 and A. I. R. (34) 1947 Cal. 32, *Rel. on.* [Para 17]

Annotation: ('49-Com.) Criminal P. C., S. 196A N. 1, Pts. 5a, 8.

(d) Evidence Act (1872), S. 73—Section applies to accused person—S. 342, Criminal P. C. does not make S. 73 inapplicable to criminal trials—Procedure of taking specimen thumb impression of accused in Court is legal—Evidence Act (1872), S. 45—Identification of Prisoners Act (1920), S. 5—Criminal P. C. (1898), S. 342.

Section 73, Evidence Act is quite general in its terms and applies to all case sand there is no exception in favour of an accused person. If there is nothing in the Criminal P. C. which precludes its application to criminal trials there is no reason why the plain language of the section should not be given its full effect. Section 342, Criminal P. C. does not make S. 73, Evidence Act inapplicable to criminal trials. The procedure followed in taking specimen thumb impressions of the accused under the direction of the Court is in strict compliance with S. 73 and S. 45, ill. (c), Evidence Act and also S. 5 of Act XXXIII [33] of 1920: *Case law discussed.* [Para 18]

Annotation: (46-Man.) Evidence Act S. 73 N. 1; ('46-Com.) Criminal P. C., S. 342 N. 30; Identification of Prisoners Act, S. 5 N. 1.

(e) Evidence Act (1872), S. 45—Finger-print expert—Court to satisfy itself as to value of evidence of expert like any other evidence — Evidence of such expert is however more reliable than handwriting expert.

It cannot be laid down as a rule of law that it is unsafe to base a conviction on the uncorroborated testimony of a finger-print expert. The true rule seems to be one of caution, that is to say, the Court must not take the expert's opinion for granted, but it must examine his evidence in order to satisfy itself that there can be no mistake, and the responsibility is all the greater when there is no other evidence to corroborate the expert. The Court cannot delegate its authority to the expert but has to satisfy itself as to the value of the evidence of the expert in the same

way as it must satisfy itself as to the value of any other evidence. Though the evidence of a handwriting expert is frequently found to be faulty, the evidence of a thumb impression expert is more reliable because with regard to finger-prints it has never been found that two finger prints are identical in all respects: A. I. R. (18) 1931 Cal. 441, *Expl.* [Para 21]

Annotation: ('46-Man.) Evidence Act S. 45 N. 6.

S. C. Taluqdar and C. F. Ali—for Appellant.

Harideb Chatterji and N. K. Sen—for the Crown.

Lahiri J.—In April 1943, the Government of Bengal received reports from the Collector of Burdwan about acute economic distress in certain parts of that district and sanctioned certain sums of money on various dates amounting to a total of about 4 lacs under the Famine Code to be spent on Test Relief operations under the provisions of the said Code. These operations were carried on in 52 different centres through the District Board under the control of the Collector between the months of April and July 1943. The District Board, in its turn, carried out the operations by "Agents" who used to be employed on a commission basis. Purulia-Ambalgram road under P. S. Kethgram was one of the 52 Centres where Test Relief operation in the shape of earth work was taken up and one Gulzar Shaikh (who has since died) was employed as an agent at this Centre. Under S. 63 of the Famine Code read with para. 6 of the Famine Manual, the Collector directed that the Agent would employ his own men and the District Engineer would have to pay the Agent the following: (a) Cost of temporary staff employed and (b) Supervision allowance to the Agent [vide Collector's order dated 11th May 1943. Ext. 1 (41)]. Acting under this order, the District Engineer authorised the Agent to appoint the following temporary staff (1) One Pay Master for every 500 labourers, (2) one Work Sircar for 200 labourers, (3) one dafadar for every 100 labourers [vide Ex. 68 (1)]. To supervise the work of the Agents there was to be a Supervisor under the District Board. The duties of the Agent in carrying out the works were specified in various circular orders and instructions issued by the District Engineer from time to time, as will appear from Exs. 68 (2), 68 (3), 68 (4) and 68 (5). The following were some of the more important duties of the Agents and Supervisors : (1) Men from neighbouring districts are not to be employed for the relief works of the Burdwan District. (2) Agents should maintain a Muster Roll which will be signed by Supervisors in course of inspection. (3) Measurements of earth work are to be entered daily in Measurement Books to be maintained by the Agents and they are to be submitted once a week along with Muster Rolls and Paysheets to the District Engineer. (4) Measurements are to be checked regularly and Muster Rolls are to be checked daily by Supervisors and their initials are to be affixed at the end of the entries of each date. (5) Entries in Measurement Books, Paysheets and Muster Rolls are to be made without leaving any blank space. Supervisors and Sub-overseers are to sign the paysheets and Muster Rolls whenever they visit any centre and corrections, if any, are to be signed by the Supervisor.

[2] Exhibit 1 (29) shows that allowances at the rates of 8, 6 and 4 p. c. were sanctioned for the Agents upon daily labourers employed by them upto 500, 501 to 2000 and above 2000 respectively.

[3] The system followed in carrying out the earth work was as follows: (a) Gangs of Coolies working in a centre and consisting of males, females and children were employed in different batches working under a mate who was himself a coolie and also a representative of the coolies working under him and used to receive payments on behalf of all the members of his gang on affixing his thumb impressions on paysheets. (b) Attendance of coolies used to be recorded in muster rolls maintained for the purpose and paysheets used to be drawn up showing the quantity of earth work done by each batch and the amounts of money paid by the Agent against the receipt containing the thumb impression of the mate to whom the payment is supposed to have been made and also the signature of the witness of payment, the signature of the Sarkar and a certificate by the Supervisor about the accuracy of the entries. (c) Daily wages were to be paid at the rate of ./8/- for a male and ./6/- or ./7/- for a female labourer against a daily output of 100 cubit feet of earth work. (d) The Agent used to receive payments from the District Board on production of periodical abstracts of paysheets certified as correct by the Supervisor.

[4] One Santosh Kumar Bhattacharjya was the supervisor of the District Board and Ghulam Rahaman, Mirza Ghulam Hossain, Abdul Baeed and Gora Chand Chakravarty were members of the temporary staff maintained by the Agent Gulzar Shaikh (deceased) in the Purulia Ambalpur Section of the Test Relief operations. The prosecution case is that the deceased Agent had submitted a bill for Rs. 16,732-12-6 claiming the amount as actually spent by him against 21,09,322 cubic feet of earth work done in the Purulia Ambalpur Section and had received an amount of Rs. 16,599 in several instalments from the District Board on the strength of paysheets submitted from time to time. As a result of departmental enquiry, however, it transpired that the total quantity of earth work shown in the paysheets was considerably in excess of the work that had been actually done, that payments alleged to have been made to mates had been artificially

inflated by including the names of fictitious and non-existent persons in the muster rolls and by showing that a particular person had worked for a larger number of days than he had actually done and that payments were shown to have been made in the paysheets against forged thumb impressions and in this way the District Board had been cheated to the extent of a considerable sum of money. The prosecution case further is that the accused named above along with one Abadhut Majhi entered into a criminal conspiracy to cheat the District Board of Burdwan by fabricating muster rolls and paysheets and making false entries as indicated above. One of the co-conspirators according to the prosecution case named Bholanath Majhi, made a confession at the time of the investigation and he has been examined as an approver in the case. A finger-print expert and a handwriting expert examined thumb impressions and the handwriting appearing in the different paysheets and compared them with the specimen thumb impressions and handwritings of the different accused taken in Court and as a result of his examination the finger-print expert gave it as his opinion that: (a) the specimen of the right thumb impression of the accused Ghulam Rahaman was identical with the finger-impressions in the pay sheets against the names of 108 mates who were named by the expert in his evidence; (b) the specimen of the left thumb impression of Ghulam Rahaman was identical with the thumb impressions in the pay sheets against the names of four mates; (c) the specimen of the right middle finger impression of Ghulam Rahaman was identical with the finger impressions in the pay sheets against the names of four mates; (d) the specimen of the right thumb impression of the accused Mirza Ghulam Hossain was identical with the finger impressions in the pay sheets against the names of 39 mates; (e) the specimen of the left thumb impression of the accused Mirza Ghulam Hossain was identical with the finger impressions in the paysheets against the names of 66 mates; (f) the specimen of the left thumb impression of the accused Abdul Based was identical with the finger impressions in the pay sheets against the names of 15 mates; (g) the specimen of the left thumb impression of the accused Gora Chand Chakravarty was identical with the finger impressions in the paysheets against the names of thirty-one mates.

[5] We need not refer to the opinion of the handwriting expert; because nothing hinges on that opinion in this appeal and that opinion has not also been relied upon by the Court below.

[6] Upon the aforesaid allegations all the four appellants named (1) Ghulam Rahaman, (2) Mirza Ghulam Hossain, (3) Abdul Based, (4) Santosh Kumar Bhattacharjya were placed on their trial on a charge under S. 120B, Penal Code and besides that common charge Ghulam Rahaman was specificially charged under S. 467, Penal Code on 116 counts in respect of each thumb impression alleged to have been forged by him; Mirza Ghulam Hossain was similarly specifically charged under S. 467, Penal Code on 105 counts in respect of the thumb impressions alleged to have been forged by him; Abdul Based was similarly specifically charged under S. 467, Penal Code on 15 counts in respect of the thumb impressions alleged to have been forged by him; Santosh Kumar Bhattacharjya was also specifically charged under S. 420/109, Penal Code on eight counts. Besides these four persons Gora Chand Chakravarty, who has not appealed to this Court, was also placed on the trial on charges under Ss. 120B and 467, Penal Code, the charge under S. 467 being on 31 counts and Abadhut Majhi who has been acquitted was charged under S. 120B, Penal Code only.

[7] It appears from the oral and documentary evidence in the case and it is not also disputed that the accused Santosh was employed as the Supervisor under the District Engineer and his duty was to sign the certificates in the pay sheets and generally to maintain the measurement books. The other four accused were members of the temporary staff employed by the Agent Gulzar Sheikh and no fixed duty was allotted to them and by turn one or other of them kept the muster roll or drew up the pay sheets or signed as witnesses of payment.

[8] Under notification No. 495J., dated 17th February 1947, issued by the Government of Bengal under S. 269 (1), Criminal P. C., the trial was held by the Additional Sessions Judge of Burdwan with the aid of assessors, and the trial went on from day to day for a period of nearly three months from 26th January 1948 to 22nd April 1948. 406 witnesses were examined by the Court of the committing Magistrate and 357 witnesses by the Court of Session, because some of the witnesses examined by the committing Magistrate had died and others were not available and the evidence of still others was tendered for cross-examination. Besides the oral evidence the prosecution produced hundreds of exhibits and sub-exhibits to prove the complicity of the different accused. As a result of the trial all the assessors unanimously found the accused Abadhut Majhi not guilty of the offences charged against him and the learned Additional Sessions Judge accepted that finding and acquitted him. With regard to the remaining five accused, two of the assessors found them not guilty of the offences and this opinion was rejected by the learned Judge. One other assessor found the accused Gora

Chand Chakavarty not guilty under S. 120B but guilty under S. 467, Penal Code and the other accused guilty of all the charges against them. The learned Judge rejected the opinion of not guilty under S. 120B, Penal Code in favour of Gora Chand because the materials on the record do not afford any ground for differentiation between the charge under S. 120B and the charge under S. 467, Penal Code. The fourth assessor found all the accused except Abadhut Majhi guilty of all the charges against them and this opinion was accepted in its entirety by the learned Additional Sessions Judge. In the result the accused Santosh Kumar Bhattacharjya was sentenced to to rigorous imprisonment for one year and to pay a fine of Rs. 150 for each of the two charges under Ss. 120B and 420/109 and in default of payment of the aggregate fine of Rs. 300 to suffer rigorous imprisonment for three months more. Ghulam Rahaman and Mirza Ghulam Hossain were sentenced to rigorous imprisonment for one year and to pay a fine of Rs. 150 for each of the two charges under Ss. 120B and 467, Penal Code and in default of payment of the aggregate sum of Rs. 300 to suffer further rigorous imprisonment for a further period of 3 months but the sentences of rigorous imprisonment to run concurrently; Abdul Based and Gora Chand Chakravarty were similarly sentenced to rigorous imprisonment for six months and to pay a fine of Rs. 100 for each of the two charges under Ss. 120B and 467, Penal Code and in default of payment of the aggregate sum of Rs. 200 to suffer rigorous imprisonment for an additional period of two months, the sentences of rigorous imprisonment to run concurrently in each case. In awarding the sentences, the learned Judge very rightly took into consideration the impecunious condition of the accused and also the fact that they were helpless tools in the hands of the principal conspirator, the agent, named Gulzar Sheikh who had died. In the case of Gora Chand Chakravarty he rightly observed that this accused joined in the conspiracy at a very late stage and in the case of Abdul Based it was found that the number of instances in which he was implicated were fewer.

[9] Against the aforesaid order of conviction and sentence the present appeal has been filed by four viz., Ghulam Rahaman, Mirza Ghulam Hossain, Abdul Based and Santosh Kumar Bhattacharjya. Out of these four, again, Santosh Kumar Bhattacharjya filed an application from jail praying for an order that his name might be struck off from the category of the appellants as he did not desire to prosecute the appeal. This petition is dated 17th September 1948, and the signature of the petitioner is attested by the jail clerk, Sailendra Nath Biswas.

[10] Mr. Taluqdar appearing in support of the appeal has raised the following points: (1) that the trial has been vitiated by a misjoinder of charges because more than three offences have been tried together at the same trial, and in support of this point reliance has been placed upon the well-known case of *Subramania Iyer* v. *King-Emperor*, 28 I. A. 257:(25 Mad. 61 P. C.). (2) Even if the joinder of charges be permissible under the law the accused in the present case have been bewildered by a plurality of charges and the prospect of a fair trial was endangered by the production of a mass of evidence tending by its mere accumulation to induce an undue suspicion against the accused and consequently the trial is bad. In support of this proposition reliance was placed upon the decision of the Bombay High Court in the case of *Queen-Empress* v. *Fakirapa*, 15 Bom. 491 and the case of *Alimuddi Naskar* v. *Emperor*, 52 Cal. 253 : (A. I. R. (12) 1925 Cal. 341 : 26 Cr. L. J. 487). (3) The prosecution under S. 120B, Penal Code is invalid in the absence of a sanction under S. 196A, Criminal P. C. (4) The procedure of taking the specimen thumb impression in Court, as followed in this case, is not permissible under the law. (5) Undue importance has been placed upon the evidence of the finger-print expert which cannot be accepted unless it is corroborated by other evidence.

[11] On the merits of the case it has been argued that the evidence adduced by the prosecution is unworthy of acceptance as a large number of witnesses examined in this case were concentrated in a police camp and deposed at the dictation of the police and the evidence of the executive engineer, Ramnath Chatterjee (P.W. 256) shows that his measurements are unreliable as they were undertaken about a year after the earth work had been completed and after a substantial portion of the work done had been washed away by flood. It is urged that the deficiency in earth work found on measurement by the Executive Engineer is the foundation of the whole structure of the prosecution case and if that foundation is found to be rotten the whole case fails. We propose to deal with the points raised, one by one.

[12] On the first point about misjoinder of charges Mr. Chatterjee appearing for the Crown has strongly relied upon the decision of the Judicial Committee in the case of *Babulal Chukani* v. *Emperor*, 65 I. A. 158: 42 C. W. N. 621: (A. I. R. (25) 1938 P. C. 130 : 39 Cr. L. J. 452), in which Lord Wright made the following observations on S. 239 (d), Criminal P. C. :

"This clause is expressly an exception from S. 233 and enables a plurality of offences to be dealt with in the same trial. But it does not import either expressly

or by implication the limitation set out in S. 234 according to which not more than three offences, of the same kind committed within the space of 12 months can be tried together or the limitation contained in S. 235 (1) under which more offences than one committed by the same person can only be tried together, if they are in one series of acts so connected together as to form the same transaction in which case there is no specific limit of number. Nor is there any limit of the number of offences specified in S. 239 (d). The one and only limitation there is that the accusation should be of offences 'committed in the course of the same transaction . . . . . ' It is enough for the present case to say that if several persons conspire to commit offences and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of each and all the conspirators) these acts are committed in the course of the same transaction which embraces the conspiracy and the acts done under it. The common concert and the agreement which constitute the conspiracy serve to unify the acts done in pursuance of it."

[13] The charge of conspiracy as framed against all the accused in the present case runs as follows :

"That you between 29th April and 17th June 1943, at Purulia . . . . . and at other places agreed with one another and with others to do or cause to be done illegal acts, viz., to cheat the District Board of Burdwan and some of its officers by dishonestly inducing them to recommend payments to, pass and deliver moneys on false bills to Guljar Sheikh, since deceased, which is an offence under S. 420, Penal Code, in connection with the test Relief operations on Purulia-Ambalgram Road Section and also for that purpose to fabricate Muster Rolls and Pay Sheets and Abstracts by making false entries therein and committing forgeries of thumb impressions and signatures therein and also to fabricate Measurement Books and Abstracts of Pay Sheets, daily reports and other documents and the aforesaid illegal acts, viz., fabrication of Muster Rolls, Pay Sheets, Abstracts, etc., by making false entries, were done in pursuance of the said agreement and thereby committed an offence punishable under S. 120B, Penal Code."

[14] In furtherance of the dominant object of the conspiracy the appellants before us are alleged to have forged a large number of thumb impressions on pay sheets and for these specific acts of forgery, charges under S. 467, Penal Code, on 116 counts were framed against the appellant Ghulam Rahaman, charges under S. 467 on 105 counts were framed against the appellant Mirza Ghulam Hossain and charges under S. 467 on 15 counts were framed against the appellant Abdul Based. A sample of the specific charges under S. 467, Penal Code, is given below:

"that you on or about 8th May 1943 . . . . . forged a certain document purporting to be a valuable security to wit, a pay sheet Ex. 19 (5) by putting your finger impression Ex. 19 (5f) purporting to be the left thumb impression of Sadu Ram with intent that fraud may be committed upon the District Board and its officers by acting upon the pay sheet with a forged finger impression as a genuine one and thereby committed an offence punishable under S. 467, Penal Code, etc."

[15] It is remarkable that each of these specific charges which were 236 in number against the three appellants Rahman, Hossain, and Based specifically mentions the thumb impression which is alleged to have been forged, the pay sheet on which it was affixed and also the purpose for which it was forged. The community of purpose which "serves to unify" the specific acts and makes them parts of the same transaction is the intention to cheat the District Board and the *modus operandi* is the forgery of the thumb impressions of different persons on the different pay sheets. It is therefore clear that the present case comes under cl. (d) of S. 239, Criminal P. C. and we are bound by the decision of the Judicial Committee to hold that in such a case the limitation as to the number of offences contained in S. 234, Criminal P. C. does not apply. The first point about misjoinder of charges must therefore be overruled.

[16] The second point relates to the alleged bewilderment of the accused resulting from a plurality of charges. Mr. Taluqdar has argued that even if the joinder of so many charges is permissible under the law it is improper as it tends to prejudice the accused. In support of this proposition Mr. Taluqdar cited the decisions of *Queen-Empress* v. *Fakirappa*, 15 Bom. 491 and *Alimuddi Naskar* v. *Emperor*, 52 Cal. 253 : (A. I. R. (12) 1925 Cal. 341 : 26 Cr. L. J. 487). The Bombay decision does not really support the proposition for which it was cited, because in that case it was held that the different criminal acts charged against the four accused were not parts of the same transaction within the meaning of Ss. 235 and 239, Criminal P. C. of 1882 and it was held that the accused were likely to be bewildered by having to meet many "disconnected" charges. It was pointed out that the alleged criminal acts were "separated by distinct intervals of time and place" and that the "identity of circumstances" required to constitute one transaction was "impaired by differences of time, place and persons present". We have not been able to find in this decision any support for the view that even if the joinder of charges be permissible under the law, a plurality of charges is improper as it bewilders the accused. In the case of *Alimuddi Naskar* v. *Emperor*, 52 Cal. 253 : (A. I. R. (12) 1925 Cal. 341 : 26 Cr. L. J. 487) seven offences of murder were combined in one charge and Mukherji J. observed at p. 264 as follows :

"then first part of S. 233, Criminal P. C. lays down that for each distinct offence there shall be a separate charge. This provision is mandatory, and seven different charges should have been framed for these seven offences of murder which appear to have been huddled into the first count as it stands."

His Lordship then points out that the joinder of several charges was permissible in that case in view of the fact that the offences were committed in pursuance of one conspiracy. Still however, the accused were prejudiced by reason of the

fact that several charges of murder were huddled into one count as it appeared from the evidence that there was no foundation for the charges as regards most of the accused. The case before us avoids the mischief pointed out by Mukherji J. by including each offence of forgery in a separate count. The sample of the charge under S. 467, quoted above, shows that each offence was set out with sufficient clearness and precision against each accused and that there was no ambiguity or obscurity with regard to the accusation the accused had to meet. We have not been able to read the decision in *Alimuddi Naskar's case*, 52 Cal. 253 : (A. I. R. (12) 1925 Cal. 341 : 26 Cr. L. J. 487), as laying down the proposition that even in a case where the charges are absolutely clear and unambiguous and strictly in conformity with S. 233, Criminal P. C., the accused must be deemed to have been prejudiced merely by the plurality of counts, the prosecution case being that the appellant Ghulam Rahman (to take only one instance) committed 116 offences of forgery in pursuance of the conspiracy to cheat the District Board. We fail to see how the prejudice to him would have been less if he had been put on trial in 39 different cases with three counts in each. On the contrary we think that one trial for all the different counts set out with sufficient clearness and precision is less prejudicial and less embarassing from the point of view of the defence. We are accordingly unable to give effect to the second point raised by the appellants.

[17] The third point is that the prosecution under S. 120B, Penal Code, is invalid for want of sanction under S. 196A, Criminal P. C. It is admitted that sub-s. (1) of S. 196A, Criminal P. C. does not apply to the present case and the only question is whether it comes under sub-s. (2) which requires that the object of the conspiracy must be to commit either a non-cognisable offence or a cognisable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards. If the object of the conspiracy is a cognisable offence punishable with imprisonment for two years or upwards no sanction is required under S. 196A (2). From the charge of conspiracy set out above, it is clear that the principal object was to cheat the District Board which is an offence under S. 420, Penal Code and a cognisable offence punishable with imprisonment for 7 years. Such a case does not fall within the mischief of sub-s. (2) of S. 196A. It is true that in the charge of conspiracy it is also alleged that for the purpose of cheating the accused committed forgeries of thumb impressions which are offences under S. 467, Penal Code and non-cognisable offences. The mere fact that the subsidiary acts, which are means to the achievement of the principal object of the conspiracy, are non cognisable offences will not attract the operation of S. 196A (2) provided the principal or "dominant" object falls outside its scope. This principle was laid down by the Bombay High Court in the case of *Ram Chandra Rango* v. *Emperor*, A. I. R. (26) 1939 Bom. 129 : 41 Bom. L. R. 98 : 40 Cr. L. J. 579) and followed by a Division Bench of this Court presided over by Blank and Ellis JJ. in the case of *Paresh Nath* v. *Emperor*, 47 Cr. L. J. 710 : (A. I. R. (34) 1947 Cal. 32). The result of these authorities, with which we respectfully agree, is that there is difference between the object of a conspiracy and the means adopted to achieve that object and if the object is not hit by S. 196A (2) it does not matter whether that object is sought to be attained by non-cognizable offences. Accordingly we hold that S. 196A, Criminal P. C. does not apply to the present case and the third point fails.

[18] The fourth point of law raised in the appeal relates to the legality of taking specimen thumb impressions in Court. Mr. Taluqdar has argued that this procedure is wholly unwarranted and relied upon *Bazari* v. *King-Emperor*, 1 Pat. 242 : (A. I. R. (9) 1922 Pat. 73), where it was observed that there is no law which authorises a Court to ask the accused to do something which may have a tendency to incriminate them. It is remarkable that in this case the attention of the Court was not invited to S. 73, Evidence Act. This decision was dissented from by the same High Court in the cases of *Basgit Singh* v. *King-Emperor*, 6 Pat. 305 :(A. I. R. (15) 1928 Pat. 129:28 Cr. L. J. 850) and *Zahuri Sahu* v. *Emperor*, 6 Pat. 623: (A. I. R. (15) 1928 Pat. 103 : 28 Cr. L. J. 1028) in which reliance was placed upon S. 5 of Act XXXIII [33] of 1920. (Identification of Prisoners Act) which authorises a Magistrate for the purpose of any investigation under the Criminal Procedure Code to direct finger impression to be taken. In the case of *Public Prosecutor* v. *Kanda Sami*, 50 Mad. 462: (A. I. R. (14) 1927 Mad. 696: 27 Cr. L. J. 1251), the Madras High Court has dissented from the view taken by the Patna High Court in *Bazari's case*, (1 Pat. 242 : A. I. R. (9) 1922 Pat. 73) and held that it is not illegal or improper for a Magistrate to direct the finger print of the accused to be taken in the course of a criminal trial where he is charged with the offence of forgery of a finger print. The Bombay High Court has taken the same view as the Madras High Court in the case of *Emperor* v. *Ram Rao*, 56 Bom. 304 : (A. I. R. (19) 1932 Bom. 406 : 33 Cr.L.J. 666). In the case of *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Kiran Bala Dasi*, reported in 30 C. W. N. 373 : (A. I. R. (13) 1926 Cal. 531 : 27

Cr. L. J. 409), C. C. Ghosh and Duval JJ., it was held that the procedure of directing the specimen of the thumb impression of the accused to be taken was permissible under S. 5 of Act XXXIII [33] of 1920 as also under illustration (c) of S. 45, Evidence Act but no reference was made to the provisions of S. 73, Evidence Act. In *Kishori* v. *Emperor*, 39 C. W. N. 986 : (A. I. R. (22) 1935 Cal. 309 : 36 Cr. L. J. 921), there was a difference of opinion between Lort-Williams and Jack JJ. on the question whether S. 73, Evidence Act applied to such a case although it was not necessary for the learned Judges to decide the point. The obiter dictum of Lort Williams J. was to the effect that it was doubtful whether the word "person" in S. 73 applies to an accused person whereas the obiter dictum of Jack J. was to the effect that S. 73 does apply to the accused in a criminal trial. The question of the applicability of S. 73 to the accused in a criminal trial was decided in the affirmative by a Full Bench of the Rangoon High Court in *King-Emperor* v. *Nga Tun Alaing*, 1 Rang. 759 : (A. I. R. (11) 1924 Rang. 115 : 26 Cr. L. J. 108 F. B.) where it was pointed out that S. 342, Criminal P. C., does not prevent the application of S. 73, Evidence Act to a criminal trial. Young C. J. observed as follows:

"Section 342, Criminal P.C. relates only to oral questioning of the accused and does not prohibit a direction to him to make a thumb impression, any more than it prohibits a direction to him to face a witness in order that he may be identified."

Section 73, Evidence Act is quite general in its terms and applies to all cases and there is no exception in favour of an accused person. If there is nothing in the Criminal Procedure Code which precludes its application to criminal trials we do not see any reason why the plain language of the section should not be given its full effect. The operation of any other Act is, of course, expressly saved by S. 2, Evidence Act. We agree with Young C. J. that S. 342, Criminal P. C. does not make S. 73, Evidence Act inapplicable to criminal trials. We accordingly hold that the procedure followed in taking specimen thumb impressions under the direction of the Court is in strict compliance with S. 73 and S. 45, ill. (c), Evidence Act and also S. 5 of Act XXXIII [33] of 1920. The fourth point raised by Mr. Taluqdar is accordingly overruled.

[19] We have now to address ourselves to the question whether the evidence on the record, which is voluminous, is sufficient to justify the order of conviction and sentence. [After discussing the evidence and holding that the charges under S. 467, Penal Code and conspiracy were proved his Lordship proceeds.]

[20] There is an approver in the case whose name is Bholanath Majhi and who has been examined as P. W. 6. Before his examination in Court he made a confession which is Ex. 2. He has proved the association and common concert of the different accused for the purpose of cheating the District Board by forging thumb impressions and showing inflated numbers and figures in Muster Rolls and Pay sheets. From the discussion of the prosecution evidence on the heads of forgery and also of conspiracy we are satisfied that his evidence has been corroborated in material particulars by independent and reliable evidence. The best corroboration of the approver's evidence comes from the acts of the accused in affixing their thumb impressions against the names of fictitious persons and also against the names of living persons who never worked.

[21] On behalf of the appellants, Mr. Taluqdar strenuously argued that the evidence of the finger-print expert is unworthy of acceptance and in any case it is unacceptable without corroboration. On the first branch of this argument it is said that the so-called expert is not a real expert, and his omission to take photographs of the impugned thumb impressions has vitiated his conclusions. From the evidence of the expert it appears that he received training at the Finger Impression Bureau in Calcutta under the D. I. G. C. I. D. and passed the examination and since 1939 he has been serving in that department. At the time he examined the thumb impressions of this case he had nearly seven years' experience. With regard to photographs it appears that P. W. 242 confined his opinion only to those thumb impressions in which the ridges are quite clear and distinct and avoided any opinion with regard to thumb impressions which are blurred or smudged in which cases photographs are necessary. For example the expert did not give any opinion with regard to Exs. 26 and 29 which are blurred. This precaution eliminates the possibility of any mistake resulting from the omission to take photographs. We have carefully gone through the evidence of the expert and we have also compared some of the specimens with the disputed thumb impressions with the help of magnifying glasses to test the conclusions arrived at by the expert and without pretending to have any expert knowledge, we can say that we are in general agreement with the opinion of the expert. The learned advocates appearing for the defence also did not point out any thumb impression with regard to which the opinion of the expert might be said to be erroneous. In these circumstances we cannot reject the testimony of the expert as unacceptable. Mr. Taluqdar next contended that at all events, no conviction can be based upon the opinion of the expert without corroboration by

independent evidence, and relied upon the decision in the case of *Harendra* v. *Emperor*, 35 C. W. N. 863 : (A. I. R. (18) 1931 Cal. 441 : 32 Cr. L. J. 1001), where S. K. Ghose J., sitting with Lord. Williams J. observed as follows :

"I do not think that it can be laid down as a rule of law that it is unsafe to base a conviction on the uncorroborated testimony of a finger print expert. The true rule seems to be one of caution, that is to say, the Court must not take the expert's opinion for granted, but it must examine his evidence in order to satisfy itself that there can be no mistake, and the responsibility is all the greater when there is no other evidence to corroborate the expert."

We respectfully agree with the observations quoted above but in our judgment they only mean that the Court cannot delegate its authority to the expert but has to satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself as to the value of any other evidence. We have to point out, however, that in the case before us it cannot be said that there is no evidence to connect the accused except the evidence of the expert. From the evidence which we have discussed above it will appear that finger prints of imaginary persons and finger prints of persons who exist but never worked, were affixed to the pay sheets and the evidence of the expert was utilised only for the purpose of connecting the different accused with the different faked thumb impressions. Moreover the thumb impressions with which we have to deal are not casual or accidental ones but deliberately affixed for the purpose of giving a valid discharge to the Agent. We cannot also lose sight of the fact though the evidence of a handwriting expert is frequently found to be faulty, the evidence of a thumb impression expert is more reliable, because with regard to finger prints it has never been found that two finger prints are identical in all respects. As already indicated, we have for ourselves tested the opinion of the expert examined in this case and we accept his evidence as reliable.

[22] Mr. Taluqdar has also argued that the foundation of the prosecution case is the deficiency of the earthwork undertaken in the course of the Test Relief Operations and as the prosecution has failed to prove any deficiency the whole case fails. The evidence of the Executive Engineer (P. W. 256) Ram Nath Chatterjee has been placed before us in this connection and it has been pointed out that he took measurements about a year after the earthwork had been completed and after a considerable portion of the work done had been washed away by flood and rain. It is undoubtedly true that it appears from the evidence of P. W. 256 Ramnath Chatterjee who was the Executive Engineer from May 1939 to June 1944, that he submitted his report in July 1944 whereas the charges framed against the appellants cover the period beginning from 29th April 1943 and ending with 17th June 1943. It is also true that portions of the work done had been washed away by natural causes; but the Executive Engineer gave his opinion about deficiency after making an allowance of 18½ p. c. for sinking, wastage etc. But the more serious objection to this argument is that it does not form the subject-matter of any of the charges against any of the appellants. Far from being the foundation of the prosecution case it may be said that the prosecution case does not suffer in the least if this part of the evidence be totally excluded from consideration. From Ex. 1 (29) it appears that the remuneration of the Agent depended on the number of coolies employed by him and the prosecution case, as far as we have been able to understand it, is that the Agent used to draw larger amounts of money than were really due to him by falsely and dishonestly inflating the number of coolies and the amounts paid to them. The samples of the charges which we have quoted in an earlier part of the judgment will confirm this conclusion.

[23] The last argument of Mr. Taluqdar is that a large number of witnesses examined by the prosecution in this case were concentrated in police camps and they deposed at the dictation of the police and as such their evidence is unworthy of acceptance. This argument was dealt with by the learned Judge in his judgment and we have nothing to add to what has been said by him. As has been pointed out by the learned Judge these witnesses are illiterate and improvident village folk for whom suitable accommodation could not be found in the town. The learned Judge accepted only so much of their evidence as received corroboration from other reliable evidence on the record. In our opinion this was the most proper thing to do in the circumstances of the present case.

[24] A feeble attempt was made to prove that the approver's evidence as to the complicity of the appellants has not been corroborated by any independent evidence and that the appellants were not named by the approver in his confession Ex. 2. With regard to the former, it is sufficient to state that the prosecution evidence which we have already discussed will show that it does not bear a moment's scrutiny. The evidence adduced by the prosecution is so strong that the findings arrived at by the Court below can be supported even without any reference to the approver's evidence. With regard to the confession it is clear that it purports to give only a bare outline of the prosecution case without the details. As we have accepted the evidence of the finger print expert

and the evidence of other witnesses to have proved that the names of imaginary persons were introduced into the muster rolls and pay sheets it does not matter whether or not the appellants' names were mentioned in the confession.

[25] The result of the foregoing discussion is that the appellants have been rightly convicted. On the question of sentence we find that the learned Judge took into account, the fact that the appellants committed the offences under pressure of poverty and that they were mere tools in the hands of the principal offender Gulzar Sheikh who has died. In this view of the matter we do not think we shall be justified in interfering with the sentences passed by the Court below.

[26] Before parting with this case we desire to place on record our grateful appreciation of the assistance we have received from Mr. Harideb Chatterjee who has taken enormous pains in placing before us a very helpful analysis of the huge mass of documentary and oral evidence produced by the prosecution.

[27] The appeal is accordingly dismissed. The appellants will surrender to their bail bonds and serve out the remaining portion of their sentences. We have not specifically dealt with the case of the appellant Santosh Kumar Bhattacharjya because he has withdrawn his appeal.

Blank J.—I agree.

D.H. *Appeal dismissed.*

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* A. I. R. (37) 1950 Calcutta 74 *[C. N. 17.]*

HARRIES C. J. AND SINHA J.

Bhulan Singh and others—*Appellants* v. *Ganendra Kumar Roy Chowdhury*—*Respondents.*

A. F. O. D. Nos. 114, 115, 116 and 117 of 1949, Decided on 23rd August 1949, from decrees of Banerjee J., D/- 12th May 1949.

✠ Houses and Rents— Rent Control Legislation —Landlord "bona fide requiring premises for rebuilding"—Meaning of—Landlord honestly requiring premises for re-building is sufficient—*Premises* need not require re-building—Tests to be applied—Case where landlord requires premises for his own occupation and case where he requires it for rebuilding must be distinguished — West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), S. 11 (1) (f).

Proviso (f) to S. 11 (1) of the Act does not mention *premises* requiring rebuilding. What it states is that sub-s. (1) shall have no application if the *landlord* requires the premises *bona fide* for rebuilding. The state of the premises therefore is not an essential factor in the case. [Para 14]

The premises are *bona fide* required by the landlord for the purpose of rebuilding if the landlord honestly requires them for that purpose. The equivalent of the phrase "bona fide" is "honestly". It refers to the state of the landlord's mind. The landlord, therefore, will be entitled to possession as against the tenant if he establishes that he honestly requires the premises for rebuilding. It cannot be inferred that the landlord's intention was not honest merely because he had not got permits for cement and steel before he brought the ejectment suit against the tenant. If he honestly believed that steel and cement would be available the moment he was in a position to use such materials, then he would be acting perfectly honestly in bringing the suits. [Paras 15 & 19]

There is a considerable difference between what a landlord has to establish when he sets out to prove that he reasonably requires premises for his *own occupation* and when he sets out to prove that he requires premises bona fide for *rebuilding*. A man who could be satisfactorily accommodated in three or four rooms cannot possibly 'honestly' require twenty rooms for his occupation. Whether the landlord really needs the accommodation is a test of his honesty. [Paras 21 & 22]

If a landlord genuinely intends to rebuild an old and somewhat dilapidated premises and has the means to do so, it can be said that he *bona fide* requires the premises for rebuilding, because they cannot be rebuilt until he obtains possession and demolishes the existing structure. [Para 23]

H. N. Sanyal—for Appellants.
Atul C. Gupta—for Respondents.

Harries C. J.—These are four appeals from decrees of Banerjee J. sitting on the Original Side of this Court, made on 12th May 1949 in ejectment suits. The plaintiff-respondent in each of these appeals purchased certain premises known as No. 30 Kali Krishna Tagore Street in the year 1938. These premises were let to a number of tenants—including the four appellants. Notices to quit were served on each of the four appellants and on 14th January 1949 ejectment suits were filed by the plaintiff respondent against each of the four appellants. These suits were tried together by Banerjee J. sitting on the Original Side, as the facts were common to each case. The learned Judge eventually came to conclusion that the plaintiff was entitled to possession as against each of the four defendants and accordingly made decrees for ejectment in each suit. It is from these four decrees of ejectment that the present appeals have been filed.

[2] The short point involved in each of these appeals is whether having regard to the terms of S. 11 (1) (f). West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, the plaintiff landlord was entitled to possession as against these tenants.

[3] As I have said earlier, the plaintiff who was a trustee under a trust deed, acquired these premises in 1938. It is to be observed that the plaintiff is also the chief beneficiary under this trust. According to the evidence, the premises were old and in the year 1939 before the War and long before these Rent Control Acts were thought of, the plaintiff applied to the Corporation of Calcutta for sanction to rebuild these premises and in the month of March 1939 the Corporation accorded a preliminary sanction

to rebuild. In September 1939 the second World War broke out and it is not surprising to find that the plaintiff did not proceed with his intention to rebuild. However, he paid on 4th May 1942 an encroachment fee amounting to Rs. 5,500 which would entitle him to build certain projections to the proposed building which he otherwise could not have done, and sometime during the month of May the Corporation gave their final sanction to the rebuilding of these premises.

[4] Nothing however was done presumably owing to the War. On 27th March 1948, the Corporation of Calcutta issued a notice on the plaintiff and the occupiers drawing attention to the dangerous condition of this building and demanding that certain repairs should be done immediately, otherwise they would be done by the Corporation and charged to the plaintiff or the occupants.

[5] On 2nd April 1948, the plaintiff entered into an agreement with a firm of contractors know as Messrs. A. K. Sircar & Co. Ltd. to rebuild these premises in accordance with the plan sanctioned by the Corporation. In the month of June 1948 an application was made for a permit for the necessary cement and in September 1948 an application was made for the necessary steel which should be required for the construction of this building.

[6] It appears that permits could not be granted then and the plaintiff was told to make a further application in March of the following year. In consequence, rebuilding could not be commenced and on 8th November 1948, the plaintiff applied to the Rent Controller for sanction to bring ejectment proceedings against the tenants. The plaintiff alleged that he required possession as he bona fide required the premises for rebuilding. This permission however was refused by the Rent Controller.

[7] On 1st December 1948, the new West Bengal Premises Rent Control (Temporary Provisions) Act, 1948 came into force and under that Act no previous permission of the Rent Controller to bring a suit was necessary. Accordingly on 8th December 1948, notices to quit were served on the tenants and on 14th January 1949 four suits were filed against the four appellants on the original side of this Court. On 12th May 1949, these suits were decided and decreed in the manner I have indicated.

[8] Before Banerjee J. a number of witnesses were called and amongst them was an Engineer, a Mr. Satish Chandra Bose. According to this witness, the premises in question were between 100 and 150 years old and were in a dilapidated condition. He gave details of the disrepair and in his view the premises would probably collapse if extensive repairs were not undertaken forthwith.

[9] There was evidence given by the defendants-appellants that the premises were not so old. But even their evidence showed that these premises were in a state of serious disrepair. Further, notices had been served by the Calcutta Corporation calling upon the plaintiff or the occupiers to put these premises into repair.

[10] Banerjee J. who saw and heard the Engineer, Mr. Satish Chandra Bose, accepted his evidence. According to the learned Judge he gave his evidence very fairly and if his evidence is accepted, it is clear that these premises were in a state of very serious disrepair and were probably dangerous to the occupants.

[11] The defence of the tenants was that the plaintiff respondent was not entitled to possession because it could not possibly be said that he required these premises for rebuilding. Reliance was placed upon S. 11, West Bengal Premises Rent Control (Temporary Provisions) Act, 1948. That section in so far as it is material is as follows:

"(1) Notwithstanding anything contained in the Transfer of Property Act, 1882, the Presidency Small Cause Courts Act, 1882, or the Indian Contract Act, 1872, no order or decree for the recovery of possession of any premises shall be made as long as the tenant pays to the full extent the rent allowable by this Act and performs the conditions of the tenancy : Provided that nothing in this sub-section shall apply

* * * * *

(f) Where the premises are *bona fide* required by the landlord either for purposes of building or rebuilding, or for his own occupation or for the occupation of any person for whose benefit the premises are held."

[12] The tenants claimed that they could not be ejected as long as they paid to the full extent the rent allowable by the Act. There was no allegation that the rent had not been so paid. The plaintiff landlord however contended that S. 11 (1) afforded the tenants no protection against ejectment because the landlord *bona fide* required the premises for the purpose of rebuilding.

[13] Quite clearly, if the landlord *bona fide* required these premises for rebuilding then the tenants had no defence whatsoever. On the other hand, if the landlord failed to show such *bona fide* requirement then the tenants could not be ejected.

[14] It was suggested that this provision giving the landlord a right to possession, if he established that he required the premises *bona fide* for rebuilding, could have no application whatsoever unless the state of the premises was such that they required to be rebuilt. It is to be observed that proviso (f) to S. 11 (1) of the Act does not mention premises requiring rebuilding. What it states is that sub-s. (1) shall have no

application if the landlord requires the premises *bona fide* for rebuilding. The state of the premises therefore is not an essential factor in the case. However, it cannot be overlooked that in this case the learned Judge has accepted the evidence of a witness which showed that these premises were very old, dilapidated, dangerous and likely to fall if extensive repairs were not done to them quickly.

[15] It appears to me that the premises are *bona fide* required by the landlord for the purpose of rebuilding if the landlord honestly requires them for that purpose. The equivalent of the phrase "*bona fide*" is "honestly". It refers to the state of the landlord's mind. The landlord therefore will be entitled to possession as against the tenant if he established that he honestly requires the premises for rebuilding.

[16] The facts in this case show to my mind clearly that the landlord did honestly require these premises for rebuilding. They were bought in 1938 and even then they were obviously old and somewhat dilapidated. The following year an application was made to the Corporation for sanction to rebuild the premises. That application was made when no Rent Control Acts were in force and when a tenant would have no defence whatsoever to a suit for ejectment if notice to quit had been given. A preliminary sanction was granted and Mr. Sanyal has suggested that this application could not have been serious or *bona fide* because nothing was done. In the first place, before a building can be commenced safely the final sanction of the Corporation was required and it must be remembered that in September 1939, the Great War broke out. Even so the landlord moved in the matter because in the month of May 1942 he paid an encroachment fee of Rs. 5,500 and then obtained final sanction to build. Is it likely that a landlord would pay this very substantial sum of Rs. 5,500 if he did not honestly require these premises for rebuilding? The war dragged on its weary course and it is not surprising to find that the plaintiff respondent took no steps to demolish these premises and rebuild them. As is well known, labour was scarce, materials were scarce and building operations on any great scale were practically impossible during the later stages of the War and for some considerable time thereafter. On 27th March 1948, however, the plaintiff had a reminder that these premises were in a very bad state of repair because on that day the Corporation served a demolition notice on him. The plaintiff immediately took steps with a view to rebuilding and entered into a contract with a firm of contractors in April of 1948 and in June and September began to busy himself with a view to obtaining permits for steel and cement. The Corporation in September served another demolition notice on the plaintiff.

[17] The plaintiff failed to obtain permits for steel and cement and was told to wait a little time. He then took steps to eject his tenants.

[18] Mr. Sanyal has urged that bringing these ejectment suits must be *mala fide* because the plaintiff was not in a position to rebuild without permits for steel and cement. The evidence called on behalf of the plaintiff however is to the effect that cement and steel would be readily available if the plaintiff was in a position to use them immediately and he would use them if he was able to eject his tenants.

[19] I do not think it can be inferred that the plaintiff's intention was not honest merely because he had not got permits for cement and steel before he brought these ejectment suits. If he honestly believed, as I think he did, that steel and cement would be available the moment he was in a position to use such materials, then he would be acting perfectly honestly in bringing these suits. He had been so advised by his Engineer and I think that the plaintiff honestly believed that he could rebuild immediately the tenants were ejected.

[20] I can see nothing in the facts of this case to suggest that the plaintiff did not require these premises *bona fide* for rebuilding. He had, as I have said, bought them as old premises and immediately took steps to obtain sanction for building. What prevented the rebuilding was undoubtedly the War and now further difficulties are created by these Rent Acts. The plaintiff satisfied the learned Judge that he had the means to rebuild, that he had made the necessary contracts to rebuild and that he had every intention of demolishing the premises and erecting new premises thereon which would be very much more commodious and would produce five or six times the rent which he was then receiving from the premises. It appears to me upon those plain facts that the learned Judge was bound to hold that the landlord *bona fide* required these premises for rebuilding.

[21] It seems to have been argued in the Court below that the landlord could not *bona fide* require the premises for rebuilding unless rebuilding was absolutely necessary and that the disturbance of the tenants was absolutely necessary. It was pointed out that Courts have held that a landlord does not *bona fide* require premises for his own occupation unless he can show that the premises are necessary to him. It appears to me, however, that there is a considerable difference between what a landlord has to establish when he sets out to prove that he reasonably requires premises for his own occupa-

tion and when he sets out to prove that he requires premises bona fide for rebuilding.

[22] A landlord cannot possibly be said bona fide to require a twenty-roomed house for his occupation if three or four rooms would be ample for all his purposes. If in the circumstances he claimed that he bona fide required a twenty-roomed house for his occupation the Court would immediately hold that the requirement was not bona fide or honest, but was in fact dishonest. A man who could be satisfactorily accommodated in three or four rooms cannot possibly honestly require twenty rooms for his occupation. Whether the landlord really needs the accommodation is a test of his honesty.

[23] If a landlord genuinely intends to rebuild old and somewhat dilapidated premises and has the means to do so then I think it can be said that he bona fide requires the premises for rebuilding because they cannot be rebuilt until he obtains possession and demolishes the existing structure.

[24] There is a decision of this Court *Rekhabchand Doogar* v. *J. R. D'Cruz*, 26 C. W. N. 499 : (A. I. R. (10) 1923 Cal. 223), dealing with this phrase "bona fide requires." But it was a case dealing with the bona fide requirement of certain premises for the landlord's own occupation. At page 502, Buckland J., observed :

"It seems to me that the plaintiff has here based his requirement of the premises in suit on the ground of his wife's health because he feels that the other grounds would not be sufficient to entitle him to say that he bona fide requires the house for his own occupation which it is necessary that I should find for him to obtain an order for possession. From this point of view I am not at all satisfied as to the bona fides of the plaintiff. Without asserting that he is deliberately untruthful, he has to my mind strained the circumstances in his own favour to the utmost limit. I do not think it is enough that a plaintiff in order to defeat a plea under the Calcutta Rent Act should merely say that he desires the premises bona fide for his own occupation. The word in the Act is not 'desire' but 'require.' This in my opinion involves something more than a mere wish aud it involves an element of need, to some extent at least."

[25] I think this view of the meaning of the phrase "bona fide requires" when it is applied to a landlord's bona fide requirement of premises for his own occupation, is the true one. But it in no way affects my view of what the landlord has to establish when he alleges that he bona fide requires premises for rebuilding. It seems to me that he establishes bona fide requirement for rebuilding when the Court is satisfied on the facts placed before it that the landlord honestly desires to rebuild, has the means to rebuild and will rebuild if the possession is given to him. In considering whether the landlord genuinely and honestly desires to rebuild the Court will consider all the surrounding circumstances. Here it is very easy to come to the conclusion that the landlord honestly desires to rebuild because, as I have said, the premises are old, dilapidated and could be made to yield not Rs. 600 per month as they yield at present, but Rs. 3,500 per month if the premises were rebuilt. From these facts the Court could very easily come to the conclusion that there was an honest desire to rebuild, particularly when it finds that the landlord had taken steps to rebuild long before these restrictions were placed on landlords by these Rent Acts. On the evidence also, it is quite clear that the landlord was in a position to give effect to his desire and had done everything short of beginning the work of demolition in carrying out his purpose. Mr. Sanyal could, as I have already pointed out, only stress the fact that the landlord up to the present had failed to obtain permits for steel and cement. I am satisfied that the learned Judge was right in coming to the conclusion that there would be no difficulty with regard to steel and cement once the landlord was in a position to enter the premises and begin demolition work. It seems to me, upon these facts, that the learned Judge was right and indeed was bound to hold that the landlord bona fide required these premises for rebuilding and that being so, the decrees which he made in each case cannot be assailed.

[26] In the result therefore all the four appeals fail and I would dismiss them with costs. Certified for two counsel.

Sinha J.—I agree.

S.A.R. *Appeals dismissed.*

A. I. R. (37) 1950 Calcutta 77 *[C. N. 18.]*

SEN J.

Bishan Singh—Accused—Petitioner v. *Ram Nagina Singh — Complainant — Opposite Party.*

Criminal Revn. No. 517 of 1949, Decided on 23rd August 1949, against order of Magistrate, First Class, Howrah.

(a) Criminal P. C. (1898), S. 195 (1) (b) — Information lodged by accused—Complainant described therein as thief of bicyle — Complainant tried and acquitted of offence of theft — Complaint against accused for offence under S. 500, Penal Code—Complaint of Court trying complainant held was necessary.

Where in consequence of the information lodged by the accused, wherein the complainant was described as a thief of a bicycle, the complainant was tried for theft and acquitted and thereupon the complainant filed a complaint charging the accused not with the offence punishable under S. 211, Penal Code but with an offence punishable under S. 500, Penal Code:

Held that the Court could not take cognizance of the offence except upon a complaint made by the Court which tried the complainant: A. I. R. (4) 1917 Cal. 708

and 111 I. C. 433 (Cal.), *Foll.*; A. I. R. (8) 1921 Cal. 1 (S. B), *Disting.* [Para 4]

Annotation : ('49 Com.) Criminal P. C., S. 195, N. 3 Pts. 16, 26a, 26b.

(b) Penal Code (1860), S. 499, Exceptions 8 and 9 —Good faith—Accused lodging information against complainant—No specific charge of theft of bicycle —Accused merely stating that two persons told him that complainant had taken away bicycle—Accused held came within Exceptions.

Where the accused merely stated in the information lodged by him at the *thana* that two persons told him that the complainant had taken away the bicycle and he asked the police to do the needful to get back the bicycle without specifically charging the complainant of theft and the lower appellate Court came to a definite finding that the accused believed in the statements made by the two persons that the complainant had taken away his bicycle:

Held that on that finding alone the accused would be entitled to the benefit of the Exceptions 8 and 9 of S. 499. [Para 5]

Annotation : ('46-Man.) Penal Code, S. 499, Notes 11 and 12.

Debabrata Mukherjee—for Petitioner.

Purnendu Sekhar Basu—for Opposite Party.

Order. — This rule has been obtained by the petitioner who has been convicted by Sri R. C. Sen, Magistrate, First Class, Howrah, of having committed an offence punishable under S. 500, Penal Code and sentenced to pay a fine of Rs. 200, in default, to undergo rigorous imprisonment for three monhts. An appeal was taken to the Sessions Judge and it was dismissed. Thereafter this rule has been obtained.

[2] The facts briefly are as follows: The accused Bishan Singh went to a Grain Shop on a bicycle and leaving the bicycle outside he entered the Grain Shop. He borrowed the bicycle from one Mahadeo. When he came out he found the bicycle missing and was informed by some persons that a carpenter named Ram Nagina had taken the bicycle. Upon this information being received, he went to his superior officer, B. N. Railway, at Shalimar, and informed him of the incident. A document was written out and signed by Bishan Singh and it was taken to the Government Railway Police where it was treated as a first information report. The Police investigated the case and returned a charge sheet against Ram Nagina. He was tried and acquitted. Thereafter Ram Nagina filed a petition of complaint before the Sub-Divisional Magistrate, Howrah, in the following terms:

"The humble petition of complaint of Ram Nagina Singh most respectfully sheweth : (1) That a false and malicious case under S. 379, Penal Code was started by the Shalimar G. R. P (2) That as a result of the false and malicious statements made in the F. I. R. and those before the Court of Mr. S. K. Das Gupta, Magistrate, 1st Class, Howrah, the complainant has suffered loss of reputation. (3) That the said case has ended in acquittal on 22nd April 1948."

Thereafter there was a prayer that the Magistrate should issue process against Bishan Singh under S. 500, Penal Code. Bishan Singh was tried. The prosecution examined five witnesses, the defence examined none. I think it necessary in this case to set out the charge which was framed against the accused. It is in the following terms:

"That you, on or about 21st October 1947 at Shalimar G. R. P. defamed Ram Nagina by making a certain imputation concerning Ram Nagina namely describing him as a thief of a cycle by lodging an information at *thana* to that effect in consequence of which Ram Nagina was tried for theft and acquitted, having reason to believe that such imputation would lower the reputation of the said Ram Nagina and thereby committed an offence punishable under S. 500, Penal Code and within my cognizance, etc."

It is quite clear, therefore, that the defamatory statement with which the accused was charged was not any statement made to any one other than the statement made to the Inspector of the G. R. P., B. N. Railway at Shalimar which statement was treated as the First Information Report.

[3] The defence taken was that the accused acted *bona fide* when he made his report to the police and that his case came within Exception 8 of S. 499, Penal Code. It was also argued that the Ninth Exception operated because the statement was made in good faith for the protection of the interests of the person making it. The lower Courts have held that the allegation was not made in good faith and convicted the accused. The order of the Court below is attacked on two grounds. First, it was contended that the whole proceedings were without jurisdiction inasmuch as there was no complaint made against the accused with respect to this offence in accordance with the provisions of S. 195 (1) (b) read with S. 476, Criminal P. C. and the second line of defence was that the Court below had erred in holding that the accused was not protected by Excps. 8 and 9 of S. 499, Penal Code and also that the Court below has erred in taking into consideration many facts which were not evidence in the case.

[4] I shall consider the first contention. Learned advocate points out that if it be held that the accused made a false complaint at the thana knowing that there was no just or lawful ground for making such complaint, then the offence committed by him would be one punishable under S. 211, Penal Code and that as the offence had been committed in or in relation to a proceeding in Court no Court had jurisdiction to take cognizance of such offence except on the complaint in writing of the Court in which those proceedings had been held or of some other Court to which such Court was subordinate. Now, there can be no doubt that if it is held that the accused falsely charged Ram Nagina

with theft knowing that there was no just or lawful ground for making such charge he would be guilty of an offence punishable under S. 211, Penal Code. There can also be no doubt that if he is guilty of an offence punishable under S. 211, Penal Code, he would also be guilty of having committed an offence punishable under S. 500, Penal Code as there would be no ground for holding that he acted *bona fide*. I should like it to be clearly understood that I am not suggesting that the accused is guilty of an offence punishable under S. 211, Penal Code. I am acting on the assumption that he has committed such an offence. Now, if such an offence has been committed, it was committed in relation to or in connection with proceedings in Court because the matter went up for trial and Ram Nagina was acquitted. No Court could take cognizance of such an offence unless the Court in which the trial was held or a Court to which such Court was subordinate complained. Here, admittedly no complaint was lodged by any such Court but Ram Nagina adopted the device of filing a complaint charging the accused not with the offence punishable under S. 211, Penal Code, but with the offence of defamation. It was argued on behalf of the complainant, Ram Nagina, that with respect to the offence of defamation punishable under S. 500, Penal Code, the Court could take cognizance of it without any complaint being made in accordance with the provisions of S. 195 (1) (b)/476, Criminal P. C. and therefore there was no defect of jurisdiction in the present case which was a case of defamation. For this proposition, reliance was placed on a decision of a Special Bench of this Court in the case of *Satish Chandra* v. *Ram Dayal*, 24 C. W. N. 982:(A.I.R. (8) 1921 Cal. 1 : 22 Cr. L. J. 31 S. B.). On behalf of the petitioner, it was argued that if the offence committed be one punishable under S. 211, Penal Code, the Court cannot exercise jurisdiction and take cognizance of such offence by whittling it down and treating it as an offence punishable under S. 500, Penal Code and for this purpose reliance was placed upon the case of *Prafulla Kumar Ghose* v. *Harendra Nath*, 44 Cal. 970 : (A. I. R. (4) 1917 Cal. 708 : 18 Cr. L. J. 377) and the case of *Ibrahim* v. *Emperor*, 29 Cr. L. J. 849 : (111 I. C. 433 Cal.), where both the previous mentioned cases were considered. In my opinion the point for decision in the Special Bench case was whether a person making a false statement in Court could claim an absolute privilege. The point under discussion was not directly in issue but there were certain dicta which taken out of their context may lend support to the contention urged on behalf of the complainant Ram Nagina. There is a passage however at p. 1000 of that case, *Satish Chandra* v. *Ram Dayal*, 24 C.W.N. 982:(A. I. R. (8) 1921 Cal. 1:22 Cr. L. J. 31 (S.B.)) which is to this effect :

"Now, the maker of single statement may be guilty of two distinct offences, one under S. 211 (which is an offence against public justice) and the other, an offence under S. 499, wherein the personal element largely predominates. The Legislature has provided, in the Criminal Procedure Code, that the sanction of the Court where the offence is committed, is essential in the former case for the institution of criminal proceedings. In the latter case, the Legislature has omitted to make a similar provision."

Then the learned Judge goes on to say that in such latter case no sanction was necessary. I may mention that the first two cases mentioned above were decided prior to the amendment of the Code of Criminal Procedure whereby sanctions have been removed and in their place complaints in writing by the Court concerned have been introduced. In my opinion this passage indicates that where the offence substantially is one punishable under S. 211, Penal Code, sanction should be taken and that where offence complained of constituted a mere personal attack more than anything else, then no sanction is necessary. Rankin C. J. distinguished that case in the following terms :

"It is said that in a Full Bench case reported as *Satish Chandra* v. *Ram Dayal*, 24 C. W. N. 982 : (A. I. R. (8) 1921 Cal. 1:22 Cr. L. J. 31), the contrary of this doctrine was laid down. In that case, however, the view taken was that the offences defined in Ss. 211 and 499 were fundamentally distinct in nature."

Having regard to this decision, I am of opinion that the decision of the Special Bench is really not applicable having regard to the facts of the present case. I respectfully agree with the view of Sanderson C. J. and Richardson J., that if the contentions made by learned Advocate for the opposite party were to prevail, then the provisions of S. 195, Criminal P. C., may just as well be wiped out. It is worthy of note that these remarks were made both by Sanderson C. J. and Richardson J., separately and that Richardson J., was one of the Judges in the Special Bench case. If he held the view that what he had said before was not correct, one would have expected a learned Judge of his eminence to say so in the decision of the Special Bench, but he did not resile from the view taken in the earlier decision when he decided the later decision as one of the Judges of the Special Bench. In my opinion in a case of this description the Court could not take cognizance of the offence except upon a complaint being made by the Court which tried Ram Nagina. That being so, the entire proceedings are without jurisdiction, and they must be set aside and the accused must be discharged.

[5] Having regard to this decision it is not necessary for me to deal in detail with the trial

and judgment of the Courts below. I would point out however that the charge framed against the accused related solely to the statement made in the First Information Report. The statement is in the following terms :

"That I took the cycle from one of my carpenters named Mohadeb T. No. 401 to call my carpenter from the Grain Shop No. II who was taking rations today 20th October 1947. I kept the cycle near the gate of No. II Grain Shop Shalimar and entered into the Grain Shop to have a look as because I did not find my man outside.

After coming out from there I did not find the cycle there, I asked Gararam and Appanna Khalasi of Carriage Department who were waiting near the cycle for drawing their rations. Being asked they told me that one of your carpenters, blackish, bearded, named Ramnagina to look (sic) has taken away the cycle without asking anybody. They may be asked to identify the man if required.

The cycle bearing Registered No. 660 and the cycle No. 23885 and the holder of the same is Mohadeb Manna Carpenter T. N. 401 of Marine Workshop, Shalimar. The cycle is a Phillips one and the colour is black.

Will you be kind enough to investigate the matter and do the needful to get back the cycle ?

Thanking you in anticipation."

The statement by itself shows that the accused was acting in good faith. He was not charging Ram Nagina with theft. He merely stated that some persons told him that Ram Nagina had taken away the bicycle and he asked the police to do the needful to get back the cycle. There is no specific charge of theft against the accused in the statement. The Courts below, however, have come to the conclusion that there was a charge of theft and they arrived at this conclusion by referring to certain statements made by witnesses at the former trial. These statements are inadmissible in evidence except for the purposes of corroborating or contradicting the statements of the witnesses in the present case. The Court, however, dealt with all the evidence in the former case and also with the reasons given in the judgment of the former case and then came to the conclusion that the offence punishable under S. 500, Penal Code, had been committed. Now, the reasons of the judgement given in the former theft case are irrelevant and inadmissible in evidence. The trial by the Court below has been full of irregularities. In this connection, I would also mention that the lower appellate Court came to a definite finding that the accused believed in the statements made by two persons that Ram Nagina had taken away his bicycle. If that be so, I cannot see how the Court could hold that the accused was not acting *bona fide* when he lodged the First Information at the *thana*. On that finding alone he would be entitled to the benefit of the Exceptions 8 and 9 of S. 499, Penal Code.

[6] I set aside the order of conviction and sentence and direct the accused to be discharged. The fine, if paid, shall be refunded.

V.R.B. *Conviction and sentence set aside.*

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SEN J.

Panchanan Das — *Accused* — *Petitioner* v. *The King on the complaint of Upendra Nath Samanta* — *Opposite Party.*

Criminal Revn. No. 596 of 1949, Decided on 25th August 1949.

(a) Penal Code (1860), S. 441 — Tenant temporarily vacating premises for purposes of repairs on request of landlord — Landlord refusing to give back possession — No evidence that landlord has any intention to intimidate, insult or annoy or to commit offence — Action of landlord though unlawful does not amount to offence under second part of S. 441.

A person charged with trespass under the second part of S. 441, Penal Code, not only must remain on the premises unlawfully but he must remain on the premises unlawfully with certain intentions, namely, the intent to intimidate, insult or annoy or to commit an offence. [Para 4]

Where a landlord induces his tenant to vacate the premises temporarily for the purpose of repairs and the tenant vacates them but on return of the tenant the landlord refuses to hand over possession to the tenant, the action of the landlord in remaining in possession of the premises no doubt is unlawful but unless the prosecution establishes that the landlord had remained in possession with one of the intentions mentioned in the section, he cannot be held guilty under the second part of S. 441. [Para 4]

Annotation : ('46-Man.) Penal Code, S. 441, N. 1, 11 and 13.

(b) Criminal P. C. (1898), S. 439 — Retrial — Conviction under second part of S. 441, Penal Code, set aside in revision — High Court refused to order retrial under first part of S. 441, Penal Code, on ground that complainant had an effective remedy in Civil Court. [Para 6]

Annotation : ('46-Com.) Criminal P. C., S. 439, N. 25a.

M. M. Sen and Surathi Mohan Sanyal — for Petitioner.

Debabrata Mukherjee — for Opposite Party.

Order. — The petitioner has been convicted of having committed an offence punishable under S. 448, Penal Code and sentenced to pay a fine of Rs. 200, in default to undergo simple imprisonment for one month. Out of the fine, if paid, the complainant was to be awarded Rs. 150, as compensation. This order of conviction and sentence was passed by Sri B. Majumdar, Magistrate, Second Class, Howrah. An appeal by the petitioner to the Additional District Magistrate was dismissed. The petitioner has now obtained this Rule.

[2] The facts alleged by the prosecution are these. The complainant was a tenant of the accused petitioner in respect of a shop room at 8 Lal

Behari Basu Lane and he used this room for the sale of straw. On 3rd Aswin the accused landlord came to the complainant and asked him to vacate the room temporarily as he wished to repair it. Believing in the statement the complainant on 4th Aswin removed his articles from the room and went away. He returned on 14th Aswin and found that the room was being used as a garage by the accused who refused to vacate although requested to do so. The defence taken is that the complainant terminated his tenancy in the month of Sravan and gave up possession of the room in question to the accused. The complainant had a grocery shop in a room taken lease of from one Kirtibash. The landlord of Kirtibash brought a suit against Kirtibash and got orders to demolish this room. Upon this Kirtibash asked the complainant to give up the room and the complainant not having any other place to go to has brought this false case against the accused in order to get back the room which he had already surrendered. The learned Court below has disbelieved the accused's case regarding surrender and it has believed the complainant's case that the room was given up to the accused temporarily for the purpose of enabling the accused to repair it and that the accused is now refusing to give up possession.

[3] The question which arises is whether on these findings the accused can be held guilty of having committed the offence of criminal trespass. The charge against the accused as originally framed was in the following terms :

"That you on or about 30th September 1948 (corresponding to 14th Aswin) at Lal Behari Basu Lane, p. s. M. P. Ghora committed house trespass by entering into 8 Lal Behary Basu Lane used as a shop room by the complainant Upendra Nath Samanta with the intent to cause annoyance to him."

The charge clearly shows that what was being alleged against the accused was that he entered into the premises on 14th Aswin with intent to cause annoyance to the complainant and thereby committed the offence of criminal house trespass. The learned Magistrate found that the facts did not support the charge because the entry was not on 14th Aswin but on 4th Aswin. Realising this he says that the charge was not quite accurate and he says that the offence of the accused was that he lawfully entered into the shop room on 4th Aswin but committed criminal house trespass by remaining there after 14th Aswin although requested by the complainant to give up possession. On appeal the learned Additional District Magistrate also comments on this defective charge and he says that the entry of the accused on 4th of Aswin was lawful and that the offence of trespass was committed on 14th Aswin when he refused to vacate the premises. He holds that the intention of the accused on this date was to cause mischief and annoyance to the complainant. He further said that the defective charge had not caused any failure of justice and thereafter he upheld the order of conviction and sentence.

[4] It is clear from both these judgments that the crime with which the accused has been charged is that which has been defined in the second portion of S. 441, Penal Code. The section is as follows :

"Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,

is said to commit criminal trespass."

In order to establish the offence described in the second portion of S. 441, Penal Code, the prosecution must prove that the accused remained in the premises into which he has lawfully entered with the intention of intimidating, insulting or annoying the person in possession of the property or with intent to commit an offence. Learned advocate for the petitioner contended that as the petitioner had already entered upon the property he was in possession and therefore, there could be no criminal trespass because in order to establish criminal trespass it must be proved that some one else other than the trespasser was in possession of the property. He says that constructive possession would not do. I am not impressed with this argument. If a person lawfully enters into a room in the possession of another person and induces that person to go out and on return of that person forcibly prevents him from re-entering and remains in the room with the intention of insulting that person, then it cannot be said that the second part of S. 441, Penal Code, does not apply. When possession is spoken of in this section it means possession at the time of the entry. If a person is in possession at the time of the entry and some one enters into the premises with one of the criminal intents mentioned in the section he will have committed an offence punishable under the first part of the section. Again, if a person enters into the property of another and after such entry refuses to leave the property with any of the intents mentioned in the section, he will be guilty of criminal trespass although by his entry he has succeeded in dispossessing the person who was in possession of the property at the time of the entry. There are, however, other difficulties in the way of the prosecution. As I have said before the case which the accused had to answer was the case of lawful entry and

unlawfully remaining in the premises entered with one of the intents specified in the section. There is nothing in the charge to give notice to the accused that when the landlord entered the premises he had any of the intentions specified in the section. The judgment proceeds on the basis that the entry was lawful. In other words, the judgment proceeds on the basis that the landlord entered into the premises with none of the intentions mentioned in the section. If ten days after such entry he refused to vacate can it be said that he is remaining in the premises with the intention to intimidate, insult or annoy the person who was in possession at the time of the lawful entry or to commit any offence? I do not think it can. The lower appellate Court has held that the accused has continued in unlawful possession with a view to cause mischief and annoyance. There is no evidence that he had any intention to cause mischief nor is there any evidence to show that he had any intention to annoy. At worst his intention was to remain in the premises unlawfully but that by itself does not constitute an offence of trespass. A person charged with trespass under the second part of S. 441, Penal Code not only must remain on the premises unlawfully but he must remain on the premises unlawfully with certain intentions namely, the intent to intimidate, insult or annoy or to commit an offence. There is nothing to show that the accused had any of these intentions. That being so, the second part of S. 441, Penal Code can have no application.

[5] The order of conviction and sentence must therefore be set aside and the accused must be acquitted.

[6] I realise that it may be that the landlord when he entered originally on the premises got in there by committing the offence of cheating, but there is no such allegation either in the charge or anywhere else On the contrary, the specific finding is that the landlord when he entered the premises entered lawfully. I was asked to send the case back for a retrial on the footing that the offence committed was one described in the first part of S. 441, Penal Code, but I do not think that the accused should be harassed any further because the complainant has his remedy in the civil Court where this question could be more effectively dealt with.

[7] The rule is made absolute. The fine, if paid, shall be refunded.

K.S. *Rule made absolute.*

A. I. R (37) 1950 Calcutta 82 *[C. N. 20.]*

G. N. DAS AND K. C. CHUNDER JJ.

Jatindra Mohan Das—Petitioner v. *Khitipathinath Mitra and another—Opposite Party.*

Civil Rule No. 203 of 1949, Decided on 17th August 1949.

Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), Ss. 11 (3) and 18—Scope of— Proceedings between landlord and tenant—Decree passed under S. 18 — Sub-tenant claiming statutory tenancy under S. 11 (3) has no right to ask for variation or rescission of such decree—Fact that decree is consent decree is immaterial.

Section 18 vests a Court with certain powers and does not in any other way interfere with ordinary civil law as to the rights of parties. Under the ordinary civil law a person who is not a party to a suit or proceeding has no right to come to the Court to have the decree in that suit varied or rescinded. Section 11 (3) of the Act has conferred some independent rights on a sub-tenant, provided his case is within that section, to claim a statutory tenancy under the landlord under certain circumstances. But nowhere in this Act is there any provision which entitles such a sub-tenant to intervene in any proceedings between other parties, namely, the landlord and the tenant. Therefore, a sub-tenant has no right when he claims a staturory tenancy under S. 11 (3) to intervene and ask for a variation or rescission of the decree under S. 18. It is immaterial whether such a decree is a consent decree or a decree on contest or *ex parte*. [Para 2]

Sachindra Chandra Das Gupta and Sudhansu Kumar Bose—for Petitioner.

Chandra Sekhar Sen and Bhabesh Narayan Bose—for Opposite Party.

K. C. Chunder J. — The rule was issued on the application of the petitioner who was a sub-lessee of premises No. 81 Pataldanga Street, Calcutta. Opposite party No. 2 was the lessee and Opposite party No. 1 was the landlord. On 4th August 1947 the landlord gave a notice to his tenant opposite party No. 2 to quit by the last date of August 1947. As the premises were not vacated and peaceful possession delivered the landlord on 10th October 1947 brought a suit in ejectment at the Calcutta Court of Small Causes being Suit No. 5772 of 1947. The suit was decreed on 8th March 1948 by consent whereby the tenant agreed to vacate by 9th September 1948. Opposite party No. 2 brought a suit in the Original Side of this Court being Suit No 3079 of 1948 for a declaration that the ejectment decree was null and void. In that suit by consent it was ordered in September 1948 that opposite party No. 2, the tenant, was to give up vacant possession on 31st January 1949. It is said that opposite party No. 2 has now given up possession. On 24th January 1949 the petitioner who was the sub-tenant in portion of the premises filed an application before the Court of Small Causes purporting to be under S. 11 (3) and S. 18, West Bengal Premises Rent Control (Temporary Provisions) Act, 1948. It was not in execution as the petition itself shows,

as also the consent decree, that there was no execution proceedings pending at the time. The Small Cause Court Judge on 1st February 1949 dismissed the application on contest but without costs holding that the provisions of S. 18 did not apply to consent decree and further that the petitioner had no *locus standi* to file an application under S. 18 and thereby make a prayer before the Court for varying the decree which was passed on confession. Against this order a petition in revision was filed and the present rule was issued.

[2] The main question which arises in this case is whether the petitioner has *locus standi* to ask the Court under S. 18 of the Act to vary or rescind the decree itself. It appears that in a decision in the case of *Brojendra Kumar* v. *Moslem Ali Molla* in Civil Revn. Case No. 465 of 1949 dated 12th May 1949 : (A. I R. (36) 1949 Cal. 610), our learned brother Sen J. made an obiter dicta that a sub-tenant could come under S. 11 (3) for variation or rescinding of a decree under S. 18 of the Act. It was not necessary at all in that decision to go into that question. Section 18 is a section which vests a Court with certain powers and does not in any other way interfere with ordinary civil law as to the rights of parties. Under the orninary civil law, a person who is not a party to a suit or proceeding has no right to come to the Court to have the decree in that suit varied or rescinded and a perusal of S. 18 would be quite sufficient to show that no such new right was conferred by that section upon any third party. Section 11 (3) of the Act has conferred some independent rights to a sub-tenant, provided his case is within that section, to claim a statutory tenancy under the landlord under certain circumstances. But nowhere in this Act is there any provision which entitles such a sub.tenant to intervene in any proceedings between other parties, namely, the landlord and the tenant. How this right given to him is to be enforced by him or used as a shield by him is a matter with which we are not at present concerned and so we express no opinion. The sub-tenant not having any right to intervene in a proceeding between the landlord and the tenant under the Act itself if he claims any such right it must be under the general law and it may be at once said that under the general law he has no such right. Therefore a sub-tenant has no right when he claims a statutory tenancy under S. 11 (3) to intervene and ask for a variation or rescission of the decree. It is immaterial whether such a decree is a consent decree or a decree on contest or *ex parte*. We pass no opinion whether a consent decree can be varied or rescinded under this section at the instance of any of the parties to the suit.

[3] Under the circumstances the Small Cause Court Judge came to a right decision though his reasons may not be proper.

[4] The rule is, therefore, discharged. Each party to bear his own costs.

G. N. Das J.—I agree.

K.S. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 83 *[C. N. 21.]*

K. C. CHUNDER AND P. N. MITRA JJ.

Hazi Mahammad Ekramal Haque — Appellant v. *Province of Bengal through the Land Acquisition Collector—Respondent.*

A.F.O.D. No. 146 of 1945, Decided on 27th July 1949, against decree of Arbitrator appointed under the Defence of India Act for Calcutta and 24-Parganas at Alipore, D/-7th April 1945.

Land Acquisition Act (1894), S. 23 (1)—Requisition—Possession taken—No acquisition of ownership—Compensation has to be assessed on basis of fair market value for such interest—Fair rent must be notional fair rent of hypothetical tenant — Any restrictive executive order or Rent Control Order cannot be considered in assessing fair rent.

In case of a requisition where possession is taken, and there is not a complete acquisition of ownership of the land or buildings, compensation has to be assessed under S. 23 on the basis of fair market value for such interest in land. The relationship created is not that of a landlord and a tenant. Therefore, in deciding upon fair rent, for the purpose of S. 23, it must be a notional fair rent of a hypothetical tenant, and the assessment of such notional fair rent must be based upon a consideration which does not take into account restrictions temporarily imposed by any restrictive executive order or legislation like Rent Control Order, etc. The assessment in practice should be as if it was of a house of like nature let out for the first time to a tenant who is not compelled to take it up and by a landlord who is not compelled to let it out. The practical method will be to assess rent as if it was a new house for the first time let out on that date. [Para 5]

Annotation : ('46-Man.) Land Acquisition Act, S. 23, N. 8.

Atul Chandra Gupta and Shyama Charan Mitter —for Appellant.

Chandra Sekhar Sen, Jajneswar Majumdar and Smriti Kumar Roy Chaudhury—for Respondent.

K. C. Chunder J.—This is an appeal against a decision of the arbitrator in a proceeding in connection with the assessment of compensation for a building requisitioned under the Defence of India Act, S. 19, read with Defence of India Rules 81 (2) (bb) and S. 75A of the Rules.

[2] Briefly, the facts are that premises No. 9 Chittaranjan Avenue used to be occupied by the Central Government under a lease which expired on 29th July 1943. The lease had been granted on 28th July 1940, the rent reserved being Rs. 1950 monthly. On the expiry of the lease, the owner refused to renew the tenancy. Therefore on 30th July 1943, a requisition order was served requisitioning the building for the Controller of the Army Factory Accounts. The Collector offer-

ed Rs. 2200 as the monthly rent inclusive of the Corporation rates. This was refused by the landlord who claimed Rs. 3989 as the monthly rent inclusive of rates. He asked for a reference to arbitrator. The arbitrator came to the conclusion that as the House Rent Control Order had come into force from 26th June 1943, the landlord if he had let out the house on 30th July 1943, would not have been entitled to any increase in rent because of the limitations contained in S. 8 of that Order and he was not entitled to claim any increased rent. Under the Rent Control Order, then in force, only an increase of rent by ten per cent. could have been claimed if the creation of the tenancy was prior to 1st December 1941 which it was in the present case, but the right to increase rent was limited by S. 8 of the Order, and in the present case, in view of S. 8 no increase would have been possible in the rent and so the arbitrator came to the conclusion that Rs. 1950 should be the fair rent, and as the Collector had offered much more than that, he did not disturb what the Collector had done. The landlord has come up on appeal.

[3] It has been urged by Mr. Gupta on behalf of the appellant that the entire principle on which compensation has been assessed in the present case is wrong. According to him, the occupation will be for an indefinite period, and this fact is not contested. He urges that there is no provision in law, when once compensation has been assessed, for changing the same from time to time. This proposition cannot be contested.

[4] The requisitioning authority is not a tenant in law, and therefore whatever changes are introduced in the rent control legislation cannot beneficially affect the claimant. It is clear, and is not disputed, that in the present case the appellant wrote to the Collector after the West Bengal Act of 1948 came into force that the amount paid by the Government ought to be increased by forty per cent. because such was the increment allowed by that Act. The Collector rightly contended that the Government was not a tenant, and so the claim did not come within the West Bengal Act of 1948 and the amount awarded by the arbitrator would not be increased by any percentage.

[5] We are disposed to agree with the contention of Mr. Gupta after having heard both the Senior Government Pleader and the Junior Government Pleader. It is clear that in case of a requisition like this, where possession is taken, and there is not a complete acquisition of ownership of the land or building, compensation has to be assessed under S. 23, Land Acquisition Act on the basis of fair market value for such interest in land. The relationship created is not that of a landlord and a tenant. The requisition is by the Government by virtue of its suzerian position by which it can forcibly take away any one's property. It is the superior authority which the State possesses by virtue of which such compulsory acquisition or requisition is made. It does not bring about any actual relationship of landlord and tenant. Therefore the Rent Control Order or other legislation or executive order with the backing of legislation have very little direct bearing upon the assessment of compensation. The market value of the interest taken away from the owner has got to be assessed. In the present case, it is the possessory interest which has been taken by the State, and, therefore, in assessing the fair market value of the case, fair rent is taken to be a good criterion. It is as a criterion of market value of the interest that the question of fair rent arises, and the only bearing that the rent control legislation may have is in so far as it affects by way of fall in rent the income which will be obtainable from the property in a proper market by a landlord. Rent may be brought down by means of such legislation or Rent Control Order and, therefore, fair rent to be assessed may be lower, but it cannot for a moment be contended that the principle on which compensation should be assessed is the principle on which a rent controller will at that particular time assess that particular building or land to rent for the very simple reason that in spite of the Rent Control Order certain rights remain with a landlord e. g. in particular cases even mentioned in the Rent Control Order itself, a right of re-entry lies with the landlord but not in case of requisition. Then again a Rent Control Order being an executive order, though backed by legislation under the Defence of India Act, has only a very limited duration, or expected to have a limited duration, whilst the requisition made by the Government was for an indefinite period. It has now been made clear that it is for an indefinite period. This was done when the appellant communicated with the collector and wanted to know when possession was likely to be given over. He was informed that the occupation by the Government would be for an indefinite period. The owner not being in the position of a landlord does not become entitled to any increment of rent, as was rightly pointed out by the Collector, that subsequent legislation might entitle a landlord to. Therefore, in deciding upon fair rent, for the purpose of S. 23, Land Acquisition Act, it must be a notional fair rent of a hypothetical tenant, and the assessment of such notional fair rent must be based upon a consideration which does not take into account restrictions temporarily imposed by any restrictive executive order or legislation like Rent

Control Order etc. The assessment in practice should be as if it was of a house of like nature let out for the first time to a tenant who is not compelled to take it up and by a landlord who is not compelled to let it out. The practical method will be to assess rent as if it was a new house for the first time let out on that date. This will exclude all the trouble that has been introduced in the present case by taking into account the Rent Control Order which has very little direct bearing except in so far as it has or has not succeeded in bringing down the market rate of rent. Rule 75A, Defence of India Rules corresponds in England with Regulation 51 of Defence General Regulations, 1939, as to power to take possession of land, and as to compensation under the Defence Compensation Act, 1939, was passed in England. Unfortunately there was no such elaborate provision for compensation made in India as it was done in England in the Act of 1939 so that we have all this trouble. If requisitioning is to be made a permanent method of acquiring subordinate interest in property forcibly by the Government, it is desirable that the rate and method of compensation should be settled by appropriate legislation after careful consideration.

[6] In the present case, the arbitrator proceeded upon a wrong principle and his decision must be set aside and the matter is remitted back to him for further consideration and disposal of the case according to law in the light of the principles laid down and according to the evidence which both sides may have already adduced or may on remand adduce before him.

[7] The appellant will get his costs from the respondent : Hearing fee twenty gold mohurs.

P. N. Mitra J.—I agree.

V.R.B. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 85 *[C. N. 22.]*

G. N. DAS J.

Balaram Mandal — Defendant 2 — Appellant v. *Sahebjan Gazi and others — Respondents.*

S. A. T. No. 171 of 1949 (Taxing Matter), Decided on 22nd July 1949, against decree of Sub-Judge, Second Court, Alipur, D/-22nd December 1948.

(a) Court-fees Act (1870), S. 7 (iv) (c) — Suit for declaration of title and for permanent injunction restraining defendant from interfering with plaintiff's possession—Section 7 (iv) (c) applies—Plaintiff to put single valuation — Court has power to correct valuation under S. 8C (Beng.) — Court is however powerless where there is no objective standard of valuation—Where plaintiff is not before Court, Court to put valuation as best as it can.

The expression 'consequential relief' means some relief which follows directly from the declaration, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for and cannot be claimed independently of the declaration as a substantial relief.

Where the plaintiff has prayed for a declaration of his title and for a permanent injunction restraining the defendant from interfering with his possession the prayer for a permanent injunction is a consequential relief and court-fees are payable, under S. 7 (iv) (c), ad valorem on the amount at which the relief is sought to be valued in the plaint, subject to the provisions of S. 8C (Beng). Where the relief for declaration is valued at Rs. 1000 and the consequential relief by way of permanent injunction at Rs. 10 and a fixed court-fee has been paid on the former relief under Sch. II, Art. 17 (iii) and on the latter relief under S. 7 (iv) (d), the mode of valuation is entirely erroneous. The correct mode of valuation is to put a single valuation, the option of valuing the relief resting with the plaintiff. The High Court has power to correct a valuation improperly made by the plaintiff. However, as no rules under S. 9, Suits Valuation Act, have been framed the Court is powerless in cases where there is no objective standard of valuation. [Paras 9, 10 & 11]

The proper procedure in cases where the defendant and not the plaintiff is before the Court, is that the Court has to serve a notice on the plaintiff to appear in Court for the limited purpose of assessment of court-fees and if the plaintiff fails to appear in spite of such notice the Court is authorised to put a valuation as best as it can in the circumstances of each particular case: *Case law referred.* [Para 12]

Annotation : ('44-Com.) Court-fees Act, S. 7 (iv) (c) N. 21 and 23.

(b) Court-fees Act (1870), S. 17 (2) (Beng.)—Relief — Meaning of — Section 17 (2) not applicable to cases under S. 7 (iv) (c).

Relief contemplated by S. 17 (2) must be one in respect of which court-fees are independently payable under the Act. It cannot mean consequential relief which is not *per se* chargeable with court-fees. Section 17 (2) does not apply to cases arising under S. 7 (iv) (c) where a single valuation is to be put and ad valorem court-fees are to be paid on that valuation : 53 C. W. N. 340, *Dissent.* [Para 15]

Annotation : ('44-Com.) Court-fees Act, S. 17, N. 8, Pt. 3.

Bholanath Roy — for Appellant.

Chandra Sekhar Sen and J. Mujumdar, Government Pleader — for Government.

Judgment.— This is a reference under S. 5, Court-fees Act and raises three questions for decision, viz., (1) whether one valuation should be put under S. 7 (4) (c), Court-fees Act, subject to correction by the Court under S. 8 (c), Court-fees Act; (2) where the defendant and not the plaintiff is before the Court, what is the procedure to be followed for valuing the relief and (3) whether S. 17 (2), Court-fees Act as amended would apply to cases arising under S. 7 (4) (c), Court-fees Act.

[2] The substance of the plaint, as it appears from the report of the Stamp Reporter, is that the plaintiff brought the suit out of which the appeal arises on the allegation that the disputed property belonged to one Akazaddin and others. The plaintiff purchased the same by a registered deed of sale for a consideration of Rs. 1,000 from the said Akazaddin and others in the benami of his brother-in-law defendant 1. The plaintiff

went into possession of the property purchased by him. Later on, defendant 1 sold the disputed property to defendant 2 who in collusion with defendants 3 and 4, is trying to dispossess the plaintiff from the disputed property. The plaintiff accordingly brought the suit for declaration that defendant 1 is the benamdar of the plaintiff in respect of the disputed property and for a permanent injunction restraining the defendants from taking possession.

[3] The suit was valued at Rs. 1,000 for declaration and Rs. 10 for permanent injunction. A sum of Rs. 20 was paid on the prayer for declaration and a sum of annas 12 only was paid on the prayer for permanent injunction.

[4] The suit was decreed on contest.

[5] An appeal was taken by the contesting defendants to the lower appellate Court on the valuation as made in the plaint and court-fees were paid on the same footing. The appeal was dismissed by the lower appellate Court.

[6] The present appeal has been taken by defendant 2 and in the memorandum of appeal court-fees have been paid on the same basis as it was paid in the Courts below.

[7] The Stamp Reporter was of opinion that the mode of valuing the relief claimed in the plaint was contrary to S. 7 (4) (c), Court-fees Act and that court-fees should be paid on a single valuation of the reliefs claimed in the plaint. The learned advocate for the appellant having contested the view taken by the Stamp Reporter, the aforesaid points of difference were placed by the Stamp Reporter before the learned Registrar, Appellate Side, as a Taxing Officer of this Court.

[8] The learned Registrar was of opinion that the questions involved are substantial questions and require a decision by the Court. The matter was referred to me as a Taxing Judge under the orders of the learned Chief Justice for giving my decision on the points already mentioned. I shall first take up the first question submitted to me for decision.

[9] I have already stated the substance of the plaint which is to be found in the report of the Stamp Reporter and this is not disputed on behalf of the defendant appellant. The present case, therefore, is one where the plaintiff has prayed for a declaration of his title and for a permanent injunction restraining the defendant from interfering with his possession. The question is whether S. 7 (4) (c), Court-fees Act is attracted to the facts of this case. Section 7 (4) (c), Court-fees Act would apply if the suit is one for a declaration where a consequential relief is prayed for. The expression 'consequential relief' has been defined to mean some relief which follows directly from the declaration, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for and cannot be claimed independently of the declaration as a substantial relief: *Kalu Ram* v. *Babu Lal*, 54 ALL. 812: (A. I. R. (19) 1932 ALL. 485 F.B.), *Mt. Zeb Ul-Nisa* v. *Din Mohammad*, I. L. R. (1941) Lah. 451: (A.I.R. (28) 1941 Lah. 97 F B). Tested in this light, the prayer for a permanent injunction in the present case is a consequential relief. The present case, therefore, directly comes within S. 7 (4) (c), Court-fees Act. Court-fees are, therefore, payable ad valorem on the amount at which the relief is sought to be valued in the plaint, subject to the provisions of S. 8 (c), Court-fees Act.

[10] In the plaint, the plaintiff has valued the relief for declaration at Rs. 1,000 and the consequential relief by way of a permanent injunction at Rs. 10. A fixed court-fee of Rs. 20 has been paid on the former relief under Sch. II, Art. 17 (iii), and on the latter relief under S. 7 (4) (d), Court-fees Act. Such a mode of valuation is entirely erroneous and the court-fees paid are not in terms of the statute. The correct mode of valuation of the relief in such a case is to put a single valuation, the option of valuing the relief resting with the plaintiff. This was held by this Court in the case of *In re Kalipada Mukherji*, 58 Cal. 281 : (A. I. R. (17) 1930 Cal. 686). This is conceded by the learned advocates appearing on both sides. Mr. Roy, appearing for the appellant, however, contends that unless the plaintiff values his relief properly the proper fee payable on the plaint and on the memorandum of appeal cannot be ascertained, and as there is no objective standard of valuation in the present case, the Court is not in a position to value the same. In the present case, the plaintiff was served with a copy of the order of this Court specially drawing his attention to the fact that the plaint may have to be valued in this Court under S. 7 (4) (c), Court-fees Act. The plaintiff has chosen not to appear in pursuance of the notice.

[11] The power of this Court to correct a valuation improperly made by the plaintiff was recognised in the case of *Narayangunj Central Co-operative Sale and Supply Society Ltd.* v. *Mafizuddin Ahmed*, 61 Cal. 796 : (A. I. R. (21) 1934 Cal. 448 F. B.), and is now embodied in S. 7 (4) (c), Court-fees Act as amended by S. 7 (2), Bengal Act, (Act VII [7] of 1935), 1935. As pointed out, however, in the case of *Star Trading and Investment Ltd.* v. *Ashutosh Mukerjee*, 43 C. W. N. 1116 : (A. I. R. (26) 1939 Cal. 627), as no rules under S. 9, Suits Valuation Act have been framed, the Court is powerless in cases where there is no objective standard of valuation. If the question had arisen in the trial Court.

the Court might have acted under O. 7, R. 11, Civil P. C. In the present case, however, the plaintiff is a respondent and has not appeared before the Court in spite of service of notice. The question, therefore, is whether the Court is powerless in these circumstances. As the plaintiff has not availed himself of the option given to him by law of valuing the relief, in my opinion, the Court has to value the same as best as it can. In cases arising under S. 7 (4) (c), Court-fees Act, the value for the purpose of jurisdiction follows the valuation for the purpose of court-fees. In the case of *Sailendra Nath* v. *Ram Chandra*, 25 C. W. N. 768 : (A. I. R. (8) 1921 Cal. 84), the plaintiff valued his suit at Rs. 1,010 for the purpose of jurisdiction. The Court [?] to trial on that footing. The decree for costs on a valuation of Rs. 1,010 was passed in favour of the plaintiff. In my opinion, in the special facts of this case, the value of the relief cannot be put at a sum less than Rs. 1,010. As such the value of the relief in the present case must be deemed to be Rs. 1,010 under S. 7 (4) (c), Court-fees Act. This disposes of the first question which was referred to me for my decision.

[12] As regards the second question, the proper procedure in cases where the defendant and not the plaintiff is before the Court, the Court has to serve a notice on the plaintiff to appear in Court for the limited purpose of assessment of court-fees, and if the plaintiff fails to appear in spite of such service of notice, the Court is authorised to put a valuation as best as it can in the circumstances of each particular case.

[13] Coming to the third question, the material provision is S. 17 (2), Court-fees Act which runs as follows:

"Where more reliefs than one based on the same cause of action are sought either jointly or in the alternative, the fee shall be paid according to the value of the relief in respect of which the largest fee is payable."

[14] In the case of *In re Kalipada Mukherji*, 58 Cal. 281: (A. I. R. (17) 1930 Cal. 686), Rankin J. was of opinion that in cases coming within S. 7 (4) (c), Court-fees Act, there is only one relief and court-fees have to be paid on a single valuation which it is the right and duty of the plaintiff to put in the plaint. In the case of *Mohitosh Mukherjee* v. *Satyanarain Chatterjee*, 53 C.W.N. 340, which arose out of a suit for a declaration that two deeds of gift and settlement were invalid as being fraudulent and collusive and for khas possession, Sen J. held that the case came within S. 7 (4) (c), the relief for possession being ancillary to the relief for declaration. Sen J. then proceeded to observe that the relief for declaration and the relief for khas possession are two reliefs based on the same cause of action and as such the fee shall be paid according to the value of the relief in respect of which the largest fee is payable. The view taken by Rankin J. in the case of *In re Kalipada Mukherji*, 58 Cal. 281 : (A. I. R. (17) 1930 Cal. 686), was held to have become obsolete in view of the amendment of S. 17, Court-fees Act by S. 12, Bengal Act, (Act VII [7] of 1935), 1935.

[15] The answer to the question formulated really depends on the meaning of the word 'relief' occurring in that clause. In my opinion, the second part of the clause clearly shows that the relief contemplated by the clause must be one in respect of which court-fees are independently payable under the Act. It cannot mean consequential relief which is not per se chargeable with court-fees. The view taken by Sen J. does not seem to be correct. In my opinion, S. 17 (2) does not apply to cases arising under S. 7 (4) (c), Court-fees Act where a single valuation is to be put, and ad valorem court-fees are to be paid on that valuation.

[16] The defendant-appellant must pay the costs of this reference, hearing fee being assessed at one gold-mohur.

D.H. *Answers accordingly.*

A. I. R. (37) 1950 Calcutta 87 *[C. N. 23.]*

G. N. DAS AND GUHA JJ.

Kally Nath Dutta — Defendant 3 — Petitioner v. *Shew Bux Mohata & another, Plaintiffs and others, Defendants — Opposite Party.*

Civil Rule No. 474 of 1949, Decided on 19th July 1949, from order of fourth Addl. Sub-Judge, Alipur (24-Paraganas), D/- 15th March 1949.

(a) Evidence Act (1872), S. 106 — Plaintiff claiming actual receipts as mesne profits — Burden of proof lies on defendant — Plaintiff claiming mesne profits which defendant ought to have received — Burden rests on plaintiff.

Where the plaintiff claims mesne profits the burden of proof would depend on the nature of the claim made by the plaintiff. If the plaintiff limits his claim to the actual profits which the defendant is said to have received obviously in such a case, as the defendant is the person who had special knowledge of the actual receipt of profits received by him, the burden would lie on him to prove the actual receipts made by him. If, on the other hand, the plaintiff wants to make the defendant liable for the profits which the defendant ought to have received by the use of ordinary diligence in the event it cannot be said that that is a matter within the special knowledge of the defendant and the burden of proof would rest on the plaintiff to prove the probable receipts in respect of the disputed property : A. I. R. (12) 1925 Mad. 145, *Rel. on*; 8 Cal. 343, *Disting* ; A. I. R. (30) 1943 Pat. 69 and A. I. R. (30) 1943 Cal. 125, *Ref.* [Para 4]

Annotation : ('46-Man.) Evidence Act, S. 106, N. 2.

(b) Civil P. C. (1908), S. 115 (c) — Material irregularity — Plaintiff claiming mesne profits — Claim not limited to actual profits received by defendan

—Direction of Court to Commissioner to ask defendant to lead evidence in first instance—Case comes under section.

The Court acts with material irregularity in the exercise of its jurisdiction when it adopts a wrong procedure in the course of the trial which materially affects the decision of the case. Thus, where the plaintiff claiming mesne profits does not limit his claim to the actual profits received by the defendant, the direction of the Subordinate Judge to the Commissioner to ask the defendant to lead evidence in the first instance materially affects the determination of the question of mesne profits and the case comes within S. 115 (c) : A. I. R. (36) 1949 P. C. 156, *Foll.* ; A. I. R. (36) 1949 P. C. 239, *Expl.* ; *Case law discussed.* [Paras 8 and 10]

Annotation : ('44-Com.) Civil P. C., S. 115, N. 12 Pt. 35.

(c) Civil P. C. (1908), S. 115 (c) — Error of law—Jurisdiction of Court not involved — High Court cannot interfere under section.

Only in those cases where in the exercise of jurisdiction the Court acts illegally or with material irregularity that the High Court can interfere under S. 115 (c); a mere error of law not involving the jurisdiction of the Court is not enough. [Para 10]

Annotation : ('44-Com.) Civil P. C., S. 115 N. 13.

Chandra Sekhar Sen and Syamadas Bhattacharyya — for Petitioner.

Apurba Charan Mukherjee and Sunil Kumar Ghose (for Nos. 1 and 2); Satindra N. Roy Choudhury and Sovendra Madhab Basu (for Nos. 3, 4 and 7) and Lala Hemanta Kumar and Monohar Saha (for No. 6) — for Opposite Party.

G. N. Das J. — This rule was obtained by defendant 3 against an order of the learned Subordinate Judge dated 15th March 1949 in which he gave certain directions in the matter of the ascertainment of mesne profits, to a Commissioner appointed for this purpose. In 1944 a suit for declaration of the plaintiff's title and for recovery of possession was instituted against several defendants. Defendants 1, 2 and 6 were the trustees to the estate of one Sm. Sekheswari. Defendants 3, 4 and 5 were in possession of distinct plots under the trustees. On 20th March 1948 the suit was decreed, the plaintiff's title was declared and a decree for recovery of possession and for mesne profits was passed in favour of the plaintiff. Against the decree defendant 3 preferred an appeal to this Court and obtained Civil Rule No. 872 (F) of 1948 for a stay of the decree for delivery of possession and for ascertainment of mesne profits. This rule was heard on 23rd August 1948. An order was made by this Court directing stay of delivery of possession on certain conditions. The order directed that the Subordinate Judge should make a rough estimate of the mesne profits in respect of the property which was in the possession of defendant 3 from the date of suit, that is, 13th September 1944 till August 1950. If the security was furnished in respect of this sum the decree for delivery of possession would be stayed. There was a further order made in the rule to the effect that thereafter the Subordinate Judge would proceed to an ascertainment of the mesne profits for the entire period from 13th September 1944 till August 1950 and after such ascertainment the order requiring security to be furnished would be liable to be varied. After the matter went down to the Court below the plaintiff filed a petition stating that the mesne profits should be calculated on the basis that the profits of a *cotta* of land was Rs. 10 per month. On this footing the plaintiff stated that the probable mesne profits would come up to Rs. 4,08,000. To this petition defendant 3 filed a petition of objection wherein he mentioned the profits received by him, and that the profits so received by him were largely due to the improvements made by him and which cost him a sum of about Rs. 2,C0,000. After making deductions for interest on such cost the defendant stated that the nett profits would be about Rs. 500 per annum. In the alternative the defendant stated that the probable rent of the disputed land would be Rs. 6 per *cottah* per annum. By an order dated 15th February 1949 the learned Subordinate Judge made a rough estimate. He took the view that the land in the possession of defendant 3 would be about 6 bighas, the probable letting value would be Rs. 12 per *cottah* per annum and on that footing he calculated the probable mesne profits for the entire period, roughly six years, at the total sum of Rs. 8640. Thereafter the Court proceeded with the work of ascertaining the mesne profits of the land. A commissioner was appointed to ascertain the same. The commissioner in the course of his enquiry prayed for directions as regards the question as to the person on whom the onus lay to prove the amount of mesne profits. The learned Subordinate Judge dealt with this matter by order No. 109 dated 15th March 1949. In the course of his order the learned Subordinate Judge stated that the defendant judgment-debtor who was in possession was to lead evidence first to enable the commissioner to arrive at a conclusion as regards the amount of mesne profits. In case defendant 3, the judgment-debtor, did not lead such evidence the commissioner was to take further directions from the Court. On behalf of defendant 3, the judgment-debtor, a prayer was made that in case he was called upon to lead evidence first he might be allowed the opportunity of adducing rebutting evidence. The learned Judge did not pass any final orders on this petition but held it over for further direction in case the question arose at a later stage. It is the propriety of this order which is called in question in this Rule on behalf of the petitioner.

[2] Mr. Sen appearing on behalf of the petitioner has contended that the learned Subordinate Judge adopted a wrong procedure by calling upon defendant 3 to lead evidence first. His

contention is that in a case like the present the burden of proof is initially on the plaintiff and it is the plaintiff who is to lead evidence first. He has referred us to some cases bearing on this question.

[3] Mr. Apurba Charan Mukherji appearing for the decree-holders has raised two contentions. In the first place he contends that the learned Subordinate Judge was right in holding that the burden of proof lay on the defendant judgment-debtor who was in wrongful possession. He has referred us to a decision of this Court in the case of *Brojendra Coomar Roy* v. *Madhub Chunder Ghose*, 8 Cal. 343. He has also contended that even assuming that the learned Subordinate Judge was wrong in holding that the burden of proof lay on the defendant, that is at best an error of law and this Court is powerless to interfere with the order passed by the Court below in revision.

[4] We shall first deal with the first question, viz., whether in a case like the present it was for the plaintiff to adduce evidence first on the ground that the burden of proof lies on him. The word mesne profits is defined in S. 2, cl. (12), Civil P. C., which runs thus:

"'Mesne profits' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

A plain reading of the clause shows that the plaintiff is entitled to receive from the person in wrongful possession either the profits received by such a person or the profits which such a person might have derived by the exercise of ordinary diligence. The burden of proof would depend on the nature of the claim made by the plaintiff. If the plaintiff limits his claim to the actual profits which the defendant is said to have received, obviously, in such a case, as the defendant is the person who had special knowledge of the actual receipt of profits received by him, the burden would lie on him to prove the actual receipts made by him. If, on the other hand, the plaintiff wants to make the defendant liable for the profits which the defendant ought to have received by the use of ordinary diligence in the event it cannot be said that that is a matter within the special knowledge of the defendant and the burden of proof would rest on the plaintiff to prove the probable receipts in respect of the disputed property. Under S. 101, Evidence Act the burden lies on the person who would fail if no evidence is given on either side. This is subject to a qualification to be found in S. 106, Evidence Act. The observation of Field J. in the case of *Brojendra Coomar Roy* v. *Madhub Chander Ghose*, (8 Cal. 343) quoted above is to the effect that as the defendants were in possession as wrong-doers it lay upon them to show what profits were realised by them. This observation has got to be read in the light of the facts of that case. In that case a claim was made in regard to mesne profits in respect of a certain taluk of which the defendant was in wrongful possession. The defendant produced certain account papers and wanted to prove to the Court the actual receipts which came into his hands. The account papers were found to be unreliable. It is under these circumstances that Field J. made the above observation. It cannot be said that this observation was intended to lay down a general rule applicable to all cases where the plaintiff claims mesne profits from the defendant. *Brojendra Coomar Roy's case*, (8 Cal. 343) was considered in the case of *Ramakka* v. *Negasam*, 47 Mad. 800: (A. I. R. (12) 1925 Mad. 145). That was a case which arose out of proceedings by way of restitution, the defendant claiming mesne profits from the plaintiff in respect of the property which was taken possession of by the plaintiff in course of execution. In that case a question arose as to who would begin first. Their Lordships of the Madras High Court after referring to the provisions of O. 18, R. 1, Civil P. C., proceeded to state that in the enquiry held by the commissioner the defendant was to lead his evidence in the first instance and thereafter the plaintiff would lead his evidence. It may be pointed out that in that case the defendant was the person who was claiming mesne profits as against the plaintiff who was in wrongful possession. The case therefore is an authority for the proposition that the person claiming mesne profits has to lead evidence first. In the cousre of their judgment their Lordships draw a distinction between two classes of cases which may arise in the matter of determination of the amount of mesne profits. Their Lordships point out that in case the plaintiff claims the actual receipts made by the defendant as mesne profits, by virtue of the provisions of S. 106, Evidence Act, the burden would lie on the defendant, that is the person in wrongful possession to lead evidence first but where the plaintiff makes a claim in respect of profits that might have been realised by the defendant by the exercise of reasonable care the burden of proof would lie on the plaintiff to show the probable profits which the defendant might have received. We entirely agree with the view taken by the Madras High Court. This view found favour with the Patna High Court in the case of *Ram Kishun Lal* v *Abu Abdullah*, 21 Pat. 735:(A. I. R. (30) 1943 Pat. 69). Mr. Sen also drew our attention to the case of *Province of Bengal* v. *Sm. Purna Sashi*

Chaudhurani, 75 C. L. J. 479:(A. I. R. (30) 1943 Cal. 125). In that case Nasim Ali J. with whom the learned Chief Justice agreed observed that where the plaintiff claims probable profits of the land the burden lies on the plaintiff to prove what those probable profits are.

[5] On a consideration of the cases referred to above we hold that in the present case the burden lies primarily on the plaintiff to prove his claim. As such the plaintiff is to begin first. Mr. A. C. Mukherji did not say in answer to a question by the Court that the plaintiff would limit his claim to the actual profits which the defendant received. The first contention raised on behalf of the petitioner must therefore succeed.

[6] We have now to consider the second objection raised by Mr. Mukherji. This concerns the powers of this Court to interfere in revision under S. 115, Civil P. C. which runs thus :

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

Mr. Sen contends that the present case is covered by the observations of Sir John Beaumont in the case of *N. S. Venkatagiri Ayyangar* v. *Hindu Religious Endowments Board, Madras*, 53 C. W. N. 458 : (A. I. R. (36) 1949 P. C. 156), towards the end of the judgment at p. 461. In order to appreciate the observation to which we shall refer presently it is necessary to state the facts which came up for decision in that case. In that case a question arose as to the construction of a will. This had bearing on the question whether the temple therein in dispute was a private temple or a public temple. The High Court was of opinion that the learned District Judge was under a serious error in construing the terms of the will. On this ground the High Court interfered with the decision of the learned District Judge in revision and proceeded to give a decision on their view of the construction of the will. Before the Judicial Committee a question was raised as to whether the High Court acted with jurisdiction in setting aside the decision of the District Judge under S. 115, Civil P. C. The Judicial Committee was of opinion that the High Court had exceeded their jurisdiction in interfering with the decision of the District Judge on the question of the construction of the will. Their Lordships in the course of their judgment referred first to the following passage in the case of *Rajah Amir Hussan Khan* v. *Sheo Baksh Singh*, 11 Cal. 6:11 I. A. 237 (P. C.) viz. :

"Whether they decided rightly or wrongly they had perfect jurisdiction to decide the question which was before them and they did decide it."

Their Lordships pointed out that if the decision is erroneous in law that fact of itself did not entitle the High Court to interfere in revision because the Court has jurisdiction to decide a point rightly or wrongly. It is to be noted that the point before the Judicial Committee in the case of *Rajah Amir Hussan Khan*, (11 Cal. 6: 11 I A. 237 P. C.) was a question of *res judicata* and did not concern the jurisdiction of the Court either in entertaining the suit or in proceeding with it; the Court had jurisdiction to go into the question of *res judicata* if in exercise of its jurisdiction the Court made a mistake on the point of law, that was not a ground which empowered the High Court to interfere in revision. Their Lordships then proceeded to refer to the observations in the case of *Balakrishna Udayar* v. *Vasudeya Aiyar*, 44 I. A. 261 : (A. I. R. (4) 1917 P. C. 71), to the effect that

"S. 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it, the section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

The Judicial Committee there make the following observation in construing S. 115 (c) :

"that in exercising jurisdiction the Court has not acted illegally, that is in breach of some provision of law, or with material irregularity, that is by committing some error of procedure in the course of trial which is material so that it may have affected the ultimate decision."

Mr. Sen contends that the Judicial Committee explained the word illegal in cl. (c) as inclusive of cases where there is a breach of some provision of the law.

[7] In our opinion having regard to the context, it cannot be said that their Lordships were inclined to take the view that any error of law which the Court may commit in exercising its jurisdiction would arm this Court with powers to interfere with the decision of the Court below.

[8] In the present case the learned Subordinate Judge adopted a wrong procedure in the matter of the ascertainment of mense profits, as such the case clearly comes within the observations of the Judicial Committee which say that the Court acts with material irregularity in the exercise of its jurisdiction when it adopts a wrong procedure in the course of the trial which materially affects the decision of the case. The present case therefore presents no difficulty whatsoever in the way of our assuming powers under S. 115, Civil P. C. Mr. Sen also referred us to the decision of the Judicial Committee in the case of *Joy Chand* v. *Kamalakshya Chaudhury*, 53 C. W. N. 562: (A. I. R. (36) 1949 P. C. 239). In that case on an application under the

Bengal Money-lenders Act the decree-holder who was the appellant before the Privy Council raised a contention that the loan was a commercial loan and the case therefore did not fall to be decided under the provisions of the Bengal Money-lenders Act. The Subordinate Judge on a construction of the mortgage bond was of opinion that the loan was a commercial one and he dismissed the application made by the judgment-debtor under the Bengal Money-lenders Act. Against that order a petition in revision under S. 115, Civil P. C., was taken to this Court. This Court disagreed with the decision of the learned Subordinate Judge that the loan was a commercial loan and the order of the Subordinate Judge was varied with regard to some properties. Against the decision of this Court, an appeal was taken to the Judicial Committee. Before the Judicial Committee, Mr. Pringle appearing on behalf of the appellant conceded that no appeal lay from the decision of the Subordinate Judge to this Court. This concession was accepted by the Judicial Committee without expressing any opinion on the point. Mr. Pringle then contended that as no appeal lay to this Court, this Court had no power to interfere in revision with the order of the Subordinate Judge. It was contended on the authority of *Raja Amir Hossain Khan's case*, (11 Cal. 6: 11 I. A. 237 P. C.) that at most the question whether the loan was a commercial loan or not depended on a question either of law or of fact and this Court in revision had no power to interfere. This contention was repelled by the Judicial Committee.

[9] It is to be noted that the Judicial Committee expressly said that the question came under S. 115 (b), namely that on an erroneous view of the powers of the Court, the Court had failed to exercise its jurisdiction. The case obviously came within the purview of S. 115 (b) because once the Court determined that the loan was not a commercial loan the Court had to proceed to the next step in course of the proceedings, namely, whether relief should be given under the Bengal Money-lenders Act or not. The decision of the question whether the loan was a commercial loan or not, involved the further question namely whether the Court would assume further jurisdiction in the case or not. It had, therefore, direct reference to the jurisdiction of the Court to continue the proceedings before the Court. After stating that the case before their Lordships came under S. 115 (b), their Lordships proceeded to observe as follows:

"The cases of *Babu Ram* v. *Munna Lall*, 49 All, 454; (A. I. R. (14) 1927 All. 358) and *Hari Bhikaji* v. *Naro Vishvanath*, 9 Bom. 432, may be mentioned as cases in which a subordinate Court by its own erroneous decision (erroneous, that is in the view of the High Court) in the one case on a point of limitation and in the other on the question of *res judicata* invested itself with a jurisdiction which in law it did not possess, and the High Court held, wrongly their Lordships think, that it has no power to interfere in revision to prevent such a result."

[10] It is contended that in this passage their Lordships seem to lay down a general rule that if on a question of *res judicata* or on a question of limitation a subordinate Court goes wrong, this Court is entitled in revision to interfere with the decision of the subordinate Court. If this were the correct reading of the above sentence, it would be in direct conflict with what was decided by the Judicial Committee in the case of *Rajah Amir Hossain Khan*: (11 Cal. 6: 11 I. A. 237 P. C.), where the question of *res judicata* was said to be a pure question of law and an erroneous decision on that question was said to be a matter outside the old S. 622, Civil P. C., 1882. It is obvious that such a result could never have been intended. If we examine the facts in *Babu Ram* v. *Munna Lal*, 49 ALL. 454: (A.I.R. 114) 1927 ALL 358), it would appear that in that case an application to set aside an *ex parte* decree had been made. This was accepted by the trial Court without properly going into the question of limitation. On an application in revision on behalf of the plaintiff, the High Court of Allahabad was of opinion that the application was obviously barred under Art. 164, Limitation Act, but the High Court declined to interfere as this was not a matter which came within S. 115, Civil P. C. Reference was made to the case of *Balkrishna Udayar* v. *Vasudeva Aiyar*, 44 I. A. 261: (A. I. R. (4) 1917 P C. 71). In the latest case before the Judicial Committee the case is said to have been wrongly decided by the Allahabad High Court. It is to be observed that in the case under consideration the trial Court had not properly dealt with the question of limitation, the assumption of jurisdiction by the Court which depended on the decision of an initial question whether the application was made at a time beyond the period of limitation, as required by the terms of S. 3, Limitation Act, was irregular. In the case of *Hari Bhikaji* v. *Naro Vishvanath*, 9 Bom. 432, the High Court had refused to interfere in revision on the ground that the point raised was a question of *res judicata* which was a mere question of law. This decision is also considered by the Judicial Committee in the latest case to have been wrongly decided. A reference to the facts of this case would show that the claim for mesne profits had been previously negatived and a second proceeding had been started to ascertain the mesne profits which had been already negatived in a former trial. It may be that here if the question of *res*

judicata had been decided properly, the latter Court would have no power to go into the further question as to the ascertainment of mesne profits. This may be the reason why the Judicial Committee opined that this case was wrongly decided. The actual facts in the case of *Raja Amir Hossain Khan* do not appear either in 11 Cal. 6, or in 11 I. A. 237. It is difficult for us to gather what the precise facts were. It would seem, however, from the bare summary which is given in the reports that there a previous suit for redemption was dismissed and later on proceedings were again taken under the Oudh Taluk Act for the same relief. It is possible that the question of *res judicata* arose merely as an issue in the case, namely, whether the claim for redemption was available to the plaintiff in the later proceeding in view of the previous decision. In our opinion, it cannot be said that in the last two decisions, the Judicial Committee have differed from the view which was taken in the early case of *Rajah Amir Hossain Khan* in 11 I. A. 237: 11 Cal. 6 (P C.) viz., that a mere error of law which has no reference to the question of jurisdiction is not by itself sufficient to entitle this Court to interfere in revision. In our opinion only in those cases where in the exercise of jurisdiction the Court acts illegally or with material irregularity that this Court can interfere under S. 115 (c), Civil P. C., a mere error of law not involving the jurisdiction of the Court is not enough. As we have already observed, in the present case the direction of the learned Subordinate Judge to the commissioner to ask judgment-debtors to lead evidence in the first instance materially affects the determination of the question of mesne profits and the case comes within S. 115 (c), Civil P. C. The objection raised by Mr. Mukherjee must, therefore, be overruled.

[11] In the result this Rule is made absolute. The order of the learned Subordinate Judge is set aside and this case is remitted to him for directing the commissioner to proceed with the work of mesne profits in the light of the observations made above.

[12] The defendant petitioner is entitled to his costs in this Rule from the plaintiff opposite party, the hearing-fee being assessed at two gold mohurs.

Guha J.—I agree.

V.R.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 92 *[C. N. 24]*

R. P. MOOKERJEE AND P. N. MITRA JJ.

Aditya Kumar Ray—Appellant v. *Dhirendra Nath Mandal and another—Respondents.*

Letters Patent Appeal No. 1 of 1948, Decided on 18th July 1949, against judgment of Blank J., D/-29th January 1948, in A. F. A. D. No. 1819 of 1943.

(a) Limitation Act (1908), Art. 144 — Symbolical possession— Delivery of, operates as transfer of possession — Decree-holder given such possession on certain day — Judgment-debtor keeping him out of possession from next day — Judgment-debtor's possession becomes adverse from such date —Suit for possession by decree-holder is governed by Art. 144.

Delivery of symbolical possession operates in law as a transfer of possession from the judgment-debtor to the decree-holder. And this is so even where the judgment-debtor is in direct possession and not in possession through tenants: 16 Cal. 530 (F. B.) ; A. I. R. (4) 1917 P. C. 197 and 24 Cal. 715, *Foll.* ; 36 Bom. 373 (F. B.), *Not foll.* ; A. I. R. (10) 1923 Cal. 138, *Ref.* [Para 9]

Where, however, the decree-holder is given symbolical possession on a certain day, but the judgment debtor keeps him out of possession from the next day, the judgment-debtor's possession becomes adverse to him from that day, and limitation would begin to run against him from that date in respect of any suit for possession that he might afterwards bring against the judgment-debtor and such a suit would be governed by Art. 144: 24 Cal. 715, *Foll.* [Para 9]

Annotation : ('42-Com.) Lim. Act, Arts. 142 and 144, N. 65, Pts. 1 and 2.

(b) Limitation Act (1908), Art. 144 — Adverse possession against mortgagor — Simple mortgage by *H* in plaintiff's favour—Suit by plaintiff—Decree obtained — In execution mortgaged property purchased by plaintiff and symbolical possession obtained—In meanwhile *H* obtaining ejectment decree against defendants who were his tenants and obtaining symbolical possession—Suit by plaintiff for khas possession within twelve years of date of his purchase — Art. 144 and not Art. 137 or Art. 142 held applied—Suit held was not barred—Limitation Act (1908), Arts. 137 and 142.

The term "adverse possession" implies that the person against whom adverse possession is exercised, is a person who is entitled to demand possession at the moment adverse possession begins. Hence, the possession of a person who has dispossessed the mortgagor of a simple mortgage subsequently to the date of the mortgage is not adverse to the simple mortgagee: 33 Cal. 1015 ; A. I. R. (5) 1918 Cal. 933 and A. I. R. (3) 1916 Mad. 990 (F.B.), *Rel. on.* [Para 10]

One *H* executed a simple mortgage of the lands in suit in favour of the plaintiff in 1921. In 1928 the plaintiff brought a suit upon this mortgage and obtained decree and in execution of that decree he purchased the mortgaged property on 14th April 1931 and on 9th September 1931 took delivery of possession through Court. In the meanwhile, in 1928, *H* got an ejectment decree against the defendants who were his tenants and obtained possession on 13th September 1928. It was found that the defendants' tenancy under *H* was put an end to by the ejectment decree and that the possession through the Court which *H* obtained on 13th September 1928 and which the plaintiff obtained on 9th September 1931 was only symbolical possession and actual possession remained with the defendants all along. In a suit by the plaintiff instituted against the defendants on 18th September 1940 for declaration of title to and recovery of *khas* possession of the land:

Held, that as a simple mortgagee the plaintiff had no right to demand possession at the time when the adverse possession by defendants against *H* started. He became entitled to possession only when he purchased the mortgaged property in execution of his mortgage decree on 14th April 1931 and the defendants' possession became adverse to him only from that date. In this

view Art. 144 and not Art. 137 or Art. 142 would apply to the suit and as it was brought within twelve years of the time when the defendants' possession became adverse to the plaintiff, it was not barred by time.

[Paras 10, 11 and 13]

Annotation : ('42-Com.) Lim. Act, Art. 144, N. 84, Pt. 4.

(c) Limitation Act (1908), Art. 137—Applicability —Article cannot apply to purchaser at sale in execution of mortgage decree.

Article 137 contemplates an auction purchaser who has by his purchase acquired just the interest which the judgment-debtor had in the property at the date of the sale and no higher, and who stands in precisely the same position as the judgment-debtor did in relation to third parties in respect of that property. The purchaser at a sale in execution of a mortgage decree, however, becomes clothed not merely with the equity of redemption but also the mortgagee's interest in the mortgaged property and, therefore, Art. 137 cannot apply to such a purchaser: A. I. R. (10) 1923 Mad. 160, *Ref.*

[Para 12]

Annotation : ('42-Com.) Lim. Act, Art. 137, N. 2, Pt. 4.

Sarat Chandra Jana—for Appellant.

Sukumar Ghose (Sr.)—for Respondents.

P. N. Mitra J.—This is an appeal on behalf of the plaintiff under Cl. 15, Letters Patent from a judgment of Blank J. in a suit for declaration of title to and recovery of *khas* possession of certain lands. The trial Court decreed the suit, but on appeal the learned Subordinate Judge, 2nd Court, Howrah, modified that decree by dismissing the plaintiff's claim for *khas* possession and giving him only a declaration of his title to the landlord's interest in the suit lands. Our learned brother has affirmed that decision of the lower appellate Court.

[2] The suit lands are C. S. Dag No. 2684, which is a tank, and C. S. Dag. No. 2683, which an adjoining garden. These plots formed part of a *maurashi mokarari jama* which belonged to one Harish Chandra Mondal. Harish executed a simple mortgage in respect of this *jama* in favour of the plaintiff. It was stated to us by the learned advocate for the appellant that this mortgage was made in 1921. In 1928, the plaintiff brought a suit upon this mortgage, being Title Suit No. 83 of 1928, and obtained a decree. In execution of that decree he purchased the mortgaged property on 14th April 1931 and 9th September 1931 he took delivery of possession through Court.

[3] In the plaint the plaintiff made the case that since obtaining delivery of possession through Court he remained in *khas* possession until the defendants dispossessed him on 20th Falgoon 1344 B. S. corresponding to 4th March 1938 on the allegation that they had a tenancy right in the suit lands. Plaintiff averred that the defendants never had any tenancy right in the lands and Harish had all along been in *khas* possession. Upon these averments the plaintiff brought his suit on 18th September 1940 for declaration of his title by auction purchase and for *khas* possession.

[4] The defendants filed their written statement on 12th December 1940. They put the plaintiff to proof of his title to the suit land, and they pleaded that they had a tenancy right in the suit lands under Harish since more than 50 years ago from the time of their grand father and the plaintiff's case of *khas* possession and dispossession in Falgoon 1344 was a false story. They said they had all along been in possession. They also pleaded limitation.

[5] It appears that on 7th August 1941, an application supported by an affidavit was filed on behalf of the plaintiff praying that certain records might be called for. In this application it was stated that Harish had got an ejectment decree in Title Suit No. 144 of 1928 in the 3rd Munsif's Court at Howrah against the predecessors-in interest of the defendants and had taken possession of the property in suit through Court and thereby all right, title and interest of the defendants' predecessors in property in suit had been extinguished. These allegations were materially divergent from the averments in the plaint, but no application was made for amendment of the plaint, which was allowed to remain as it was.

[6] The suit came on for trial on 13th August 1942. The learned Munsif allowed the plaintiff to put in evidence the decree for ejectment obtained by Harish in Title Suit No. 144 of 1928 against the predecessors-in-interest of the defendants and the peon's return to the writ of possession showing delivery of possession to Harish on 13th September 1928. The decree was an *ex parte* one and was dated 31st May 1928. The defendants' objection to the reception of this evidence was overruled by the learned Munsif with the observation that the defendants had notice of the plaintiff's application of 7th August 1941, but they had not filed any additional written statement or counter-affidavit challenging the facts set out in the plaintiff's application. Upon this evidence supplemented by a little oral evidence the learned Munsif came to the conclusion that although the plaintiff's case that Harish had been in *khas* possession all along was untrue, the defendants' tenancy had been put an end to by this ejectment decree and Harish had obtained *khas* possession in execution of it. With regard to the plaintiff's allegation of dispossession in Falgun 1344, the learned Munsif does not appear to have come to any finding, but he held that the suit was not barred by limitation as the plaintiff had proved that he had taken possession on 9th September 1931. As he

also found title in favour of the plaintiff, he gave the plaintiff a decree for declaration of title and *khas* possession.

[7] On appeal by the defendants, the learned Subordinate Judge took the view that the course that had been adopted at the trial of allowing the plaintiff to adduce in evidence the *ex parte* ejectment decree and the peon's return to the writ of possession without any amendment of the plaint had been unfair to the defendants and had caused them prejudice. He observed that "unless the plaint had been amended the defendants were not required to plead that the decree was a fraudulent one or that in spite of the decree the defendants have acquired a limited right of tenancy by adverse possession for more than twelve years."

He remarked that he

"had a mind to send the case back on remand for an amendment of the plaint as well as to allow the defendants opportunity to file additional written statement and for framing additional issues,"

but he said that this course was not "necessary in view of the fact that the plaintiff's claim for *khas* possession is barred by limitation". Differing from the learned Munsif, he held that Harish had only taken symbolical possession and had never taken actual possession, and he also disbelieved the plaintiff's case of *khas* possession after his purchase. His finding was that the defendants had been in actual possession all along. He held the plaintiff's claim for *khas* possession to be barred by time, because the cause of action, he said, had arisen on 13th September 1928 when Harish obtained delivery of possession through the Court and the plaintiff had failed to prove his possession within twelve years of the accrual of the cause of action, but he did not indicate which Article of the Limitation Act he thought to be applicable. He accordingly gave the plaintiff only a declaration of his title to the landlord's interest in the suit lands and dismissed the claim for *khas* possession.

[8] On second appeal Blank J. disagreed with the view that any prejudice had been caused to the defendants by the course adopted at the trial, but he concurred in the view of the lower appellate Court upon the question of limitation and affirmed the decree which had been made by it.

[9] The view taken by Blank J. and by the lower appellate Court on the question of limitation has been assailed before us by the plaintiff appellant. That question has to be dealt with on the basis of the case that the defendants' tenancy under Harish was put an end to by the ejectment decree obtained by him against them and on the findings of fact arrived at by the lower appellate Court that the possession through the Court which Harish obtained on 13th September 1928 and which the plaintiff obtained on 9th September 1931 was only symbolical possession and actual possession remained with the defendants all along. Delivery of sbymolical possession operates in law as a transfer of possession from the judgment-debtor to the decree-holder: *Jugobundhu* v. *Ram Chunder*, 5 Cal. 584 :(5 C. L. R 548 F. B.); *Joggobandhu* v. *Purnanund*, 16 Cal. 530 (F.B.) and *Radha Krishna* v. *Ram Bahadur*, 22 C. W. N. 330 : (A. I. R. (4) 1917 P. C. 197). And this is so even where the judgment-debtor is in direct possession and not in possession through tenants; *Hari Mohan* v. *Baburali*, 24 Cal. 715. The contrary view taken by the Bombay High Court in *Mahadeo* v. *Janu*, 36 Bom. 373 : (14 I. C. 447 F. B.) has not been accepted in our Court: *Bhulu Beg* v. *Jatindra Nath*, 27 C. W. N. 24:(A. I. R. (10) 1923 Cal. 138). Harisb, therefore, must be taken to have obtained possession on 13th September 1928 when he was given symbolical possession as against the defendants' predecessors. As, however, they kept him out of possession from the next day, their possession became adverse to him from that day, and limitation would begin to run against him from that date in respect of any suit for possession that he might afterwards bring against them. It was held by Banerjee J. in *Hari Mohan's case* (24 Cal. 715), that such a suit would be governed by Art. 144. It is unnecessary to consider whether Art. 142 would not be more appropriate in the view that Harish must be taken to have been dispossessed on the day after the delivery of possession to him, as the date of the dispossession for the purpose of Art. 142 and the date when the possession of the defendants became adverse to him would be the same so far as Harish was concerned.

[10] But the position of the plaintiff was entirely different from that of Harish. There could be no question of the plaintiff being dispossessed, as he was not in possession. Nor can it be said that the possession of the defendants' predecessors became adverse to him at the time when it became adverse to Harish. It is now well settled that the possession of a person who has dispossessed the mortgagor of a simple mortgage subsequently to the date of the mortgage is not adverse to the simple mortgagee; See *Aimadar Mondal* v. *Makhan Lal*, 33 Cal. 1015: (10 C. W. N. 904); *Priya Sakhi* v. *Manbodh Bibi*, 44 Cal. 425 :(A. I. R. (5) 1918 Cal. 933) and *Vyapuri* v. *Sonamma*, 39 Mad. 811 : (A. I. R. (3) 1916 Mad. 990 F. B.). The principles which govern the matter have been fully discussed in the judgments of Sanderson C. J. and Mookerjee J. in *Priya Sakhi* v. *Manbodh Bibi*, 44 Cal. 425 : (A. I. R. (5) 1918 Cal. 933), which reversed a judgment of Fletcher J. taking the contrary view. As Sanderson C. J. observed in that case,

"the term 'adverse possession' implies that the person against whom adverse possession is exercised, is a person who is entitled to demand possession at the moment adverse possession begins."

As a simple mortgagee the plaintiff had no right to demand possession at the time when the adverse possession of the defendants' predecessors against Harish started. He became entitled to possession only when he purchased the mortgaged property in execution of his mortgage decree on 14th April 1931, and the defendants' possession became adverse to him only from that date.

[11] In this view Art. 144 would be the Article applicable to the plaintiff's suit for *khas* possession against the defendants and the suit would be in time, but the defendants have contended before us that the suit is governed by Art. 137, as this is a suit for possession of immoveable property by a purchaser at a sale in execution of a decree when the judgment-debtor is out of possession at the date of the sale. Under that Article limitation runs from the time when the judgment-debtor is first entitled to possession. As Harish, it was contended, became entitled to recover possession from the defendants' predecessors at least on 14th September 1928, which was the day after he took symbolical possession, the suit brought on 18th September 1940 must be held to be out of time.

[12] The consequence of acceptance of this argument, it will be seen, will be to nullify the proposition that adverse possession against the mortgagor cannot be adverse to the mortgagee in a simple mortgage. While we have held that the possession of the defendants' predecessors did not become adverse to the plaintiff when it became adverse to Harish on 14th September 1928, we shall, if we accede to this contention, be in effect upholding the contrary position that the adverse possession of the defendants' predecessors against Harish affected the plaintiff as well, for according to this contention limitation would begin to run against the plaintiff from the time when Harish became entitled to possession and that is the time when the possession of the defendants' predecessors became adverse to Harish. We do not think that the language of Art. 137 compels us to adopt a view which would lead to such a result. When the Article speaks of a suit for possession by an auction purchaser when the judgment-debtor was out of possession at the date of the sale and makes limitation run from the time when the judgment-debtor becomes entitled to possession, it appears to us to contemplate an auction purchaser who has by his purchase acquired just the interest which the judgment-debtor had in the property at the date of the sale and no higher, and who stands in precisely the same position as the judgment-debtor did in relation to third parties in respect of that property. The purchaser at a sale in execution of a mortgage decree, however, becomes clothed not merely with the equity of redemption but also the mortgagee's interest in the mortgaged property. In our opinion, therefore, Art. 137 cannot apply to such a purchaser. This was also the view which was taken of the article in *Sundaram* v. *Thiyagaraja*, 50 M.L.J. 183: (A. I. R. (10) 1923 Mad. 160).

[13] Article 137, therefore, is not attracted to the plaintiff's suit. Article 142 cannot apply as the plaintiff was never in possession, and no other article has been suggested as being applicable. Our conclusion, therefore, is that the suit is governed by Art. 144, and as it was brought within twelve years of the time when the defendants' possession became adverse to the plaintiff, it is not barred by time.

[14] Our decision on the question of limitation, however, does not dispose of the case finally. The learned Subordinate Judge, as noticed before, stated in his judgment that but for the view which he was taking on the question of limitation he could have remanded the case to the trial Court for amendment of the plaint and for the filing of additional written statement and the framing of additional issues, and the defendants respondents urged before us that if we held against them on the question of limitation, as we have now done, they should be given an opportunity properly to contest the new case made by the plaintiff at the trial. We think that the defendants have legitimate ground for complaint against the manner in which this matter was dealt with in the trial Court. They could not anticipate that the application filed by the plaintiff for calling for certain records would be treated as having amended the plaint, and we do not agree with the learned Munsif that the filing of the application cast a duty upon the defendants to file an additional written statement. The learned Munsif seems to have thought that it was a question merely of the factum of a decree and a proceeding for delivery of possession. But the case the defendants apparently wanted to make when they were confronted at the trial with the *ex parte* decree and the peon's return was that the entire proceedings were vitiated by fraud as they laid some evidence to the effect that no summons in the suit had been served and no delivery of possession had actually been made in the locality. It is not surprising that this aspect of the matter was not at all considered by the learned Munsif, as there were before him neither pleadings nor issues bearing upon it. As the application of 7th August 1941 was in fact treated by the trial Court as having

amended the plaint and the plaintiff was permitted to lead evidence in support of the case made in it, we consider it unnecessary to direct that the plaintiff should be asked formally to amend his plaint. But it is necessary in the interests of justice that the defendants should have an opportunity to meet the new case.

[15] We accordingly remand the case to the Court of first instance and direct that leave be given to the defendants to file an additional written statement within a time to be fixed by the Court, and that any additional issue or issues that may arise on that written statement be framed thereafter and the parties be allowed to adduce such further evidence as they may be advised on the new issue or issues. The question of plaintiff's title to the suit lands by his auction purchase at the mortgage sale and the question of limitation have been finally decided and are not to be re-opened. We may also observe that no case has hitherto been made by the plaintiff that the defendants' tenancy came into existence subsequently to his mortgage and he is not to be allowed to make such a case. If the Court comes to the conclusion that the defendants have a subsisting tenancy right in the suit lands, the plaintiff's suit for *khas* possession will be dismissed and he will only get a decree declaring his title to the landlord's interest therein. If, on the other hand, the Court comes to the conclusion that the defendants have no subsisting tenancy right in the suit lands, it will give the plaintiff a decree for *khas* possession as well as for declaration of title.

[16] We direct that the parties will bear their own costs up to this Letters Patent appeal. Future costs will be in the discretion of the Court dealing with the case.

R. P. Mookerjee J. — I agree.

V.R.B. *Case remanded.*

A. I. R. (37) 1950 Calcutta 96 *[C. N. 25.]*

K. C. CHUNDER J.

Bibhuti Bhusan—Defendant—Petitioner v. *Surendra Mohan Lahiri—Plaintiff — Opposite Party.*

Civil Rule No. 863 of 1949, Decided on 18th July 1949.

(a) Houses and Rents—Calcutta Rent Ordinance (V [5] of 1946), S. 25 — Tenant's appeal against order granting conditional permission to landlord to file suit for ejectment — District Judge can pass legal order granting permission unconditionally — No question of O. 41, Civil P. C., arises.

Where the tenant files an appeal to the District Judge against the order of the Rent Controller granting a conditional permission to the landlord to file a suit for ejectment, the District Judge has jurisdiction under S. 25 to pass a legal order granting the permission unconditionally. No question of O. 41, Civil P. C., or anything analogous to it arises. The Rent Controller is not a Court and the District Judge does not act as a Court of appeal in the sense in which the Civil Procedure Code contemplates a Court of appeal. [Para 3]

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), S. 45 (2) — Permission to file suit for ejectment obtained under Calcutta Rent Ordinance of 1946 — Pending suit Ordinance expiring and Rent Control Act coming into force—Suit held did not abate.

Where, pending a suit for ejectment by the landlord after obtaining permission under the Ordinance, the Ordinance expired and the new West Bengal Premises Rent Control (Temporary Provisions) Act was passed and came into force and it was contended that as the Ordinance under which the permission was granted expired the suit abated:

Held that the suit brought by the landlord was because of the rights given to him under the general law. The Rent Control Ordinance put certain bars to his right to institute the suit. So far as he was concerned, he had those bars removed by getting the permission but the removal of the bars themselves by the Legislature not continuing the Ordinance itself had nothing to do with his right to sue, or could in no way abate his claim. [Para 4]

(c) Houses and Rents—Calcutta Rent Ordinance (V [5] of 1946), S. 14 (3)—Landlord serving notice to quit — Rent Controller's permission to file suit obtained — Another notice to quit served before institution of suit — Second notice does not affect jurisdiction of Rent Controller to grant permission.

The law does not require the Rent Controller to grant permission to a landlord to file a suit for ejectment only when the landlord has already terminated the tenancy. The Rent Controller is at liberty to grant a permission even when the tenancy has not been put an end to. Where, therefore, the landlord serves a notice to quit and obtains permission of the Rent Controller, the question whether there was a subsequent notice to quit served before the institution of suit accepting the tenancy as subsisting till the second notice does not at all affect the question of jurisdiction of the Rent Controller who has ample jurisdiction to grant permission without a notice to quit even. [Para 5]

Asoke Chandra Sen—for Petitioner.

Girija Prasanna Sannyal and Rabindra Nath Choudhury—for Opposite Party.

Order.—This Rule was issued at the instance of the tenant defendant. The plaintiff filed a suit for ejectment in 1947 and, as is usual, though he claims the house for his personal use and occupation, he is being driven from pillar to post. The Calcutta Rent Ordinance, 1946 was then in force. The landlord got the permission of the Rent Controller. The Rent Controller granted a conditional permission.

[2] The tenant filed an appeal to the District Judge, 24-Parganas under the Ordinance. The District Judge in deciding the appeal very rightly passed a legal order by granting the permission unconditionally. Had the original order of the Rent Controller stood, there might have been some justification for the contention raised before us that the permission was not legal.

[3] As regards the question that the District Judge had no jurisdiction to pass such an order, the jurisdiction is granted by S. 25 of the Ordinance. No question of O. 41, or anything analogous to it arises. The Rent Controller is not a Court and the District Judge is not acting as a Court of appeal in the sense in which the Civil Procedure Code contemplates a Court of appeal.

[4] Then the Ordinance was extended by a further Ordinance after the suit had been filed with the permission. Then the Ordinance expired and the New West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, was passed and came into force on 1st December 1948. The contention put forward before us is that as the Rent Ordinance under which the permission was granted expired, the suit brought by the landlord abated. The suit brought by the landlord is because of the rights given to him under the general law. The Rent Control Ordinance puts certain bars to his right to institute the suit. So far as he was concerned, he had those bars removed by getting the permission, but the removal of the bars themselves by the Legislature not continuing the Ordinance itself has nothing to do with his right to sue, or can in no way abate his claim. The utmost that it can do but we do not decide at all whether it actually does so or not, is to deprive the defendant of certain defences which he might have had if no permission had been taken in such a case. The question does not even arise in the present case.

[5] Finally, it has been urged that the landlord served a notice to quit, and filed a proceeding before the Rent Controller for permission to file a suit. As the proceedings dragged on for sometime, when he got the permission finally, and before the institution of the suit, he filed a second notice to quit. It has been urged before us that this had made the permission given by the Rent Controller without jurisdiction. The law did not require the Rent Controller to grant permission only when the landlord had already terminated the tenancy. The Rent Controller was at liberty to grant a permission even when the tenancy had not been put an end to. Therefore, the question whether there was a subsequent notice to quit accepting the tenancy as subsisting till the second notice does not at all affect the question of jurisdiction of the Rent Controller who had ample jurisdiction to grant permission without a notice to quit even.

[6] These are all the points urged and, therefore, the Rule is discharged with costs.

[7] Let the records be sent down without delay.

V.R.B. *Rule discharged.*

1950 C/13 & 14

A. I. R. (37) 1950 Calcutta 97 *[C. N. 26.]*

SEN J.

Pasupati Banerji— Accused—Petitioner v. *The King.*

Criminal Revn. No. 330 of 1949, Decided on 7th July 1949.

(a) Criminal P. C. (1898), S. 195 (1) (a)—"Public servant concerned"—Offence under S. 182, Penal Code—Words mean public servant to whom false information is given— Penal Code (1860), S. 182.

The words "public servant concerned", so far as an offence under S. 182, Penal Code, is concerned, would mean a public servant to whom a false information is given with the intention or knowledge that such public servant will do something which he ought not to do. [Para 6]

Annotation: ('49-Com.) Criminal P. C., S. 195, N. 4.

(b) Penal Code (1860), S. 182 (a)— Accused writing letter to chairman of municipality objecting to name of *S* in Electoral Roll—Assertion therein that *S* was not paying income-tax and therefore he could not claim to be voter Copy of letter sent to Sub-Divisional Officer—Such officer requested in accompanying memorandum to call for from Income-tax Officer necessary information— Enquiry made by Sub-Divisional Officer—*S* found to have paid income-tax — Sub-Divisional Officer filing complaint against accused for offence under S. 182—Sub-Divisional Officer held had no right to file complaint —Criminal P. C. (1898), S. 195 (1) (a).

In order to establish an offence punishable under S. 182, Penal Code, it must be established that a person gave information which he knew or believed to be false to a public servant and that he intended thereby to cause such public servant to do something which he ought not to do. The words "to do something" which such public servant ought to do must mean to do something which the public servant was enjoined to do in his official capacity as public servant. If a person gives false information to a public servant knowing it to be likely or intending that he would do something which had no connection with his office as a public servant the conduct of the person giving such information would not come within purview of S. 182, Penal Code.

The accused wrote a letter to the Chairman of a municipality objecting to the inclusion of the name of *S* in the preliminary Electoral Roll, asserting that he had come to know after an informal enquiry that *S* did not pay income-tax, that therefore he could not claim to be a voter and that his name should be struck off if it was found after necessary enquiry that he did not pay the income-tax. A copy of the letter was sent to the Sub-Divisional Officer and in the accompanying memorandum he was requested to look into the matter seriously and call for from the Income-tax Officer necessary information in this connection. Enquiries were made by the Sub-Divisional Officer and he found that *S* paid income-tax and that the allegation against him was false. Upon this the Sub-Divisional Officer filed a complaint against the accused alleging that he had committed an offence punishable under S. 182, Penal Code :

Held, that the Sub-Divisional Officer was being asked to do something which did not constitute an act to be done in the exercise of his duties as a public servant. That being so, so far as the sending of the letter to the Sub-Divisional Officer together with memorandum was concerned, no offence under S. 182, Penal Code had been committed and therefore the Sub-Divisional Officer had no right to file the complaint. [Paras 2 and 6]

Annotation : ('49-Com.) Criminal P. C. S. 195 N. 4; ('46-Man.) Penal Code, S. 182, N. 1.

Bireswar Chatterjee—for Petitioner.
Noni Coomar Chakravarty—for the Crown.

Order.—This Rule has been obtained by one Pashupati Banerjee praying that certain proceedings against him should be quashed.

[2] The facts giving rise to this Rule may be briefly stated as follows : On 19th July 1948, the petitioner Pashupati Banerjee wrote a letter to the Chairman of the Kamarhati Municipality objecting to the inclusion of the name, Sri Sushil Kumar Mukherjee in the preliminary Electoral Roll. In his letter, the petitioner asserted that he had come to know after an informal enquiry that Sushil Kumar Mukherjee did not pay income-tax, that therefore he could not claim to be a voter and that his name should be struck off if it was found after necessary enquiry that he did not pay the income-tax. Copies of the letter to the Chairman were sent to various persons amongst whom was the Sub-Divisional Officer of Barrackpore. With the copy was sent the following observation :

"With a request to look into the matter seriously and call for from the Income-tax Officer necessary information in this connection. There should not be any shadow of doubt in the mind of the public that Sushil Babu being an ex-Commissioner of the Municipality is exercising his influence over the Registering Authority to include his name in the Electoral Roll in an illicit manner."

Enquiries were made by the Sub-Divisional Officer and he found that Susbil Babu paid income-tax and that the allegation against him was false. Upon this the Sub-Divisional Magistrate asked the petitioner Pashupati Banerjee to show cause why legal action should not be taken against him for giving false information to the Sub-Divisional Officer with the intention to cause annoyance and injury to Sushil Kumar Mukherjee without any lawful ground. Cause was shown and thereafter the Sub-Divisional Officer filed a complaint before Sri B. N. Sen, Magistrate, First Class, alleging that Pashupati Banerjee had committed an offence punishable under S. 182, Penal Code. The Magistrate took cognizance of the complaint and issued summons against Pashupati Banerjee who has now obtained this Rule for a quashing of the proceedings.

[3] The argument of learned Advocate appearing on behalf of the petitioner may be stated thus :

[4] The allegations which were made by Pashupati Banerjee against Sushil Kumar Mukherjee were made to the Chairman of the Municipality for necessary action and the Chairman alone could act upon this letter. It is true that a copy was sent to the Sub-Divisional Officer with a certain request but it could not be said that any offence has been committed by this act on the part of the petitioner. If the statements made by Pashupati Banerjee against Sushil Kumar Mukherjee are false, then the only person who could file a complaint against Pashupati Banerjee would be the Chairman of the Municipality or some officer subordinate to the Chairman. The Sub-Divisional Officer was not an officer subordinate to the Chairman and therefore he had no right to complain. By virtue of the provisions of S. 195 (1), Criminal P. C., the Court could take cognizance of the complaint only upon the complaint of the Chairman or his subordinate. The Court was wrong in taking cognizance of the complaint of the Sub-Divisional Officer.

[5] Learned advocate appearing on behalf of the Crown contended that the complaint filed by the Sub-Divisional Officer was a valid complaint and that the Court before whom the complaint was filed had jurisdiction to entertain the complaint and issue process. His argument is that statements made by Pashupati were false and that he made these false statements in order to induce or knowing it likely he will induce the Sub-Divisional Officer to do certain things which he would not have done. His view is that the sending of a copy of the letter addressed to the Chairman together with the request amounted to giving the Sub-Divisional Officer information and asking him to do something which he ought not to do.

[6] In order to decide this question one must first examine the words of S. 195 (1) (a), Criminal P. C. It is in the following terms :

"No Court shall take cognizance of any offence punishable under Ss. 172 to 188, Penal Code except on the complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate."

It is clear from this section that the person to make the complaint is the public servant concerned or his subordinate. The words "public servant concerned", so far as an offence under S. 182, Penal Code, is concerned, would mean a public servant to whom a false information is given with the intention or knowledge that such public servant will do something which he ought not to do. Obviously if the Chairman of the Municipality had filed this complaint, there could be no objection. The information was given to him and he was asked to act upon it. If the informant knew that the information was false he would be guilty of an offence punishable under S. 182, Penal Code. Here, however, the complaint has not been filed by the Chairman but by the Sub-Divisional Officer. I quite agree with learned advocate appearing for the Crown that by sending a copy of the letter addressed to the Chairman to the Sub-Divisional Officer the petitioner was giving information to the Sub-Divisional Officer. It is also true that in the memorandum accompanying the letter Sub-Divisional Officer is requested to do certain things. The question

which arises for consideration is whether this amounts to an offence punishable under S. 182, Penal Code. For this purpose, we have to examine the wording of S. 182 (a), Penal Code. It is in the following terms:

"Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant (a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or"

Reliance has not been placed by the learned advocate for the Crown on sub-s. (b) of S. 182, Penal Code, so, I leave it out of consideration. In order to establish an offence punishable under S. 182, Penal Code, it must be established that a person gave information which he knew or believed to be false to a public servant and that he intended thereby to cause such public servant to do something which such servant ought not to do or that he knew it to be likely that he would thereby cause such public servant to do something which he ought not to do. Now, the words "to do something" which such public servant ought not to do must mean, in my opinion, to do something which the public servant was enjoined to do in his official capacity as public servant. If a person gives false information to a public servant knowing it to be likely or intending that he would do something which had no connection with his office as a public servant then, in my opinion, the conduct of the person giving such information would not come within the purview of S. 182, Penal Code. For instance, if a person gave information to a public servant knowing it to be likely or intending that such public servant would go and beat up somebody, then it cannot be said that this offence has been committed because it is no part of the duty of a public servant to beat up people. Now, in the present case the Sub-Divisional Officer has nothing to do with the matter regarding the inclusion of Sushil Kumar Mukherjee in the Electoral Roll. He had no function to perform regarding these matters and it was no part of his duty as a public servant to make enquiries whether Sushil Kumar Mukherjee paid income-tax or not. Therefore, it is quite clear that the Sub-Divisional Officer was being asked to do something which did not constitute an act to be done in the exercise of his duties as a public servant. That being so, so far as the sending of the letter to the Sub-Divisional Officer together with memorandum is concerned, no offence under S. 182, Penal Code, has been committed and therefore the Sub-Divisional Officer had no right to file the complaint. The person who should have filed the complaint is the Chairman of the Municipality or some one subordinate to him.

[7] In these circumstances I must hold that the proceedings are bad *ab initio* and they must therefore be quashed.

[8] I wish it to be understood that I am expressing no opinion whether in the circumstances of this case the Chairman of the Municipality should take steps or not. That is a matter for the Chairman to decide.

[9] The rule is made absolute.

v.R.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 99 *[C. N. 27.]*

HARRIES C. J. AND J. P. MITTER J.

Bissen Singh—Complainant—Petitioner v. *Prameswari Singh and another — Accused—Opposite Party.*

Criminal Revn. Petn. No. 283 of 1949, Decided on 7th July 1949.

Criminal P. C. (1898), Ss. 200, 202 and 156 (3)—Complaint to Magistrate—Procedure to be followed by him stated—Order by Magistrate forwarding complaint to police to make inquiry and take cognizance if any cognizable offence was made out and send report — Order improper — Subsequent trial held illegal.

When a complaint is filed before a Magistrate he can adopt one of two courses. He can examine the complainant upon oath and then issue process. On the other hand he can under S. 202 of the Code postpone the issue of process and refer the complaint to a Magistrate or the police for further enquiry and then take action on receipt of the report. The other course open to the Magistrate is to send the complaint to the police asking them to take action under S. 156 (3) of the Code. In that case the Magistrate would not examine the complainant, but merely forward the complaint to the police for investigation and taking cognizance. [Paras 6 and 7]

On receipt of a complaint the Magistrate forwarded it to the police to make an enquiry and take cognisance if any cognizable offence was made out and send a report. On seeing the report sent by the police the Magistrate took cognizance and summoned the accused and proceeded with the trial:

Held (i) that the order of the Magistrate forwarding the complaint to police to make inquiry and take cognizance if cognizable offence was made out and send a report was an order which could not possibly be made : 53 C. W. N. 653, *Rel. on*;

(ii) that it was clear that the Magistrate acted under S. 202 and having seen the report he took cognizance and summoned the accused but he never examined the complainant on oath as required by S. 200 and therefore he could not under the circumstances take cognisance under Ch. 16 and the proceedings thereafter were illegal; [Para 9]

(iii) that the case did not fall within S. 156 (3) because the police though asked to inquire and take cognisance were also asked to report. The police did not submit a charge sheet or a challan but reported and, therefore, quite clearly they did not act under S. 156 (3). [Para 10]

Annotation: ('49-Com.) Criminal P C, S. 200, N. 11, 16; S. 202 N. 13, 18 and 20; S. 156, N. 5 and 7.

Debabrata Mookerjee and Arun Kishore Das Gupta—for Petitioner.

Diptendra Mohan Ghose—for Opposite Party.

Harries C. J.—This is a petition for revision of an order of a learned Magistrate acquitting the opposite parties under S. 258, Criminal P. C.

[2] The learned Magistrate held that the whole of the trial was illegal and he did not enter into the merits of the dispute.

[3] It appears that a complaint was made to a learned Magistrate alleging offences under Ss. 448 and 341, Penal Code. On 6th December 1947, the learned Magistrate passed the following order:" O/C Watgunge, P.S—to make an enquiry and take cognizance if any cognizable offence is made out and send a report by 6th January 1948."

[4] The police apparently reported, as an order of 6th January 1948, reads: "Seen report. Complainant absent—file." There is another order of the same date: "Complainant appears by petition. Seen police report. Summon Balai Lal Das and Parmeswar Singh under Ss. 488 and 341, Penal Code for 4th February 1948."

[5] The proceedings continued after the evidence of the prosecution had been taken and charges framed and witnesses cross-examined. A point was taken by learned advocate for the defence that the whole trial was without jurisdiction by reason of the orders passed by the learned Magistrate.

[6] When the complaint was filed before the learned Magistrate he could have adopted one of two courses. He could have examined the complainant upon oath, and then issued process. On the other hand, he could under S. 202, Criminal P. C. postpone the issue of process and refer the complaint to a Magistrate or the police for further enquiry and then take action on receipt of the report.

[7] The other course open to the Magistrate was to send the complaint to the police asking them to take action under S. 156 (3), Criminal P. C. In that case the Magistrate would not examine the complainant, but merely forward the complaint to the police for investigation and taking cognizance.

[8] It will be seen that the learned Magistrate in this case forwarded the complaint to the police to make an enquiry and take cognizance if any cognizable offence was made out and send a report. It is an order which cannot possibly be made. Either the Magistrate himself examines the complainant and then asks the police to enquire and report or the complaint must be sent to the police for them to enquire and take cognizance if they think proper.

[9] In the present case it is quite clear that the Magistrate acted under S. 202, Criminal P. C. and having seen the report he took cognizance and summoned the accused; but it is to be observed that he never examined the complainant on oath as required by S. 200 and therefore he could not in the circumstances take cognizance under Ch. 16 and the proceedings thereafter were illegal.

[10] The case does not fall within S. 156 (3) because the police though asked to enquire and take cognizance were also asked to report. The police did not submit a charge sheet or a challan but reported and, therefore, quite clearly they did not act under S. 156 (3) of the Code. It seems to me that this case is completely covered by a recent Bench decision of this Court in the case of *Pulin Behari Ghose* v. *The King*, 53 C. W. N. 653. There very much the same thing happened and the Bench held that when a complaint is filed before a Magistrate he should either take cognizance of it under S. 200 of the Code and proceed under Ch. 16 or send the complaint to the officer in charge of the Police Station directing him to proceed under Ch. 14 of the Code. He should not make a hybrid composite order, both under S. 156 (3) and under S. 202 of the Code.

[11] The Magistrate here took cognizance after a report without examination of the complainant and the proceedings thereafter were illegal and the learned Magistrate was right in so holding.

[12] That being so, this petition which is directed against the order of discharge fails and is dismissed.

[13] The Rule is discharged.

J. P. Mitter J.—I agree.

G.M.J. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 100 *[C. N. 28.]*

G. N. DAS AND GUHA JJ.

Krishna Charan Guin — Plaintiff—Petitioner v. *Governor-General in Council, representing B. N. Rly., New Delhi — Defendant —Opposite Party.*

Civil Revn. Appln. No. 502 of 1948, Decided on 8th July 1949, for setting aside judgment and decree of Munsif, 3rd Court, Midnapore, D/- 21st January 1948.

Railways Act (1890), S. 75 (1) and (2)—Applicability—Actual value of excepted goods consigned exceeding Rs. 100 but value declared to be less than Rs. 100—Goods lost — Claimant not entitled to compensation : A. I. R. (34) 1947 Cal. 182, *Not approved.*

The words of S. 75 (1) are plain and admit of no qualification. If the package contains excepted goods, and the instrinsic value exceeds the statutory limit, the railway administration cannot be held responsible for the loss, destruction or deterioration of the package, unless the value and contents are declared. The value to be declared is the true value. Section 75 (2) in terms does not entitle the consignor or consignee to get the declared value. It places a maximum limit, beyond which

the claimant cannot recover whatever the true value may be. Section 75 (2) is intended to apply to cases where a declaration is called for. An unnecessary declaration is not contemplated by the section. In cases of over-valuation of excepted articles above the statutory limit, the claimant gets the true value; the declaration does not help him. In cases of under-valuation of excepted articles above the statutory limit, a limited disability is imposed by S. 75 (2), viz., that the claimant can only recover up to the declared amount.

[Paras 10 & 11]

Where, therefore, the actual value of the excepted goods consigned exceeds Rs. 100 but the declared value is less than Rs. 100 and the goods are lost, destroyed or deteriorated, the claimant will not be entitled to any compensation : A. I. R. (34) 1947 Cal. 182, *Not approved*; Civil Rule No. 293 of 1948, *Approved*. [Para 12]

Annotation : ('46-Man.) Railways Act, S. 75 N. 1 and 4.

Nripal Chandra Roy Choudhury—for Petitioner.

Chandra Sekhar Sen and Ajoy Kumar Basu — for Opposite Party.

G. N. Das J.—This rule was obtained by the petitioner Krishna Chandra Guin. It is directed against the decision of Mr. D. N. Chakladar, Munsif, 3rd Court, Midnapore, exercising Small Cause Court powers, whereby he dismissed the petitioner's suit for recovery of a sum of Rupees 152, alleged to be the price of goods consigned for carriage by the B. N. Railway administration represented by the defendant opposite party, and not delivered to the consignee.

[2] The facts of the case are that Joseph Herber & Co., Calcutta self-consigned a package for carriage by the B. N. Railway from Esplanade, Calcutta, to Midnapore. In the forwarding note, the consignor described the package as containing Gramophone Records and declared the value to be Rs. 99 only. The plaintiff petitioner purchased the goods from the consignor and took an open delivery of the package at Midnapore Railway Station. A part of the contents of the goods was not delivered by the B. N. Railway. After service of the requisite notices, the petitioner filed this suit for recovery of a sum of Rs. 152 being the price of goods not delivered to him. The defendant denied liability; the material defence with which we are now concerned, is a plea under S. 75, Railways Act.

[3] The trial Judge gave effect to this plea and dismissed the suit. The plaintiff has moved this Court in revision.

[4] It is not disputed in this Court that the articles contained in the package come within item (r) of Sch. 2 of the Act and are excepted articles.

[5] Mr. Roy Choudhury for the petitioner pressed only one point, viz., that although the value of the package exceeded Rs. 100 and it came within S. 75 (1) of the Act, nevertheless he was entitled to recover the sum of Rupees 99, the value declared by him. In support of his contention, he relied on S. 75 (2) of the Act and the decision of Lodge J., in the case of *Governor-General in Council* v. *Tarak Nath De*, A. I R. (34) 1947 Cal. 182: (225 I. C. 630).

[6] Mr. Sen, the learned Senior Government Advocate for the opposite party, contended that S. 75 (1) is clear on the point and the disability to recover anything is not controlled by S. 75 (2). He referred us to an unreported decision of Chakravartti J., in the case of *Governor-General in Council* v. *Basanta Kumar Goldar*, Civil Rule 293 of 1948 decided on 9th July 1948.

[7] The aforesaid decisions are clearly in conflict and we have to resolve the same.

[8] Section 75 of the Act as it then stood, read as follows :

"(1) When any articles mentioned in the second schedule are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds (one) hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk.

(2) When any parcel or package of which the value has been declared under sub-section (1) has been lost or destroyed or has deteriorated, the compensation recoverable in respect of such loss, destruction, or deterioration shall not exceed the value so declared and the burden of proving the value so declared to have been the true value, shall, notwithstanding anything in the declaration, lie on the person claiming the compensation."

[9] The liability of the Railway administration is that of a bailee under S. 72 of the Act; the measure of such liability is the damage sustained by the claimant. The amount of such damage is the value of the goods lost, destroyed, or deteriorated in transit. The value declared under S. 75 (1) is not the measure of such loss, destruction or deterioration. The burden of proving the true value is upon the claimant and the burden rests on him inspite of the declaration made by the consignor and not objected to by the railway administration; this appears from S. 75 (2) of the Act.

[10] Section 75 of the Act is an exemption provision. Clauses (1) and (2) of the section are both intended to limit the liability of the railway administration, as would appear from the opening words "Further provisions with respect to the liability of a railway administration as a carrier of articles of special value". The object of the section is to protect the railway administration. In cases of excepted articles, the section compels the consignor to declare the value if it exceeds the limit of Rs. 100. The declaration is

intended to put the officers of the administration on their guard. The administration is also entitled to charge a certain percentage of the value in such cases. The words of S. 75 (1) are plain and admit of no qualification. If the package contains excepted goods, and the intrinsic value exceeds the staturory limit, the railway administration cannot be held responsible for the loss, destruction or deterioration of the package, unless the value and contents are declared. The value to be declared is the true value.

[11] Section 75 (2) in terms does not entitle the consignor or consignee to get the declared value. It places a maximum limit, beyond which the claimant cannot recover whatever the true value may be. Section 75 (2) is intended to apply to cases where a declaration is called for. An unnecessary declaration is not contemplated by the section. In cases of over-valuation of excepted articles above the statutory limit, the claimant gets the true value; ihe declaration does not help him. In cases of under-valuation of excepted articles above the statutory limit, a limited disability is imposed by S. 75 (2), viz., that the claimant can only recover up to the declared amount. In the latter case, his claim for the difference between the declared value and the true value is only negatived, but the whole of his claim is not disallowed.

[12] For the above reasons, we disagree with the view taken by Lodge J., and approve of the opinion expressed by Chakravartti J.

[13] We, therefore, overrule the contention urged on behalf of the petitioner.

[14] The Rule is accordingly discharged with costs; hearing-fee being assessed at two gold mohurs.

Guha J. — I agree.

G.M.J. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 102 *[C. N. 29.]*

HARRIES C. J. AND CHAKRAVARTTI J.

Gostha Behari Dutt—Petitioner v. *(Dead) Palaram Pal and others—Opposite Party.*

Civil Revn. Nos. 1747 and 1913 of 1946, Decided on 7th December 1948, from order of Sub-Judge, Bankura, D/- 24th August 1948.

(a) Debt laws— Bengal Agricultural Debtors Act (VII [7] of 1936), Ss. 8 and 33—Reference to certain debt not made in the body of petition deliberately — Reference made only in column reserved for history of debt— Debt is not included in application and not covered in award subsequently made — S. 33 does not apply.

Where an applicant under S. 8 makes no reference to certain debt in the body of the petition at all but makes an indirect reference to it in the column reserved for the history of the debt, the object of so framing the petition being not to exceed Rs. 25,000 as the total amount of the mortgagor's debts, the mortgagor deliberately omits to ask for an adjudication on that debt and he is not entitled to say that his application included that debt or that the debt was covered by the award which came subsequently to be made. There was therefore no amount payable with regard to it under the award and it must follow that neither of cls. (a) and (b) of S. 33 applies. [Para 15]

(b) Debt laws—Bengal Agricultural Debtors Act (VII [7] of 1936), Ss. 8 and 18 and Rr. 145, 146, 147 and 148 — Pecuniary jurisdiction — Test is amount of creditor's claim and not amount admitted by debtor or determined by Board.

Both the Form prescribed for an application under S. 8 and the Rules framed under the Act make it perfectly clear that the amount which must furnish the test as to whether the Board has pecuniary jurisdiction or not is the amount of the claim of the creditor and not the amount admitted by the debtor, or determined by the Board, at least in a case where the amounts mentioned by the debtor themselves make up a total in excess of Rs. 25,000. [Para 17]

(c) Debt laws—Bengal Agricultural Debtors Act (VII [7] of 1936), S. 39 — Territorial jurisdiction — Power to transfer — Collector has no power to transfer case to Board having no territonal jurisdiction over parties in absence of specific rule.

It will be noticed from the reading of S. 39 that the Act by itself does not give the Collector any power to transfer. It leaves it to the Provincial Government to authorise the Collector and such authorisation must be subject to rules made under this Act. It is not the power of transfer which is so restricted, but the power of authorisation given to the Provincial Government. Section 39 read with the Rules makes it perfectly clear that the limits of the Collector's power to make an order to transfer must be found within the Rules framed by the Provincial Government. In other words, the Collector will have power to make an order of transfer only in those cases where he has been authorised by the Rules to do so. [Para 20]

(d) Debt laws—Bengal Agricultural Debtors Act (VII [7] of 1936), S. 33 (a)—Question as to validity of award arising before Judge sitting as civil Court — Award found void — Proceedings before Board cannot be held to be pending — Proceedings in civil Court cannot be stayed.

Where question as to the validity of an award arises before a Judge not sitting either as an appellate officer or in revision in proceeding under the Act but only as a civil Court in a different chain altogether, and he finds that the award is without jurisdiction and void, he is not right in holding that in a view of his decision as to the validity of the award, the proceedings before the Debt Settlement Board must be deemed to be pending, and direct stay of suit in that view.: [Para 21]

(In 1747 of 1946) —

Atul Chandra Gupta and Purushottam Chatterjee —for Petitioner.

Dr. Naresh Chandra Gupta and Urukramdas Chakravartti — for Opposite Party.

(In 1913 of 1946)—

Dr. Naresh Chandrd Gupta and Urukramdas Chakravartti — for Petitioner.

Atul Chandra Gupta and Purushottam Chatterjee —for Opposite Party.

Chakravartti J. — These are two Rules directed against the same order passed by the learned Subordinate Judge, Bankura, on 23rd August 1946, whereby he stayed further proceedings in a mortgage suit, purporting to act under

S. 33 (a), Bengal Agricultural Debtors Act. The learned Judge has held that the award pleaded by the mortgagor as a bar to the suit was without jurisdiction and void. But he has also held that if the award was void, the proceedings before the Board were in the eye of law still pending and consequently the mortgage suit was liable to be stayed under the provisions of S. 33.

[2] Rule 1747 of 1946 was taken out by the mortgagee and his complaint is that the decision of the learned Subordinate Judge that the suit must be stayed is erroneous.

[3] Rule 1913 of 1946 was taken out by the mortgagor and he challenges the decision of the learned Judge that the award was without jurisdiction and void.

[4] In order to appreciate the respective contentions of the parties, it is necessary to refer to the facts in some detail. It appears that the transactions between the parties were numerous and of a complicated character. The first transaction was on 6th August 1920, when the mortgagor took a loan of Rs. 4999 from the mortgagee upon an earlier mortgage. On 14th April 1930, the mortgagor executed a simple money bond for a sum of Rs. 5182-10-6 pies which is said to have represented the resultant liability arising out of a number of previous loans. On 12th June 1933, the mortgagor executed an instalment mortgage bond for a sum of Rs. 19,700. This sum is said to have represented the amount due upon two previous bonds, as also a certain further amount as future interest. The bond provided that the amount would be payable in a number of instalments, but in case of default in the payment of any one of the instalments, interest at a certain rate would have to be paid and if there were three successive defaults, the whole amount would become due. On 19th December 1939, the mortgagor made an application under S. 8, Bengal Agricultural Debtors Act to the special Debt Settlement Board at Bankura. In columns 6 of that application, he mentioned only two debts owing to the present mortgagee. One was the debt of Rs. 4,999 which was the consideration for the first mortgage and the other was a debt of Rs. 1,999 which was one of the debts taken into consideration in arriving at the amount of the second bond. The bond of 1933 was not mentioned in column 6. What the mortgagor in fact did was that he inserted a long and somewhat rambling statement in Schedule B of the application wherein he stated that the mortgage bond for Rs. 19,700 was taken from him by undue influence and fraud and that as a matter of fact no such amount was due from him to the mortgagee. There appears to have been some controversy before the Special Debt Settlement Board as to what the amount of the debt was and the Board ultimately came to an informal decision that the amount was Rs. 7,329 1-0. Upon that finding the Board asked for the sanction of the Collector which in due course was granted.

[5] An application was thereafter made to the Sub-Divisional Officer by the mortgagor for the transfer of the case from the Bankura Special Debt Settlement Board to the ordinary Board at Midnapore in Bankura. It is not disputed that neither of the parties resided within the jurisdiction of that Board, but the application was made on the ground that the President of the Board which had territorial jurisdiction in the case was related to the mortgagee and, therefore, the case could not properly be transferred to that Board. The application succeeded and the Sub-Divisional Officer made the necessary order, transferring the case to the ordinary Board at Midnapore. The Board at Midnapore eventually entered upon an adjudication of the liabilities of the mortgagor and eventually decided that the amount due from him to the present mortgagee was Rs. 3,000. An award embodying that decision of the Board followed in due course.

[6] The mortgagee preferred an appeal from the decision of the Board to the appellate officer, but the appeal was rejected as barred by limitation. An application in revision to the District Judge also failed and a further application to this Court met with the same result. So far as this Court was concerned, it was only stated in the judgment that the learned Judges saw no reason to interfere in revision with the decision of the authorities below.

[7] The present suit was thereafter brought by the mortgagee, claiming to recover a sum of Rs. 23,476-0-6 pies upon an instalment mortgage bond of 12th June 1933. In the plaint he made a reference to the proceedings before the Debt Settlement Board and stated that the mortgagor had deliberately and fraudulently omitted to mention the debt of 1933 in his application to the Board and thereby contrived to procure an adjudication under the Bengal Agricultural Debtors Act. The plaint was subsequently amended and an allegation that the Board at Midnapore had no territorial jurisdiction to deal with the case at all was added.

[8] The mortgagee put forward three grounds as to why the so-called award under the Bengal Agricultural Debtors Act could not affect his suit. It was contended in the first place that inasmuch as the mortgagor had not mentioned the debt of 1933 at all, the award did not purport to deal with that debt and consequently the existence of the award was no bar to the suit being dealt with by the civil Court. It was contended in the second place that inasmuch as the

mortgagor had denied all liability to his creditors, the application to the Board was not maintainable at all. It was contended lastly that, in any event the total amount of the debts owing by the mortgagor having been in excess of Rs. 25,000 no Debt Settlement Board could deal with his debts and that, in particular, the Board at Midnapore had no territorial jurisdiction.

[9] The learned Subordinate Judge held that the debt of 1933 had in fact been mentioned in the mortgagor's application to the Board, inasmuch as he had mentioned the earlier debts, the dues upon which really formed the consideration for the bond of 1933. The award, in the view of the learned Judge, did purport to deal with the debt of 1933 as well. The learned Judge held further that the mortgagor had not denied any liability to any creditor but had admitted some of his debts. Consequently, the learned Judge proceeded to observe the application before the Board was not an application by a debtor who did not admit any liability to any creditor and, therefore, it was in order. The learned Judge, however, gave effect to the third objection of the mortgagee which, as already stated, was to the effect that the Board at Midnapore had no territorial jurisdiction to deal with the case. In the opinion of the learned Judge, the power of transfer conferred by S. 39 of the Act was, subject to the rules made in that behalf and under the section, read with the rules the Collector could only transfer a case to a Board having territorial jurisdiction. Inasmuch as the Midnapore Board had admittedly no territorial jurisdiction, the learned Judge concluded that the award made by it was without jurisdiction and void.

[10] Having so held, however, the learned Judge proceeded to hold that his finding that the award was without jurisdiction and void would not avoid the mortgagor's objection to his proceeding with the suit, inasmuch as the award being out of the way, the proceeding before the Debt Settlement Board must be held to be still pending. In that view he held that although cl. (b) of S. 33 had no application to the facts of the case before him, cl. (a) had, and by reason of the provisions of that clause he felt himself bound to direct stay of the suit. It is against that decision that the present rules were obtained.

[11] I may observe here that if the learned Judge was right in his view that S. 33 (a), Bengal Agricultural Debtors Act applied to the case, the proper course for him would have been not to stay the suit, as he did, but either to dismiss it or to return the plaint. That, however, is another matter.

[12] In support of the rule taken out by the mortgagee, it was contended by Mr. Gupta that the award did not affect the suit at all, inasmuch as the mortgagor had not included the mortgage debt of 1933 in his application and consequently there was no award with respect to that debt. He contended in the alternative that assuming that the award covered that debt as well, it must follow that the mortgagor's application included the debt and if it did, the total amount of debts owing by the mortgagor would clearly exceed Rs. 25,000 and consequently the case would be one beyond the jurisdiction of any Debt Settlement Board. Mr. Gupta further contended that the conclusion of the learned Judge that the Midnapore Board had no territorial jurisdiction to deal with the case was well founded, but he complained that the learned Judge should have held that in spite of the award being invalid, the suit was liable to be stayed, in the view that the proceedings before the Debt Settlement Board must be deemed to be pending.

[13] Dr. Sen Gupta, appearing on behalf of the mortgagor, contended that the power of transfer given by S. 39 of the Act was absolute in so far as such power had not been specifically restricted by Rules. He pointed out that there was no Rule which prevented the Collector from transferring a case to a Board having no territorial jurisdiction over the properties and accordingly contended that the decision of the learned Judge on this part of the case was erroneous.

[14] Dr. Sen Gupta contended in the second place that the Board had pecuniary jurisdiction in the present case inasmuch as the Board had found informally, as it was entitled to do, that the amount of the mortgagor's debt was below Rs 25,000 under the proviso to R. 145. Dr. Sen Gupta contended further that there had been no suppression of the debt of 1933, reference to which had been clearly made in the history of the debt. His argument was that inasmuch as the mortgagor had referred to the basic debts and inasmuch as the consideration for the bond of 1933 was nothing else than the amount due upon those earlier debts the debt of 1933 had been mentioned, both in substance and in fact.

[15] In my opinion, the contention urged on behalf of the mortgagee is clearly right. It cannot be pretended that the relevant columns in the mortgagee's application before the Debt Settlement Board contain any entry as regards the debt of 1933. On the other hand, the statement made by him in the column reserved for the history of debts, makes it perfectly clear that he did not wish the debt of 1933 to be taken into account at all, inasmuch as in his view the bond did not represent any real liability and had been obtained by undue influence and duress. The object of framing the application in that form is, to my mind, perfectly clear. If the debt of

Rs. 19,700 had been included in a straightforward manner in column 6 of the application where it ought to have been included, the total amount of the mortgagor's debts would obviously exceed Rs. 25,000 and the mortgagor could not possibly get what perhaps he expected, viz., a friendly adjudication by the Debt Settlement Board. The device he adopted was to make no reference to that debt in the body of the petition at all but to make an indirect reference to it in the column reserved for the history of the debt. I am of opinion that since the mortgagor deliberately omitted to ask for an adjudication on this debt and relegated whatever reference he made to it to Sch. B, he is not entitled to say that his application included this debt, or that the debt is covered by the award which came subsequently to be made. If that be so, the debt was not included in his application made under S. 8 of the Act, nor was any amount payable with regard to it under the award and it must follow that neither of the two clauses of S. 33 applies.

[16] I am also of opinion that the alternative argument of Mr. Gupta is equally sound. Assuming as the learned Judge found and as Dr. Sen Gupta contended, that the award does cover the debt of 1933, it must follow that the application included that debt. If it did, I am of opinion that the total amount of the debts owing by the mortgagor for the purposes of the jurisdiction of the Board would be clearly on the face of his own application, above Rs. 25,000 and the Board in dealing with the mortgagor's application acted without jurisdiction. It was contended by Dr. Sen Gupta that what is material for the purposes of jurisdiction was not the claim by the creditor, but the decision of the Board, although it might be an informal decision as to the amount of the debt. The learned Judge below has followed the same line of reasoning more or less, because he observes at more places than one in his judgment that the debt informally determined by the Bankura Special Debt Settlement Board fell below Rs. 25,000 and that accordingly no question of pecuniary jurisdiction would arise. In my opinion, this view of the rules is clearly wrong. Dr. Sen Gupta referred to the terms of Rr. 144 and 145 and contended that the latter of them made it perfectly clear that the Board had jurisdiction to decide by way of a preliminary point the amount of the debt due, on the principles of S. 18 and that, in a case of doubt or dispute, it was its duty to do so. It was the result of this informal determination which, according to Dr. Sen Gupta, would determine the jurisdiction of the Board. In my opinion, what R. 145 contemplates is not a determination of the debt actually due but a decision on a contest as regards what the amount of a claim actually is. The matter, in my view, is placed beyond doubt by the form which has been prescribed for applications under S. 8. Column 8 of that form is headed "Total claim by the creditor." Column 9 is headed "Amount, if any, admitted by the debtor." There is no other column. It is perfectly clear that when an application is made and the Board has to decide whether it has jurisdiction or not, having regard to the amount of the debt, the only amount which can furnish the necessary test is the amount claimed by the creditor. It is quite true that the Board may ultimately find the actual amount due to be much lower, but that decision it would arrive at in the course of the settlement and I fail to understand how a decision on that matter can be undertaken for the purpose of deciding whether the Board has or has not jurisdiction. It is elementary that the jurisdiction of the Tribunal is determined by the allegations contained in the plaint, or in other words by the claim made. If that very matter is decided in advance for the purpose of ascertaining whether the Tribunal has jurisdiction or not, the position would be that the Tribunal concerned assumes jurisdiction after deciding the main question on the merits.

[17] Referring to the Rules, the relevant Rules in the present case are in my view, Rr. 146 and 147. Rule 146 provides that if the sum total of all debts mentioned by the debtor in his application exceeds Rs. 5000 but does not exceed Rs. 25,000 the Board shall forward the application to the Collector for his sanction. It would be noticed that what the Rule contemplates is debts "mentioned" by the debtor. Sub-rule (2) of the Rule provides that if the amount so mentioned by the debtor exceeds Rs. 25,000 the Board shall not entertain the application. Again what the sub-rule contemplates is the amount "mentioned" by the debtor. In neither case is it the amount admitted by the debtor or the amount found by the Board as due, whether formally or informally. Rule 147 provides for cases other than those mentioned in R. 146, that is to say, cases where the amount mentioned by the debtor exceeds Rs. 5000 but does not exceed Rs. 25,000. There is another Rule which seems to exclude altogether the view put forward by Dr. Sen Gupta. That Rule is R. 148 which provides that if, in the case where the sum total of all the debts exceeds Rs. 5000 but does not exceed Rs. 25,000 the Collector grants sanction, the Board shall, subject to R. 139, record the order of determination with regard to each debt under sub-s. (2) of S. 18 and shall then proceed to dispose of the application according to law. This Rule makes it perfectly clear that determination under S. 18 must take place after the Collector has granted sanction and

cannot precede it. I am of opinion that both the form prescribed for an application under S. 8 and the Rules framed under the Act make it perfectly clear that the amount which must furnish the test as to whether the Board has pecuniary jurisdiction or not is the amount of the claim of the creditor and not the amount admitted by the debtor, or determined by the Board, at least in a case where the amounts mentioned by the debtor themselves make up a total in excess of Rs. 25,000.

[18] If then the application in the present case included the debt of Rs. 19,700, there can be no doubt that the total amount of the debts exceeded Rs. 25,000 and it must follow that the Board had no jurisdiction whatever to deal with the mortgagor's application. If the award is not invalid for the reason that the Board had no territorial jurisdiction, it is certainly invalid for the reason that the debt exceeded the pecuniary jurisdiction of the Board. The award, therefore, has no legal existence and cannot be a bar to the entertainment of the suit by the learned Judge.

[19] As regards the territorial jurisdiction, Dr. Sen Gupta contended that there were no limitations on the powers of the Collector to transfer a case save those prescribed by the Rules and he pointed out that the Rules did not prevent the Collector from transferring a case to a Board which had no territorial jurisdiction over the parties. In my view, this construction of S. 39 is not correct. The section reads as follows:

> The Provincial Government may authorise the Collector subject to rules made under this Act, to transfer from one Board to another, for disposal, applications made under S. S."

[20] It will be noticed that the Act by itself does not give the Collector any power of transfer. It leaves it to the Provincial Government to authorise the Collector and such authorisation must be subject to rules made under this Act. It is not the power of transfer which is so restricted, but the power of authorisation given to the Provincial Government. This section, read with the Rules, seems to me to make it perfectly clear that the limits of the Collector's power to make an order of transfer must be found within the Rules framed by the Provincial Government. In other words, the Collector will have power to make an order of transfer only in those cases where he has been authorised by the Rules to do so ; that is to say only if there is any specific Rule authorising the Collector to make a transfer to a Board which has no territorial jurisdiction over the parties, the Collector has such power. In my opinion, the view taken by the learned Judge as to the absence of territorial jurisdiction in the Midnapore Board is perfectly correct and the award is void for that reason as well.

[21] The learned Judge, however, was not right in holding that if the award was without jurisdiction and void, the proceedings before the Debt Settlement Board must be deemed to be still pending. He seems to me to have overlooked the fact that he was not sitting either as an appellate officer or as a District Judge in revision but only as a civil Court. Whatever his view as to the validity of the award might be, the award would remain as the final decision in the proceedings under the Bengal Agricultural Debtors Act till it was set aside by an appropriate authority. The learned Judge, sitting as a civil Court could not set aside the award, nor could any declaration made by him extinguish it. For example, neither of the parties could, on the authority of the view taken by the learned Judge, approach the officer now discharging the functions of the Board and ask him to resume the proceedings under the Bengal Agricultural Debtors Act on the footing that they are still pending. If the matter had come up to a District Judge under S. 40A of the Act, or come up to this Court in revision and it was held that the award was void, the effect would certainly be to restore the case to the stage at which it was before the award was made and the proceeding would have to be completed in due course by a final decision. But the question having arisen before the civil Court in a different chain altogether, the civil Court might disregard an award if it found that it was without jurisdiction, but it could mould its own procedure in the view that its decision would have an actual effect on the proceedings before the Board and revive a proceeding which had already terminated in an award. The learned Judge, in my view, was bound to take the proceeding under the Board as it was and he was not right in law in holding that in view of his decision as to the validity of the award, the proceeding before the Debt Settlement Board must be deemed to be pending.

[22] The position, therefore, is that the award pleaded by the mortgagor is an invalid award both because the Board had no territorial or pecuniary jurisdiction to deal with the case and also, as we hold, because the debt which is the subject-matter of the mortgage suit was not included in the mortgagor's application and was not in fact dealt with by the award. The result, therefore, is that neither of the clauses of S. 33 has any application and there is no bar to the learned Judge proceeding with the suit.

[23] We desire to make it clear that the effect of the view we take of the award is that the debt concerned is not covered by any valid award under the Bengal Agricultural Debtors Act and therefore there will be no bar to the learned Judge exercising his powers under the Bengal Money-

lenders Act, should that Act be otherwise applicable.

[24] In the result, Civil Rule NO. 1747 of 1946 is made absolute. The order of the learned Judge and so much of his judgment as is not upheld by this judgment are set aside and he is directed to proceed with the suit.

[25] Civil Rule NO. 1913 of 1946 is discharged.

[26] The petitioner in Rule 1747 of 1946 will get his costs from the opposite party—the hearing fee being assessed at three gold mohurs. There will be no order as to costs in Rule 1913 of 1946.

V.B.B. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 107 *[C. N. 30.]*

SEN J.

Sashi Bhusan Banerjee — Defendant 1 — Petitioner v. *Tulsi Charan Basu and others— Plaintiffs—Opposite Party.*

Civil Rule No. 919 of 1948, Decided on 22nd November 1948, for setting aside orders of Munsif, 1st Court, Alipur, D/- 14th June 1948 and 5th July 1948.

Civil P.C. (1908), O. 6, R. 17—Suit for contravention of municipal rule regarding side space — Amendment seeking to add infringement of different rule regarding back space, adds new cause of action and cannot be allowed.

In a suit against the defendant for contravention of a municipal rule regarding side space, an application to amend the plaint into an infringement of quite a different rule relating to the back space also, cannot be allowed, as it would introduce an entirely new cause of action. If the infringement of the back space rule is alleged to be subsequent to the filing of the suit, the case for amendment becomes still less maintainable, as it would be allowing the plaintiff to introduce a fresh and independent cause of action in a suit which was instituted at a time when the infringement subsequently alleged did not exist. [Para 3]

Annotation : ('44-Com.) Civil P. C., O. 6, R. 17 N. 3.

Hiralal Chakrabarty and Shyamadas Bhattacherji —for Petitioner.

Hemanta Kumar Bose for 1 to 4 and Protap Chandra Choudhury for 5 —for Opposite Party.

Order. — This rule must be made absolute. The rule was obtained by the defendant against an order allowing the plaintiffs to amend their plaint. Put shortly the facts are these. The plaintiffs instituted a suit against the defendants on 1st February 1947 for contravention of the Bengal Municipal Act regarding side space.

[2] The plaintiff's case was that the defendant petitioner erected a building on his premises in contravention of the rule regarding side space. The rule then in existence provided that there should be a three feet side space. In 1937 the rule was amended and it prescribed a four feet wide space. Before the new rule had been introduced the defendant had obtained sanction of the Tollygunge Municipality and had erected the first storey of his building in accordance with those rules. In 1946, the defendant erected a second storey in accordance with the old plan which had provided for two storied building and had practically finished construction when the present suit was instituted against the defendant by the plaintiffs alleging a breach of the rule regarding side space. There was an application for injunction by the plaintiffs which was granted and subsequently dissolved on the defendant undertaking to remove any structure if it were found in the suit that it contravened the provisions regarding side space. In November 1947 for the first time the plaintiffs applied for an amendment of their plaint. They alleged that not only had the side space rule been infringed but that the defendant had also infringed the rule regarding back space and they wished to amend their plaint by adding that the defendant had infringed the rule regarding back space. The defendant opposed this amendment on the footing that it introduced an entirely new cause of action. The learned Munsif negatived the contention of the defendant and allowed the amendment. Against that order the present rule has been obtained.

[3] It seems quite clear to me that the allowing of this amendment would introduce an entirely new cause of action. The suit was based on the infringement of a particular rule regarding side space. The plaintiffs cannot be allowed at this late stage to make out an additional and independant case of an infringement of quite a different rule which relates to the back space. The learned advocate appearing in opposition to the rule stated that at the time of the suit back space rule had not been infringed but that subsequent to the filing of the suit a permanent structure was erected on the back space. If that be so, it seems to me that the case of the plaintiffs for an amendment becomes still less maintainable. The suit was based on a certain cause of action. If a fresh cause of action has arisen after the institution of the suit, the plaintiffs may very well institute another suit on this cause of action. I see no reason why they should be allowed to introduce a fresh and independent cause of action in a suit which they instituted at a time when the infringement subsequently alleged did not exist.

[4] In these circumstances I set aside the order of the learned Munsif and disallow the amendment with costs here and in the Court below against opposite parties Nos. 1 to 4 represented by Mr. Hemanta Kumar Bose. The rule is made absolute.

V.B.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 108 *[C. N. 31.]*

SEN J.

Khan Mahammad and another — *Accused* —*Petitioners* v. *The King.*

Criminal Revn. No. 683 of 1948, Decided on 10th September 1948.

(a) Bengal Cotton Cloth and Yarn Control Order (1945), para. 18 (2)— Possession by person of cloth in excess of his normal requirement — Term "normal requirement" is vague — There must be something to show what normal requirements of accused and his family were at the time.

For a prosecution under para. 18 (2), for possessing cloth in excess of normal requirements, unless some kind of standard is fixed by the order or the Rules thereunder, it cannot be said that the accused were in possession of cloth in excess of their normal requirement. The term 'normal requirements' without further specification is a vague term. What may appear normal to some, may seem abnormal to another. In the absence of anything to show what the normal requirements of the accused and his family at the time were, his conviction cannot stand : A. I. R. (35) 1948 Cal. 78, *Rel. on.* [Para 4]

(b) Bengal Cotton Cloth and Yarn Control Order (1945) — Prosecution — Sanction of Provincial Government must be obtained — Prosecution for contravening provision of Order of 1945, cannot be started upon sanction for prosecution for contravening provision of Order of 1943, though provisions alleged to have been contravened are identical — Order sanctioning prosecution not showing offence for which sanction was given — Sanction is of no value — Criminal P. C. (1898), Ss. 196 and 188.

A prosecution for a contravention of any provision of the Cotton Cloth and Yarn Control Order 1945, requires the sanction of the Provincial Government. Sanction for prosecution for the contravention of the provisions of order of 1943 cannot be held to be a sanction for the prosecution for the disobedience of the order of 1945 which was not in force when the sanction was given, even though the terms of the corresponding paragraph of the Order of 1943 were identical. The sanction must be given with respect to the contravention for which the accused are being tried. [Para 5]

Similarly where on the face of the order sanctioning prosecution there is nothing to show for what offence the prosecution was sanctioned and there is no evidence given to show what the sanction was about, the sanction is of no value : A. I. R. (35) 1948 P. C. 82, *Rel. on.* [Para 6]

There can be no doubt that blackmarketing and similar anti-social activities should be punished. But the fundamental principle of criminal law that the prosecution must prove its case 'strictissimi juris' must be obesrved. [Para 8]

Annotation : ('49-Com.) Criminal P. C., S. 188 N. 7; S. 196 N. 3.

Ajit Kumar Dutt and N. C. Talukdar — for Petitioners.

Order. — The two petitioners have been convicted under R. 81 (4), Defence of India Rules, for having contravened the provisions of para. 18 (1) and (2), Cotton Cloth and Yarn Control Order, 1945 and each of them was sentenced to pay a fine of Rs. 80 in default to suffer rigorous imprisonment for two months. From this order of conviction and sentence an appeal was taken to the Sessions Judge who dismissed the appeal. Thereafter they obtained the present Rule.

[2] The facts are very simple. The case for the prosecution is that these two persons were walking along the embankment of the Hooghly river when they were challenged by the local people. It was at about 9 O'clock at night. Each of the petitioners had a bag and in the bag of the petitioner Khan Mahammad were found 9 pieces of mill-made dhoties and 3 yards of mill-made shirting and in the bag of the petitioner Sk. Amanat were found 6 mill-made saris and 4 pieces of mill-made dhoties. The Preventive Officer lodged a first information charging the petitioners with having contravened the provisions of Para. 4, Bengal Cotton Cloth and Yarn Control Order, 1945. The petitioners were tried for that offence. After some time that case was withdrawn as it was found that para. 4 had no application to the facts of the case because it dealt with the purchase, sale or storage of cloth without a licence or in contravention of the terms of a licence.

[3] About two months after the two petitioners were again sent up for trial on the same facts this time for having contravened the provisions of para. 18 (2), Cotton Cloth and Yarn Control Order 1945. That paragraph is in the following terms :

"No dealer or other person not being a manufacturer shall, save with the permission of the Textile Commissioner, at any time hold stocks of cloth or yarn in excess of his normal requirements."

It has been held by the Court below that the petitioners were holding cloth in excess of their normal requirements without permission of the Textile Commissioner and on this basis they were convicted.

[4] On behalf of the petitioners, the first contention raised is that it cannot be said that the petitioners were in possession of cloth in excess of their normal requirements unless some kind of standard is fixed by the Order or the Rules thereunder. I entirely agree with this view. I have expressed the same opinion in the case of *Prag Das Lakhutia and others* v. *Emperor*, 49 Cr. L. J. 31 : (A. I. R. (35) 1948 Cal. 78). The term 'normal requirements' without further specification is a vague term. What may appear normal to some may seem abnormal to another. Both the petitioners have families. We do not know how much wearing apparel the family possessed. It may be that all the wearing apparel had been exhausted and that these were the only wearing apparel which would be available to them. That being so, I cannot see how the Court can hold that they were in possession of cloth in excess of their normal requirements. On this

ground the order of conviction and sentences is liable to be set aside.

[5] There are some other grounds which would in my opinion render the conviction illegal. A prosecution for a contravention of any provision of the Cotton Cloth and Yarn Control Order 1945, requires the sanction of the Provincial Government. In the present case, no sanction was granted for the prosecution of the petitioners for having contravened any of the provisions of the aforesaid Cotton Cloth and Yarn Control Order, 1945. Sanction was obtained for contravening the provisions of the Cotton Cloth and Yarn Control Order, 1943. Now, that Order was not in force at the time that this offence was committed and the sanction for prosecution for the contravention of the provisions of that Order cannot be held to be a sanction for the prosecution for the disobedience of the Order of 1945. The learned Courts below say that the terms of the paragraph under which the prosecution is held under the Order of 1945 and the terms of the corresponding paragraph of the Order of 1943 are identical and therefore they consider that the sanction obtained for a prosecution under the Order of 1943 can be taken to be a sanction for the prosecution for the contravention of the provisions of the Order of 1945. This argument is obviously fallacious. The sanction must be given with respect to the contravention for which the petitioners were being tried. They were being tried for a contravention of the provisions of 1945 Order and unless the sanction was, such prosecution could not be a valid one. The sanction for prosecution for a contravention of the provisions of the Cotton Cloth and Yarn Control Order 1943, is not sanction for the present prosecution. It must therefore be held that there was no valid sanction for this prosecution and that being so, the entire proceedings are without jurisdiction.

[6] Next, the learned Advocate for the petitioners pointed out that all that has been proved in this case is that an entry on a piece of paper to this effect "Prosecution sanctioned"; signed (illegible) District Magistrate. The report submitted to the District Magistrate for the obtaining of the sanction has not been proved; nor has any one been examined to prove what the sanction related to. On the face of the order "Procution sanctioned" there is nothing to show for what offence the prosecution was sanctioned and there is no evidence given to show what the sanction was about. In such a case the sanction is also of no value. In this connection I would refer to the decision of the Privy Council in the case of *Gokulchand Dwarkadas Morarka* v. *The King*, 52 C. W. N. 325 : (A. I. R. (35) 1948 P. C. 82 : 49 Cr. L. J. 261).

[7] For all these reasons I hold that the orders of conviction and sentences must be set aside. The fines, if paid, must be refunded. The accused, if in custody, must be released forthwith. The rule is made absolute.

[8] In this connection I would repeat what I have said in a previous case regarding a similar matter. The practice seems to prevail in the Courts below of dealing with all irregularities and illegalities in prosecution of cases in connection with blackmarketing or contravention of Orders regarding cloth control with great laxity. There can be no doubt that blackmarketing and similar anti-social activities should be punished. But the fundamental principle of criminal law that the prosecution must prove its case '*strictis simi juris*' must be observed. The conviction in this haphazard manner helps nobody and indeed may lead to sympathy for persons engaged in blackmarketing and similar illegal transactions.

R.G.D. *Revision allowed.*

A. I. R. (37) 1950 Calcutta 109 *[C. N. 32.]*

R. P. MOOKERJEE J.

Gadadhar Dey — Plaintiff — Appellant v. *Sm. Rani Bala Dasi and others — Defendants — Respondents.*

A. F. A. D. No. 1304 of 1945, Decided on 30th June 1949, against decree of Sub-Judge, first Court, Zillah Hooghly, D/- 28th February 1945.

(a) Provincial Small Cause Courts Act (1887), Sch. II, Art. 35 (ii)—Tenant cutting and appropriating trees planted by his predecessor — Suit by landlord for compensation alleging tenant entitled only to fruits of trees — Tenant claiming right to cut trees under law — Suit held cognizable by Small Cause Court.

The right of a landlord and a tenant in respect of trees is very often a disputed right depending in some cases upon statutory provisions and in others upon custom or otherwise. A criminal case for theft or mischief or misappropriation can easily be defeated by defendant urging that he had a right to cut the trees or that he *bona fide* believed that he was entitled to cut the trees. In such a case a suit for compensation would not be excluded from the cognizance of the Small Cause Court under Sch. II, Art. 35 (ii) : A. I. R. (10) 1923 Cal. 568; A. I. R. (15) 1928 Cal. 153; A. I. R. (17) 1930 Pat. 575 and A. I. R. (15) 1928 Cal. 946, *Ref.* [Para 6]

A suit was brought by landlord against tenant for compensation for cutting and appropriating trees on the ground that the tenant was a non-permanent theka tenant who had only the right to enjoy the fruits of trees. The trees were found to have been planted by the tenant's predecessor. The tenant claimed that he had a right to cut the trees under the law :

Held that the suit was not excepted from the cognizance of the Small Cause Court under Sch. II, Art. 35 (ii). [Para 7]

Annotation : ('46-Man.) Provincial Small Cause Courts Act, Sch. II, Art. 35, N. 6, Pt. 33.

(b) Provincial Small Cause Courts Act (1887), S. 27 — Munsif having juirsdiction to try suit of Small Cause nature trying such suit in ordinary jurisdiction — That fact does not take away the

prohibition of appeal against his decision in such suit : A. I. R. (11) 1924 Cal. 487, *Rel. on.* [Para 6]

Annotation : ('46-Man.) Provincial Small Cause Courts Act, S. 27, N. 1, Pt. 3.

C. S. Sen and Samarendra Nath Banerjee —for Appellant.

Bhola Nath Roy and Sailendra Nath Chowdhury —for Respondents.

Judgment.—This appeal is on behalf of the plaintiff in a suit for recovery of Rs. 25 as compensation for cutting away and appropriating a mango tree by the defendant. The plaintiff's case is that the defendant is a non-permanent thika tenant who has only the right to enjoy the fruits of trees that may be on the land but she has no right to cut away any trees even those grown by her. The defendant had removed a mango tree and the plaintiff had accordingly filed this suit for the recovery of Rs. 25 as compensation.

[2] The defendant admits that she had cut and appropriated the mango tree planted by her predecessor-in-interest and she contends that she has a right to do so under the law.

[3] The plaintiff's witness having admitted that the defendant and her predecessors had been in possession of the disputed land for over 100 years, the mango tree in question was held by the learned Munsiff, to have been planted by the defendant's predecessor—a case as made by the defendant. The particular land is now situate within the municipal area in the town of Serampore and is used as a homestead and garden. The learned Munsif held that the tenancy was governed by the Transfer of Property Act, the defendant had the right to cut away and appropriate the tree. The suit was accordingly dismissed.

[4] An appeal was taken on behalf of the plaintiff to the Court of the Subordinate Judge, Hooghly. He held that under Art. 35, cl. (ii) of Sch. II, Provincial Small Cause Courts Act, this being a suit for damages for trees cut down and misappropriated, and even though involving a question of title to immoveable property, was cognisable by a Court of Small Causes. The learned Munsif who heard the suit was vested with the power to hear cases as a Judge of the Court of Small Causes upto a valuation of Rs. 300. Even though this suit was registered and heard as a money suit no appeal would lie against that decision.

[5] The learned Subordinate Judge further held, on the merits, that the plaintiff cannot be allowed to make a new case for the first time that the tenancy having been created more than 100 years ago, was not governed by the provisions of the Transfer of Property Act but by the general law in vogue before the promulgation of the Transfer of Property Act. The learned Subordinate Judge held that that case, not having been made in the plaint, cannot be allowed to be made now. He accepted the evidence on behalf of the defendants that the particular tree had been planted 22 years ago although the plaintiff had alleged in the plaint that that tree had been planted by his predecessor-in-interest. The plaintiff's case, as in the plaint, was rejected. The Court, further, held that the defendant had not done any act of damage by taking away a tree grown by her mother-in-law. The appeal was accordingly dismissed.

[6] The first point which requires consideration is whether any appeal lay to the Court of the Subordinate Judge against the order of dismissal of the suit passed by the learned Munsif. The value of the claim was put at Rs. 25 only. The Munsif who heard the suit had jurisdiction to try suits of a Small Cause Court nature and of the value of the claim. The suit was tried by the Munsif in his ordinary jurisdiction. That fact, however, did not take away the prohibition of an appeal contained in the Provincial Small Cause Courts Act. *Mohini Mohan* v. *Sankardas Mohanta*, 39 C. L. J. 532 : (A. I. R. (11) 1924 Cal. 487). Unless the plaintiff can invoke the provisions of Art. 35, cl. (ii) of Sch. II, Provincial Small Cause Courts Act, it must be held that no appeal lay against the decision of the Munsif. It is argued on behalf of the appellant that the allegations as made in the plaint constitute an offence of mischief within the meaning of S. 426 which falls under Chap. XVII, Penal Code. It has, however, been repeatedly pointed out that when there is a dispute between a landlord and a tenant with regard to the question as to whom the right to the trees or the right to the timber when the trees are felled, belongs is often a question of considerable difficulty. The right of a landlord and a tenant in respect of trees is very often a disputed right depending in some cases upon statutory provisions and in others upon custom or otherwise. A criminal case, either for mischief or misappropriation or for theft, would easily be defeated by the defendant urging that he had a right to appropriate the trees, as also the timber after felling them, and in the written statement as filed in this case that defence was actually raised. The tenant in such a case can very well plead that he *bona fide* believed that he was entitled to cut the trees and if under such *bona fide* belief he had felled the trees and removed the timber the provisions contained in Chap. XVII, Penal Code, cannot at all be attracted. Such a suit is one which is not excluded from the cognisance of the Court of Small Causes, (*Dildar Hossain* v. *Sadaruddin Chowdhury*, 27 C. W. N. 469 : (A. I. R. (10) 1923 Cal. 568), *Radhaballav Guha* v. *Panchcowri*

Seal, 46 C. L. J. 552 : (A. I. R. (15) 1928 Cal. 153), *Damodar Jha* v. *Baldeo Prosad*, 9 Pat. 569 : (A. I. R. (17) 1930 Pat. 575) and *Ram Prosad* v. *Sri Charn Mondal*, 27 C. L. J. 594. (A. I. R. (5) 1918 Cal. 946).) In my view, therefore, the learned Subordinate Judge was correct in holding that no appeal lay before him against the decision by the learned Munsif.

[7] It is to be noted that in the present suit the defendant is admitted to be a tenant of the plaintiff, the land is in the possession of the defendant, and the finding is that the tree in question was planted about 20 years ago by the mother-in-law of the defendant. The position might have been different if the claim was for damages for cutting of trees, standing on the plaintiff's land, without any legal justification. Such a case of a wrongful cutting of trees, for which damages are claimed, amounts to an act of mischief or criminal trespass as defined in the Penal Code, (*Commrs. of Pabna Municipality* v. *Nirode Sundari*, 46 C. W. N. 943 : (A. I. R. (29) 1942 Cal. 544)).

[8] In view of the fact that no appeal lay to the Court of the Subordinate Judge it must be held that the appeal preferred before the Subordinate Judge was rightly dismissed. There is no second appeal either against the decision and this appeal must accordingly be dismissed with costs.

G.M.J. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 111 *[C. N. 33.]*

R. P. MOOKERJEE AND P. N. MITRA JJ.

Boto Krishna Ghose — Defendant No. 1— Appellant v. *Akhoy Kumar Ghose and others —Respondents.*

Letters Patent Appeal No. 13 of 1946, Decided on 9th September 1949, against judgment of Chakravartti J., in A. F. A. D. No. 1302 of 1942, D/- 13th February 1946.

(a) Partition Act (1893), S. 4—Share in dwelling house belonging to undivided family — Meaning of —Undivided family means family which owns dwelling house and has not divided it — Transfer of share by member to stranger — House does not cease to be one belonging to undivided family — T. P. Act (1882), S. 44.

The expression "share of a dwelling house belonging to an undivided family" is used in para. 2 of S. 44, T. P. Act, and seems to have been adopted from there into S. 4, Partition Act, which takes up the law from where the former section leaves it. The expression, therefore, has the same meaning in the two enactments. [Para 11]

"Undivided family" means simply a family not divided qua the dwelling house, in other words, a family which owns a dwelling house and has not divided it. It does not mean Hindu joint family or even joint family. The members need not be joint in mess. The essence of the matter is that the house itself should be undivided amongst the members of the family who are its owners. The emphasis is really on the undivided character of the house, and it is this attribute of the house which imparts to the family its character of an undivided family. For the members of the family may have partitioned all their other joint properties and may have separated in mess and worship, but they would still be an undivided family in relation to the dwelling house so long as they have not divided it amongst themselves : A I R (21) 1934 Cal. 202, *Rel. on.* [Para 12]

Where a member of the family transfers his share in the dwelling house to a stranger, the position that arises is that the second para. of S. 44, T. P. Act, comes into operation and the transferee does not become entitled to joint possession or other common or part enjoyment of the house, although he would have the right to enforce a partition of his share. The factual position then is that it is still an undivided dwelling house the possession and enjoyment of which are confined to the members of the family, stranger transferee being debarred by law from exercising his right to joint possession which is one of the main incidents of co-ownership of property. Such a dwelling house can still be looked upon as a dwelling house belonging to an undivided family, because the members of the family have not divided it amongst themselves and are in sole enjoyment and possession of it to the exclusion of the stranger transferee who has only a right to partition. And so long as the dwelling house has not been completely alienated to strangers, successive transfers by other co-sharer members of the family do not alter the factual position in this respect, because the remaining member or members of the family have the right to hold exclusive possession to the exclusion of the stranger alienees. So long as that situation lasts, the dwelling house continues to be a dwelling house belonging to an undivided family : 23 Bom. 73; A. I. R. (16) 1929 Cal. 269 and A. I. R. (34) 1947 Cal. 426, *Ref.* [Para 13]

Annotation : ('46 Man.) Partition Act S. 4 N. 2; ('45-Com.) T. P. Act S. 44 N 8.

(b) Partition Act (1893), S. 4 (1)—Competence to apply under—Qualification to be judged with reference to position at date of application — Member, having previously alienated his share, repurchasing it before application — Member is not disqualified from claiming under S. 4 (1).

Section 4 (1) itself recognises that a person may be a member of the family although he may not be owning a share in the dwelling house. It confers the right to apply to buy the share transferred on "any member of the family being a share-holder"; the additional qualification of being a share-holder would not be necessary if the intendment of the section was that membership of the family was equivalent to co-ownership of the house. Nor is there anything in the section which disqualifies a member who, having previously alienated his share, has re-acquired it and is owning it at the time he makes his claim under S. 4. The qualification of the applicant has to be judged with reference to his position at the date of the application. A member of the family not himself having a share (e.g. the son of a co-sharer in a Dayabhag family, the father being alive up to the date of the application under S. 4) may for the first time purchase a share from another member of the family, or a share-holder member may sell his share to another member or even to a stranger and may re-purchase it from the vendee, but if he shows that he is a co-sharer member of the family at the date of his application he establishes his competence to make the application. [Para 18]

Annotation: ('46 Man.) Partition Act, S. 4 N. 1, 2.

(c) Partition Act (1893), S. 4—Dwelling house — Co-sharers having their own separate huts on sites

forming part of undivided property — Integrity of dwelling house is not destroyed. [Paras 4, 20]

Annotation : ('46-Man.) Partition Act, S. 4 N. 3.

Hiralal Chakravarti and Rabindra Nath Bhattacharyya — for Appellant.

Apurba Dhan Mukherji and Dwijendra Nath Mukherjee — for Respondents.

P. N. Mitra J.— This is an appeal under Cl. 15, Letters Patent, from a judgment of Chakravartti J. It is on behalf of defendant 1 in a suit for partition of a dwelling house and certain other properties. Our learned brother in concurrence with the Courts below has rejected the appellant's prayer under S. 4, Partition Act, to buy up the plaintiff's share in the dwelling house, and it is the propriety of this decision that is in question before us in this appeal.

[2] The facts, which are not now in dispute, are these. One Fakir Ghose and his three brothers Dwarik, Tarini and Ambika held a raiyati holding under a ganti tenure which was owned by one Kalidhan Debi, and their dwelling house stood on a portion of this holding. The ganti tenure was purchased by Fakir. He thereafter died leaving two sons Upen and Nabin as his heirs, who obtained by inheritance each an eight annas share of the ganti and a two annas share of the holding including the homestead. On 12th June 1920, Upen sold his undivided share in both the tenures and the holding including the homestead to one Troilakya who was a stranger to the family. After this sale, Upen left the homestead and Troilakya came to occupy the hut or huts in which Upen used to live. Thereafter, on 11th July 1921, Nabin, the other son of Fakir, sold to the plaintiff Akshoy Kumar Ghosh his undivided share of the tenure and the holding together with the homestead. On 3rd January 1923 Upen, however, repurchased the properties he had sold to Trailokya and came again to live in his old huts in the homestead.

[3] The plaintiff brought the present suit on 4th March 1940, for partition of the tenure and the holding including the dwelling house except certain khas lands which had previously been partitioned between the parties. Upen was then dead and his share had devolved on his sons defendant 1 and his brothers. They were joined as defendants, as also the heirs of the brothers of Fakir. In his written statement defendant 1 made a prayer under S. 4, Partition Act for buying up the plaintiff's share in the dwelling house. The learned Munsif refused it on two grounds. Firstly, he said the plaintiff Akshoy was an agnatic relation of the family and a neighbour and therefore not a stranger to the family, and as such the section could not be invoked against him. Secondly, he held that as Upen had sold away his share to a stranger, defendant 1 as the heir of Upen "cannot claim pre-emption at a subsequent period against the purchaser of another co-sharer's interest, viz. the plaintiff in the present case". On appeal by defendant 1, the lower appellate Court put this ground of rejection of the claim of defendant 1 in this way. It said that as Upen had sold away his share to a stranger, there was no joint family property at the date of the plaintiff's purchase, and re-purchase by Upen of his share subsequently did not convert the property again into joint family property. The lower appellate Court did not allude to the ground that the plaintiff was an agnatic relation of the defendants and therefore not a stranger, but assigned an additional reason of its own that as the co-sharers had separate huts of their own, there was no common dwelling house which could attract the operation of S. 4, Partition Act.

[4] Defendant 1 appealed to this Court. Chakravartti J. pronounced against both the special grounds relied on by the Courts below. Our learned brother held that the fact that the plaintiff was an agnatic relation of the defendants did not exclude the operation of S. 4 as against him, nor did the other fact that the co-sharers had separate huts of their own destroy the integrity of the dwelling house, as the sites of the huts and of the homestead as a whole were undivided property of the co-sharers. Our learned brother, however, elaborated what may be called the common ground relied on by the Courts below and proceeded to affirm their decision on a construction of S. 4, Partition Act, which negatived both the liability of the plaintiff to have any claim made against him and the competence of defendant 1 as the son of Upen to make any claim under it. The appellant has contended before us that properly construed the section is wide enough to embrace both him and the plaintiff within its ambit.

[5] Section 4 (1), Partition Act, which is the relevant provision, is in these terms :

"Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf."

[6] Upon the terms of this sub-section Chakravartti J. has observed as follows :

"They require that the sale must be of a share of a dwelling house belonging to an undivided family and the offer to buy the share must be made by a member of that family who is himself a share-holder, when the purchaser of that share, not being a member of the family, brings a suit for partition. The right is not given to any other person, nor against the purchaser of a share of any other kind of property."

As Chakravartti J., has pointed out, the section requires that the purchase must have been of a share in a dwelling house belonging to an undivided family, and our learned brother's conclusion is that this requirement is not fulfilled in the present case, because as our learned brother puts it, when the plaintiff purchased the share of Nabin on 11th July 1921, after Upen's sale to Trailokya but before the re-purchase by him, the plaintiff purchased a share of a dwelling house, not belonging to an undivided family but belonging to an undivided family and another person, viz., Trailokya. In our learned brother's view, therefore, the plaintiff is not a person against whom a claim under S. 4 can be made.

[7] This view, it will be seen, makes the plaintiff immune from any claim being made against him not merely by defendant 1 but also by the other co-sharer members of the family. But our learned brother has observed :

"I am, however, prepared to hold, as was held in the Allahabad case of *Masitullah* v. *Umrao*, A. I. R. (16) 1929 All. 414 : (119 I. C. 523) and the Patna case of *Sheodhar Prasad Singh* v. *Kishun Prasad Singh*, A. I. R. (28) 1941 Pat. 4 : (190 I. C. 117), that after a member of an undivided family has sold off his share in the family dwelling house, the remainder of the house can still be regarded as a dwelling house belonging to an undivided family, such family being constituted of the remaining members. This view of the section would make the sale by Nabin a sale of a share of a dwelling house belonging to an undivided family, but it would still not warrant a claim by defendant 1, a son of Upen, to purchase the plaintiff's share. Under this view, the dwelling house of which a share was sold to the plaintiff would be the house minus Upen's share, and the undivided family to which the house belonged would be the family minus Upen and his heirs. Since a claim against the purchaser could be maintained only by 'any member of the family, being a share-holder' it could be maintained by a member of the residuary family owning the residue of the house, who had himself a share, but no claim can be maintained by defendant 1 who is not a member of that family and who has no share in the residue of the house which, in the present view, must be taken to be the dwelling house."

[8] This view of a dwelling house minus Upen's share belonging to a family minus Upen, therefore, leads to this result that while it confers a right on the remaining co-sharer members of the family to make a claim against the plaintiff and in that sense brings him within the terms of the section, it at the same time puts Upen and his heirs outside its ambit disqualifies them from making any application under it. This view, however, is incompatible with the position that the plaintiff purchased a share of a dwelling house belonging to an undivided family *and another person*. The plaintiff is either a person who has purchased a share of a dwelling house belonging to an undivided family, or he is not such a person. The plaintiff cannot, in our opinion, be once regarded as not being such a person for the purpose of shutting out the claim of defendant 1, and again regarded as being such a person for the purpose of admitting against him the claim of the other co-sharer members of the family.

[9] The facts in the two cases referred to by our learned brother were that in one of them the stranger purchaser of a share and in the other some members of the family had actually got his or their share partitioned off by metes and bounds from the rest of the house which was left undivided amongst the remaining co-sharers. It could be truly said in those cases that after the partition the rest of the house constituted a dwelling house belonging to an undivided family. Those cases, in our opinion, do not lend any countenance to the fiction of a notional dwelling house from which a share not actually partitioned off is to be regarded as separated.

[10] This notion of a residuary dwelling house belonging to a residuary family, therefore, does not commend itself to us, and putting it aside, we have to consider whether the proposition laid down by our learned brother that the plaintiff is not the purchaser of a share of a dwelling house belonging to an undivided family and is, therefore, not amenable to the jurisdiction under S. 4, is correct.

[11] The question turns upon what meaning is to be attributed to the expression "share of a dwelling house belonging to an undivided family." It may be pointed out that this expression was used in Para. 2 of S. 44, T. P. Act and seems to have been adopted from there into S. 4, Partition Act which takes up the law from where the former section leaves it. The expression, therefore, presumably has, or ought to have, the same meaning in the two enactments.

[12] As has been pointed out by Chakravartti J. the word "family" as used in this expression, has been held not to be limited to a body of persons who are descended from a common ancestor, but to include a group of persons, related in blood, who live in one house or under a common management, *Khirode Chandra Ghoshal* v. *Sarada Prosad Mitter*, 12 C. L. J. 525 : (7 I. C. 436). Our learned brother has also pointed out that "undivided family" has been held to mean simply a family not divided qua the dwelling house, in other words, a family which owns a dwelling house and has not divided it. It does not mean Hindu joint family or even joint family. The members need not be joint in mess (*Latifannessa Bibi* v. *Abdul Rahman*, 38 C. W. N. 46: (A. I. R. (21) 1934 Cal. 202) and the cases cited therein). The essence of the matter, therefore, is that the house itself should be undivided amongst the members of the family who are its owners. The emphasis is

really on the undivided character of the house, and it is this attribute of the house which imparts to the family its character of an undivided family. For the members of the family may have partitioned all their other joint properties and may have separated in mess and worship, but they would still be an undivided family in relation to the dwelling house so long as they have not divided it amongst themselves.

[13] If in this state of things a member of the family transfers his share in the dwelling house to a stranger, the position that arises is that Para. 2 of S. 44, T. P. Act comes into operation and the transferee does not become entitled to joint possession or other common or part enjoyment of the house, although he would have the right to enforce a partition of his share. The object of this provision is to prevent the intrusion of strangers into the family residence which is allowed to be possessed and enjoyed by the members of the family alone in spite of the transfer of a share to a stranger. The factual position then is that it is still an undivided dwelling house, the possession and enjoyment of which are confined to the members of the family, the stranger transferee being debarred by law from exercising his right to joint possession which is one of the main incidents of co-ownership of property. Such a dwelling house can in our opinion still be looked upon as a dwelling house belonging to an undivided family, because the members of the family have not divided it amongst themselves and are in sole enjoyment and possession of it to the exclusion of the stranger transferee who has only a right to partition. And so long as the dwelling house has not been completely alienated to strangers as was the case in *Vaman Vishnu* v. *Vasudeo Norbhat*, 23 Bom. 73, successive transfers by other co-sharer members of the family do not alter the factual position in this respect, because the remaining member or members of the family have the right to hold exclusive possession to the exclusion of the stranger alienees. So long as that situation lasts, the dwelling house, in our opinion, continues to be a dwelling house belonging to an undivided family. The other view that as soon as a co sharer transfers his share to a stranger the dwelling house ceases to be a house belonging to an undivided family would lead to this result that as against a purchaser in the position of the present plaintiff the prohibition contained in Para. 2 of S. 44, T. P. Act against joint possession of the house by a stranger purchaser would be rendered nugatory, because he could claim that what he had purchased was not a share in a dwelling house belonging to an undivided family and that he did not, therefore, come within the mischief of the section at all. If, then, for the purposes of S. 44, T. P. Act, the expression "share in a dwelling house belonging to an undivided family" has to be interpreted in the way we have construed it above, we do not think there would be any justification for placing a different interpretation upon the self-same expression when used in the piece of complementary legislation enacted in S. 4, Partition Act. As we have said before, S. 4, Partition Act, carries forward the law laid down in S. 44, T. P. Act, and after the latter section has protected the family dwelling house from the intrusion of strangers into it, the former steps in to secure that no portion of it may pass into the possession of a stranger by giving an opportunity to the members of the family to buy him up and keep it for themselves when a suit is brought for partition of the house.

[14] The Courts have not hesitated to put a liberal construction upon the Partition Act and to interpret its provisions in such a way as would promote and fulfil the object of this piece of legislation which is to preserve the integrity of the family dwelling house and to enable the members of the family to keep it for themselves as far as possible. A good illustration is the case of *Satyabhama* v. *Jatindra Mohan*, 49 C. L. J. 136 : (A. I. R. (16) 1929 Cal. 269), where in a suit for partition brought by a stranger purchaser some co-sharer members of the family were allowed to buy up other stranger purchasers who were defendants in the action but had asked for an allotment in the house to be given to them on the partition, the reason advanced being that to deny this right to the co-sharer members of the family would be to defeat the object which the Legislature had in enacting the Partition Act. And in the recent case of *Abu Isa Thakur* v. *Dinabandhu Banik*, 51 C. W. N. 639 : (A. I. R. (34) 1947 Cal. 426), the plaintiff, who was a co-sharer member of the family, was allowed to buy up certain stranger purchasers who were defendants in the partition suit and who do not appear even to have asked for an allotment for themselves in the house.

[15] We think that the interpretation we are placing upon the expression "share in a dwelling house belonging to an undivided family" accords with and gives effect to the real meaning and intention of the Legislature in enacting S. 44, T. P. Act and S. 4, Partition Act. And this construction has this additional merit that it dispenses with the necessity of resorting to the fiction of a notional dwelling house belonging to the remaining co-sharer members of the family alone for the purpose of investing them with the right to proceed under S. 4, against a purchaser in the position of the present plaintiff. Our conclusion, therefore, is that the plaintiff

has purchased a share of a dwelling house belonging to an undivided family and an application under S. 4, Partition Act is maintainable against him.

[16] We have now to deal with the grounds upon which Chakravartti J. pronounced against the competence of defendant 1, to make an application under S. 4. The first ground sufficiently appears from the passage we have quoted above from our learned brother's judgment, and it was further developed by him in this way:

"In my opinion, the word 'family' in the phrase 'any member of the family, being a share-holder' must mean that particular undivided family, referred to in the beginning of the section, to which the dwelling house belonged, and the 'share-holder' must be a holder of a share in that house. Since, if the share sold to the plaintiff be at all a share of a dwelling house belonging to the undivided family, the family must be the family minus Upen and the dwelling house the house minus Upen's share, defendant 1, being no member of the one and having no share in the other, has no right under the section to buy off the plaintiff."

[17] As we have observed before, this ground of disqualification of defendant 1, is derived from the theory of a residuary dwelling house belonging to a residuary family; but whether it is a product of that doctrine or whether it is a corollary of the proposition that the plaintiff is not the purchaser of a share of a dwelling house belonging to an undivided family, it loses its force now that we have expressed our dissent from both of them. The other ground was formulated by our learned brother in these terms:

"When Upen re-purchased his share, it was in his hands, as it is in the hands of defendant 1 and his brothers, not a share held qua a member of the undivided family owning the house, but a share of ancestral property re-acquired from a person to whom Upen had sold it."

[18] The ties of blood which bound Upen to the other members of the family were not severed when he sold his share, and the section itself appears to us to recognise that a person may be a member of the family although he may not be owning a share in the dwelling house. It confers the right to apply on "any member of the family being a share-holder"; the additional qualification of being a share-holder would not be necessary if the intendment of the section was that membership of the family was equivalent to co-ownership of the house. Nor can we find anything in the section which disqualifies a member who, having previously alienated his share, has re-acquired it and is owning it at the time he makes his claim under S. 4. The qualification of the applicant, in our opinion, has to be judged with reference to his position at the date of the application. A member of the family not himself having a share (e. g. the son of a co-sharer in a Dayabhag family, the father being alive up to the date of the application under S. 4) may for the first time purchase a share from another member of the family, or a share-holder member may sell his share to another member or even to a stranger and may re-purchase it from the vendee, but if he shows that he is a co-sharer member of the family at the date of his application he, in our opinion, establishes his competence to make the application. The test is satisfied so far as defendant 1 is concerned, and he is competent to make a claim under S. 4.

[19] Certain equitable considerations in favour of the plaintiff and against defendant 1 were adverted to by Chakravartti J. and were advanced in argument before us by the respondent, but the matter has to be dealt with on the terms of the statute, and if the plaintiff comes within the mischief of the section and the appellant establishes his competence to apply under it, no room is left for the application of purely equitable considerations in the decision of the question before the Court.

[20] An attempt was made before us by the respondent to support the judgment of Chakravartti J. on a ground which was decided against him by our learned brother, viz. that as the co-sharers had separate huts of their own, there was no common dwelling house to which the section could be attracted. We have already briefly alluded to the reasons which led our learned brother to reject that contention and it is sufficient for us to say that we entirely agree with our learned brother's decision upon this point and the reasons upon which it is based.

[21] It remains to mention that the decision of Chakravartti J. that there is an excess area of .04 acres in the possession of the plaintiff and that the excess should be taken into account in making the partition has not been challenged by way of any cross-appeal by the plaintiff, and the direction given by Chakravartti J. in this behalf stands.

[22] The result is that this appeal is allowed with costs against the contesting respondents and defendant 1's prayer under S. 4, Partition Act is granted. Necessary directions in this behalf will be given by the trial Court to the commissioner appointed to make the partition. Defendant 1 appellant will also get his costs from the contesting respondents of the second appeal before Chakravartti J. and of the appeal to the lower appellate Court. The parties will bear their own costs of the trial Court up to the preliminary decree. Future costs will be in the discretion of the Court dealing with the case.

R. P. Mookerjee J.— I agree.

V.B.B. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 116 [C.N.34.]

HARRIES C. J. AND CHATTERJEE J.

Provat Kumar Kar and others — Accused Petitioners v. *William Trevelyan Curties Parkar — Complainant — Opposite Party.*

Criminal Revn. No. 623 of 1949, Decided on 12th September 1949.

(a) Industrial Disputes Act (1947), S. 23 (a) (b) and (c) — Clause (c) makes strike during period of settlement or award illegal, if it relates to matters covered by settlement or award — Clauses (a) and (b) do not make such distinction — Any strike during pendency of conciliation proceedings and seven days thereafter is illegal.

The words "in respect of any of the matters covered by the settlement or award" have been deliberately inserted in cl. (c) of S. 23 to limit its operation. During the period in which a settlement or award is in operation the workman cannot strike or the employers cannot lock out in respect of any of the matters covered by the settlement or award. Strikes or lock-outs in respect of other matters are permissible. Clause (c), therefore, draws a clear distinction between strikes and lock-outs on matters in respect of which an award or settlement has been made and strikes or lock-outs connected with matters not covered by any award or settlement. But no such distinction is made in cls. (a) and (b) of S. 23. Clauses (a) and (b) prohibit workmen striking or any employer locking out his employment during the pendency of conciliation proceedings and seven days after the conclusion of such proceedings, and during the pendency of proceedings before a Tribunal and two months after the conclusion of such proceedings. There is nothing in these two clauses from which the Court can infer that a strike is permissible or a lock-out is permissible where the subject-matter of the dispute is different from the subject-matter of the dispute pending before a Tribunal or before a conciliation authority. The words of cls. (a) and (b) cover all strikes or lock-outs relating to the industrial establishment which originally gave rise to the dispute which has been referred to a Tribunal or to the conciliation authorities. The fact that the proceedings were never brought to a conclusion cannot affect the convictions, when there were undoubtedly proceedings pending at that time and the employees went on strike whilst these proceedings were pending. [Paras 17 & 23]

(b) Industrial Disputes Act (1947), S. 5 — Does not cover criminal proceedings for offences created under Act.

The words in S. 5 only cover such proceedings as are pending for the settlement of disputes. Such proceedings may be before a Tribunal or they may be before the other authorities which are mentioned in S. 3 of the Act. The reference is to those proceedings and the section cannot possibly cover criminal proceedings instituted in a criminal Court for any offences created by the Act. [Para 24]

(c) Interpretation of Statutes — Intention of Act clear — Words should not be inserted to reduce it to nullity.

Chatterjee J.—Where the main object and intention of the Act is clear, it should not be reduced to a nullity by inserting words or amending a clause which would be the duty of the Legislature and not of the Court. The grammatical construction should be adhered to, unless it is clearly repugnant to the intention of the Act or unless it leads to some manifest absurdity: 150 E. R. 724, *Ref.* [Para 32]

Atul Chandra Gupta, M. M. Sen and Krishna Prosad Basu — for Petitioners.

S. M. Bose and S. C. Talukdar—for Opposite Party.

Harries C. J.—This is a petition for revision of an order passed by the Chief Presidency Magistrate convicting the ten petitioners of an offence under S. 26, Industrial Disputes Act, 1947, and sentencing each of them to pay a fine of Rs. 25. In default of payment of the fine it was provided that each should undergo a period of seven days' imprisonment.

[2] The ten petitioners were employees of Messrs. Lloyd Bank Limited, and were employed at the Head Office and the Chowringhee Office of the Bank. Disputes had arisen between the Bank and its employees and on 17th January 1948, these disputes were referred to the adjudication of a Tribunal under S. 10 (1) (c), Industrial Disputes Act (XIV [14] of 1947).

[3] Before these proceedings had terminated the ten petitioners together with other employees of the Bank went on a one-day strike on 17th August 1948. This one-day strike admittedly had nothing to do with the disputes which had been referred to the adjudication of a Tribunal under the Act. The one-day strike was a strike to express sympathy with certain employees of the Central Bank of India who were themselves on strike.

[4] Sanction from the Provincial Government was obtained and a prosecution was instituted against eleven persons for striking contrary to the provisions of S. 26 and further for instigating others to strike. The case came before the learned Chief Presidency Magistrate who held that there was no evidence upon which the eleven persons could be convicted of an offence of instigating others to strike. He, however, held that the eleven persons were guilty of an offence under S. 26, convicted them and sentenced them, as I have indicated. Of those eleven persons ten persons have petitioned this Court in revision.

[5] The prosecution was under S. 26 (1), Industrial Disputes Act (hereinafter referred to as the Act). The sub-section is in these terms:

"Any workman who commences, continues or otherwise acts in furtherance of, a strike which is illegal under this Act, shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to fifty rupees, or with both."

[6] Section 24 (1) provides:

"A strike or a lock-out shall be illegal if—(i) it is commenced or declared in contravention of S. 22 or S. 23; or (ii) it is continued in contravention of an order made under sub-s. (3) of S. 10."

[7] It is common ground that if this strike was illegal, it could only be illegal by reason of the provisions of S. 23 (b) of the Act.

[8] Section 23 is in these terms:

"No workman who is employed in any industrial establishment shall go on strike in breach of contract

and no employer of any such workman shall declare a lock-out—(a) during the pendency of conciliation proceedings before a Board and seven days after the conclusion of such proceedings; or (b) during the pendency of proceedings before a Tribunal and two months after the conclusion of such proceedings; or (c) during any period in which a settlement or award is in operation, in respect of any of the matters covered by the settlement or award."

[9] It will be seen from this section that no workman employed in any industrial establishment can go on strike in breach of his contract during the pendency of proceedings before a Tribunal and two months after the conclusion of such proceedings.

[10] On behalf of the prosecution it was urged before the learned Chief Presidency Magistrate that on the day this strike took place there were proceedings pending before a Tribunal and therefore the strike was illegal, as being contrary to S. 23 (b) of the Act in that it was a strike during the pendency of such proceedings.

[11] Mr. Atul Gupta who has appeared on behalf of nine of the petitioners has conceded that if the words of S. 23 (b) are taken literally then a case can be made out for the prosecution. He has, however, urged that no offence is committed under S. 23 (b) unless the strike in breach of contract is connected with the dispute then pending before the Tribunal. He has urged that if the strike concerns a matter or dispute different from the dispute already submitted to the Tribunal then the strike is not illegal by reason of S. 23 (b).

[12] On the other hand, the learned Advocate-General on behalf of the opposite party contends that the Legislature where it intended that the cause of the strike should have relation to the dispute before the Tribunal or the award made thereon, it has said so in the clearest terms. Reference is made to S. 23 (c). That provides that no workman who is employed in any industrial establishment shall go on strike in breach of contract during any period in which a settlement or award is in operation, in respect of any of the matters covered by the settlement or award. There is nothing in this section to prevent a workman going on strike during a period in which an award is in operation, if the strike is connected with matters other than those covered by the award. However, if the strike is in respect of any matters covered by the award then the strike is prohibited. It is to be observed that these words, "In respect of any of the matters covered by the settlement or award", appear only in cl. (c) of S. 23, and find no place in either cl. (a) or cl. (b). The contention of the Advocate-General was that if it was intended to limit the operation of S. 23 (a) or (b) to strikes arising out of matters pending before the Tribunal, then words similar to the words found in cl. (c) would have been added to cl. (a) and cl. (b).

[13] There is considerable force in this contention: but Mr. Atul Gupta has argued that the words "in respect of any of the matters covered by the settlement or award" have no reference whatsoever to the dispute or disputes which was or were the causes of the strike. He has urged that the words "in respect of any of the matters covered by the settlement or award" govern the terms "settlement or award". His point is that the whole of an award may not be put into operation and in a case where the whole of the award is not put into operation, he urges that these words "in respect of any of the matters covered by the settlement or award" are necessary. Mr. Gupta relied upon S. 15 (2) and the proviso to sub-s. (2) which is in these terms:

"(2) On receipt of such award, the appropriate Government shall by order in writing declare the award to be binding:

Provided that where the appropriate Government is a party to the dispute and in its opinion it would be inexpedient on public grounds to give effect to the whole or any part of the award, it shall on the first available opportunity lay the award together with the statement of its reasons for not making a declaration as aforesaid before the Legislative Assembly of the Province or where the appropriate Government is the Central Government, before the Central Legislative Assembly, and shall, as soon as may be, cause to be moved therein a resolution for the consideration of the award; and the Legislative Assembly may, by its resolution confirm, modify, or reject the award."

[14] Then follows sub-s. (3) which is in these terms:

"On the passing of a resolution under the proviso to sub-s. (2), unless the award is rejected thereby, the appropriate Government shall by order in writing declare the award as confirmed or modified by the resolution, as the case may be, to be binding."

[15] It is clear from these provisions that where the Government is a party to an industrial dispute, the award made by the adjudicator can be modified before an order is made to enforce it. Mr. Gupta's argument is that the words "in respect of any of the matters covered by the settlement or award" in cl. (c) of S. 23 of the Act are necessary because the award which is to be enforced may be not the award as made by the Tribunal. It may be an award as modified under the proviso to sub-s. (2) of S. 15 of the Act. In other words, the award which is to be put into operation may only be part of the award as originally made. Mr. Gupta, therefore, argues that it is necessary to insert the words "in respect of any of the matters covered by the settlement or award" in cl. (c) of S. 23, because the actual award in operation might be something less or it might not cover matters which the original award dealt with. The contention is that the words "in respect of the matters covered by the settlement or award" would limit the

operation of S. 23 (c) to the award as modified or altered under the proviso to sub-s. (2) of S. 15.

[16] In my judgment the words "in respect of any of the matters covered by the settlement or award" are unnecessary for the purpose suggested by Mr. Gupta. The award which is put in operation is the award as modified and therefore, the opening words of S. 23 (c) which are, "during any period in which a settlement or award is in operation", must mean the period in which a settlement or award as modified by the Government concerned is in operation. By reason of the proviso to sub-s. (2) of S. 15 the original award may never be put in operation, but what may be put in operation is an award modified or altered by the Government concerned.

[17] In my judgment the words "in respect of any of the matters covered by the settlement or award" have been deliberately inserted in cl. (c) of S. 23 to limit its operation. During the period in which a settlement or award is in operation the workman cannot strike or the employers cannot lock-out in respect of any of the matters covered by the settlement or award. Strickes or lock-outs in respect of other matters are permissible. Clause (c), therefore, draws a clear distinction between strikes and lock-outs on matters in respect of which an award or settlement has been made and strikes or lock-outs connected with matters not covered by any award or settlement. It is to be observed, however, that no such distinction is made in cls. (a) and (b) of S. 23. Clauses (a) and (b) of that section prohibit workmen striking or any employer locking-out his employment during the pendency of conciliation proceedings and seven days after the conclusion of such proceedings, and during the pendency of proceedings before a Tribunal and two months after the conclusion of such proceedings. There is nothing in these two clauses from which the Court can infer that a strike is permissible or a lock-out is permissible where the subject-matter of the dispute is different from the subject-matter of the dispute pending before a Tribunal or before a conciliation authority. It appears to me that the words of cls. (a) and (b) cover all strikes or lock-outs relating to the industrial establishment which originally gave rise to the dispute which has been referred to a Tribunal or to the conciliation authorities.

[18] Mr. Atul Gupta has urged that words similar to the words "in respect of any of the matters covered by the settlement or award" should be inserted in cls. (a) and (b) of S. 23. For example, cl. (b) should read "during the pendency of proceedings before a Tribunal and two months after the conclusion of such proceedings in respect of any of the matters covered by the disputes submitted to adjudication" or some similar words. He concedes that in construing a section Courts are not at liberty to insert words or sentences, but he has contended that such is absolutely necessary in this case. Further, he has urged that other additions must be made to this section to make it intelligible; for example, he has urged that the opening words of the section as they stand are not intelligible. The words are "No workman who is employed in any industrial establishment shall go on strike in breach of contract . . . . . " Mr. Gupta has contended that to make that intelligible the words "of service" should be added to contract. If the words were added it would make the section perhaps a little more artistic, but I think, as the section is drafted, the word "contract" there can only mean contract of service, because it is a section dealing with workmen employed in an industrial establishment who strike in breach of contract. That must mean, therefore, breach of their contract of service with the employer in that particular industrial establishment.

[19] Mr. Gupta also contended that unless some other words were added, workmen who were not intimately connected with the industrial dispute might be prevented from striking. For example, he urged that on a literal construction of this section employees of the Lloyds Bank in Bombay or Delhi would be prohibited from striking by reason of this section. That argument however overlooks the words "employed in any industrial establishment." Those words, to my mind, limit the ambit of this section to dispute arising in a particular factory, workshop or other place of business or industry. The section was never intended to cover cases where the same employers employed workmen or employees in various factories situate in different towns.

[20] "Employed in an industrial establishment" must mean employed in some particular place, that place being the place used for manufacture or an activity amounting to industry as that term is used in the Act. That, I think, is clear from S. 2 (n) (ii) of the Act which is in these terms :

" 'public utility service' means

* * * * *

(ii) any section of an industrial establishment, on the working of which the safety of the establishment or the workmen employed therein depends."

[21] It seems to me quite clear that there the words "industrial establishment" mean the place at which the workmen are employed and the words as used in S. 2 (n) (ii) must have the same meaning as when they are used in S. 23. That being so, it is quite clear that S. 23 could not

cover a case of workmen in Bombay striking against an employer with whom employees in Calcutta have a dispute.

[22] It appears that an Ordinance (Ordinance No. VI of 1949), was passed by the Central Government and was published in the Gazette of 30th April 1949. Section 4 of that Ordinance provided:

"Notwithstanding anything contained in any other law, it shall not be competent for a Provincial Government or any officer or authority subordinate to such Government to refer an industrial dispute concerning any banking or insurance company, or any matter relating to such dispute, to any tribunal or other authority for adjudication, inquiry or settlement."

Section 5 of the Ordinance is in these terms:

"(1) Where under any law any industrial dispute concerning any banking or insurance company or any matter relating to such dispute has, before a commencement of this Ordinance, been referred by a Provincial Government or any officer or authority subordinate to such Government to any tribunal or other authority of adjudication or settlement and any proceedings in respect of or arising out of such reference were immediately before such commencement pending before any tribunal or other authority, then on the date of such commencement such reference shall be deemed to be withdrawan and all such proceedings shall abate.

(2) The Central Government shall, as soon as may be after the commencement of this Ordinance, by order in writing, refer under S. 10 of the said Act every industrial dispute to which the provisions of sub-section (1) apply to an Industrial Tribunal constituted under the said Act for adjudication."

[23] This Ordinance put an end to all proceedings which were being carried on all over India before various Tribunals relating to disputes between banks and their employees, and the purpose of the Ordinance was that all the disputes should be referred to a Tribunal which would deal with all of them. Proceedings which had been commenced on reference of particular disputes abated and these proceedings between the Lloyds Bank in Calcutta and their employees at the Head Office and the Chowringhee branch abated under this Ordinance. The fact that the proceedings were never brought to a conclusion cannot affect the convictions. There were undoubtedly proceedings pending at that time and the employees went on strike whilst these proceedings were pending. It is in my view wholly immaterial whether the proceedings ever fructified into an award or whether they ultimately proved infructuous. The object of cls. (a) and (b) of S. 23, is to ensure an atmosphere of calm and peace during an adjudication upon an industrial dispute. Whilst the adjudication is proceeding the workmen in that particular factory or establishment cannot strike and further the employers cannot lock-out their employees and it is immaterial whether the strike or lock-out is concerning matters connected with a dispute which is before the Tribunal or not. All disputes are forbidden in order to ensure a calm atmosphere for the adjudication upon the disputes, which have been referred.

[24] Mr. Gupta suggested that these criminal proceedings had abated by reason of the concluding words of S. 5 of this Ordinance. The words are:

"Any proceedings in respect of or arising out of such reference were immediately before such commencement pending before any tribunal or other authority, then on the date of such commencement such reference shall be deemed to be withdrawn and all such proceedings shall abate."

The suggestion is that this criminal prosecution was a proceeding arising out of or in respect of the reference. But it appears to me that these words only cover such proceedings as are pending for the settlement of disputes. Such proceedings may be before a Tribunal or they may be before the other authorities which are mentioned in S. 3 of the Act. The reference is to those proceedings and in my view the section cannot possibly cover criminal proceedings instituted in a criminal Court for any offences created by this Act.

[24a] For these reasons I can see no ground for interfering with the order of the learned Chief Presidency Magistrate and accordingly this petition fails and the Rule is discharged.

[25] **Chatterjee J.**—I agree. The facts have been fully recited by my Lord the Chief Justice, and I need not repeat the same. The learned advocate appearing for the petitioners urged that a strike *per se* is not illegal and that the workmen should not be deprived of the right to strike unless there are specific words from which such an injunction can be inferred in the statute.

[26] The learned Chief Presidency Magistrate has held that there was no substance in the defence contention that S. 23 (b) of the Industrial Disputes Act should be given a limited meaning so as to indicate that the proceeding before the Tribunal must be in respect of the issue on which the petitioners went on strike.

[27] The sole question before us is this: Is the strike illegal under S. 24, Industrial Disputes Act? Under that section a strike or lock-out shall be illegal if it is commenced or declared in contravention of S. 23. Under S. 23, there is a general prohibition with regard to strikes and lock-outs. The essential ingredients of an offence in such a case are: (a) that there must be workmen employed in an industrial establishment, (b) that they shall go on strike in breach of the contract of employment and (c) that there must be the pendency of proceedings before a Tribunal.

[28] In my opinion all these ingredients were present in this case. The petitioners urge that the Magistrate failed to appreciate that the

prohibition contained in S. 23 (b), referred only to a strike concerning the particular disputes which were pending adjudication before a Tribunal.

[29] I cannot accede to this contention. On a proper reading of Ss. 23 and 24 and the other relevant sections of this Act, it seems to me that there is a conscious distinction made between the two cases (a) when a matter is pending adjudication and (b) when the adjudication has ripened into an award.

[30] In the first case, that is, when proceedings are pending either before a Board or before a Tribunal there is an absolute prohibition on both the employers and the workmen. The employer is directed not to declare a lock-out; that is obviously in the interests of the workmen themselves. Similarly, the workmen are enjoined not to go on strike.

[31] After the adjudication is over and an award has been made, the injunction is that there should be no strike or lock-out in respect of any of the matters covered by the settlement or award under S. 23 (c).

[32] It has been urged by Mr. Gupta that words should be put in cl. (b) of S. 23, otherwise the language of the statute in its plain and ordinary meaning would lead to absurdity, hardship or injustice. He has asked us to read cl. (b) so as to mean that the injunction against strikes is confined to cases when proceeding are pending before a Tribunal relating to the disputes involved in the strikes. To import these words into cl. (b) will be really to amend the statute. Where the main objection and intention of the Act is clear, it should not be reduced to a nullity by inserting words or amending a clause which would be the duty of the Legislature and not of the Court. Parke, B., has pointed out that the grammatical construction should be adhered to, unless it is clearly repugnant to the intention of the Act or unless it leads to some manifest absurdity. *Becke* v. *Smith*, (1836) 2 M. & W. 191: (150 E. R. 724). I see no manifest repugnancy or absurdity, nor anything so contrary to the intention of the statute as to force us to depart from the grammatical construction of the Act.

[33] I would have acceded to the contention of Mr. Gupta if the opening words of S. 23 are to be construed in a general sense so as to cover all disputes between workmen and employers in respect of any branch of the Lloyds Bank. It would lead certainly to hardship and inconvenience and in some cases to gross injustice, if we are driven to construe the Act in such a way as to hold that all workmen employed in the different branches of this Bank in the different parts of India are debarred from resorting to any strike, because the workmen involved in a particular establishment in Calcutta are involved in an adjudication pending before a Tribunal. Suppose there is a big corporation which has five hundred branches all over the country and there is a tiny place where there is a local dispute between the manager and the employees; assume that in such a case there is a reference under S. 10 of that particular dispute to an Industrial Tribunal. If the Act is to be construed in such a manner as to say that all the workmen who are working in the other branch organisations throughout the country are debarred from resorting to any strike for ventilating their just grievances or for the redress of their disabilities, then surely the language of the statute would lead to great hardship and injustice. In my opinion that is not what the Act contemplates. It only puts an embargo on a strike in respect of the workmen employed in the particular industrial establishment, that is, the particular factory or workshop or branch which is involved in the pending proceedings before a Tribunal. In that view there is really no scope for the argument that the statute leads to great hardship or absurdity or injustice. In my view S. 23 (c) says that workmen cannot go on strike on any of the matters covered by the award. But the Legislature has made a conscious departure in the case of pending proceedings and in such a case in order to make possible the uninterrupted course of the proceedings before the Tribunal both parties must stay their hands and must not prejudice a fair and impartial settlement or adjudication of the disputes. Therefore, in such a case the prohibition is general and unqualified. If we put that construction on the statute, then obviously there is no substauce in the point that cl. (b) should have a limited construction. So long as these proceedings are pending before a Tribunal, whatever may be their ultimate fate, and however they may be delayed, the statute says that there shall be no lock-out and no strike. If you allow the wormen to go on strike during the pendency of these proceedings, obviously the employers also will assert their right to enforce a lock-out, and it may be grossly detrimental to the interests of the unfortunate workmen or employees.

[34] I agree with the order proposed by the learned Chief Justice.

R.G.D. *Rule discharged.*

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A. I. R. (37) 1950 Calcutta 121 *[C. N. 35.]*

G. N. DAS AND LAHIRI JJ.

Governor-General in Council—Plaintiff—Appellant v. *Corporation of Calcutta—Defendant—Respondent.*

A. F. O. O. No. 149 of 1947, Decided on 30th March 1949, against order of Sm. C. C. Judge, Sealdah, D/- 30th June 1947.

(a) Municipalities—Calcutta Municipal Act (III [3] of 1923), S. 127 (a)—Applicability—Assessment of premises in 1942-1943 — Owner and occupier same at such time—No structure on land — Structures raised by lessee about year 1945—Assessment by Corporation of bare land and building portion — Assessment held was illegal both under S. 127 (a) and S. 131 (2) (d) — Calcutta Municipal Act (III [3] of 1923), S. 131 (1) and (2) (d).

There was a revised assessment of the premises in question in 1942-1943 to remain in force for 6 years i. e. till 1948-1949. At that time the owner and occupier was the same. There was then no structure on the land. When the structures were raised by the lessee about the year 1945, the Corporation assessed the same presumably under S. 131 (2) (d). The details of valuation showed that the entire premises i. e. the bare land and the remaining portion, being the building portion and appurtenant land, was re-valued:

Held that such a course was not permissible under the Act. The revised assessment in 1945 of the entire premises before the expiry of the statutory period of 6 years was therefore illegal. [Para 22]

Held further that the entire premises could not also be valued under S. 131 (2) (d) as under the section the valuation is to be made of "such building" i. e. the new building and the valuation is of a temporary duration i. e. for the unexpired portion of the period referred to in S. 131 (1). [Para 23]

(b) Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 127 (a) — Corporation valuing premises by sub-dividing same into two parts — No application for sub-division—No proceedings taken for such purpose — Assessment held was bad even if section applied.

Where the Corporation valued the premises by sub-dividing the same into two parts, viz. the building and land appurtenant thereto and the portion of bare land not so appurtenant and both were valued as held for letting purposes i. e. under S. 127 (a):

Held that the assessment, even assuming that S. 127 (a) was applicable, should have been made as one unit. The unit of assessment was the entire premises. There was no application for sub-division of the unit, nor were any proceedings taken for that purpose. The assessment was therefore bad. [Paras 25 and 26]

(c) Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 127 (a) and (b) — Assessment partly under both sub-sections is not permissible.

The mode of assessing one unit of assessment partly under S. 127 (a) and partly under S. 127 (b) is not permissible: A. I. R. (26) 1939 P. C. 20, *Foll.*; A. I. R. (27) 1940 Cal. 47, *Ref.* [Para 27]

(d) Maxims — *Quicquid inædificatur solo solo cedit*— Principle is not in consonance with usages and customs of this country.

The fiction of English law that buildings erected on land become, by the mere accident of their attachment to the soil, the property of the owner, compendiously embodied in the maxim *Quicquid inædificatur solo solo cedit*, is not in consonance with the usages and customs of this country: 6 W. R. 228 (F. B.) and A. I. R. (14) 1927 P. C. 135, *Foll.* [Para 31]

(e) Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 127—Section does not speak of hypothetical user — Land used for letting purposes—Building erected by lessee used by himself—Building cannot be regarded as held for letting purposes.

Section 127 does not speak of hypothetical user but of actual or intended user. Therefore, the assumption that because the land is used for letting purposes, the building erected by the lessee though used by the lessee himself should be regarded as held for letting purposes, is unwarranted. [Para 32]

(f) Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 127 (a) and (b) — Scheme of section—Bare land is valued under sub-s. (a)—Building erected for letting purposes — Case would be governed by same sub-section—Building not erected for letting purposes—Sub-s. (b) would apply.

The scheme of S. 127 is that if the land be bare land, it is to be valued under S. 127 (a); if there be a building upon it, the case would be governed by S. 127 (a) if the building was erected for letting purposes or was ordinarily let or by S. 127 (b) if the building was not erected for letting purposes or was not ordinarily let: A. I. R. (27) 1940 Cal. 47, *Expln.*; A. I. R. (35) 1948 Cal. 116, *Ref.* [Para 40]

Chandra Sekhar Sen and Provas Kumar Sen Gupta — for Appellant.

Krishnalal Banerjee — for Respondent.

Das J. — The appellant, Dominion of India, representing the East Indian Railways, (formerly Bengal Assam Railway) appeals to this Court under S. 141, Calcutta Municipal Act III [3] of 1923 (hereinafter called the Act) against an order dated 30th June 1947, passed by Mr. R. N. Ray, learned Small Cause Court Judge, Sealdah, District 24 Parganas, whereby he dismissed an appeal against the order of the second Deputy Executive Officer, Corporation of Calcutta, dated 11th April 1946, under S. 140 of the Act in respect of the assessment of Premises No. 52, Gopal Chandra Chatterjee Road.

[2] The B. A. Railway (Bengal Assam Railway) was the owner and occupier of Premises No. 52, Gopal Chandra Chatterjee Road, measuring 83 Bighas, 9 Kottahs 6 Chhataks and 14Sq ft., and was paying Rs. 3004-12-0 per annum on account of municipal rates and taxes to the Corporation of Calcutta, hereinafter called the Corporation.

[3] By a memorandum, Ex. 4, the B. A. Railway let out to the Civil Supply Department the aforesaid premises for one year subject to further extensions, as may be agreed upon; the relevant provision runs as follows:

"2. The Civil Supply Department shall be liable to pay to the Bengal Assam Railway Administration a sum of Rs. 60,096-4-0 per annum on account of rent for occupation of the above land. The Civil Supply Departments shall also pay a sum of Rs. 3004-12-0 per annum on account of Municipal tax which the Railway Administration is paying to the Calcutta Corporation. The Civil Supply Department shall be (sic) also pay other taxes or ancillary charges which the Railway Administration may have to pay to any local authorities or any other body in connection with the said plot of land and/or structures thereon."

It is now admitted that thereafter the Civil Supply Department erected certain godowns and other structures at its own cost and for its own use. This is also supported by the uncontradicted evidence adduced by the appellant.

[4] In September 1945, the Corporation served the following notice, Ex. 3, on the appellant :

"Corporation of Calcutta ; Assessment Department.

Special Notice under S. 138 of Bengal Act III [3] of 1923.

The owner of Premises No. 52, Gopal Chandra Chatterjee Road.

Take notice that the above premises have been assessed at an annual value of Rs. 3,71,520 and the said valuation is to remain in force from the commencement of the 3rd quarter of 1945-46 until the expiration of the period of assessment of the ward within which the above premises are situated, viz., the 4th quarter of 1948-1949.

Grounds of increase.

Valuation of the new structures on estimated yearly rental value less statutory allowance for repairs.

Municipal Office S. M. Hossain
Acting Assessor to
Dated 11th September, 1945. the Corporation."

[5] The following grounds of objections were then raised to the said proposed assessment :

(i) That the entire revaluation is *ultra vires*, illegal and inoperative :

(ii) that the additional constructions which are sought to be assessed are not liable under the law to be assessed ;

(iii) that the entire principle and basis of assessment are wrong and not warranted by the law ; and

(iv) that the taxes demanded on the assessment are patently disproportionate to the services rendered.

[6] It would appear from Ex. A (1) that the Executive Engineer of the B. A. Railway admitted that the approximate cost of construction of the godown and structures was Rs. 35,90,000 only (excluding costs of land).

[7] The second Deputy Executive Officer by his order dated 11th April 1946, Ex. 2 (a), reduced the valuation to Rs. 3,22,920.

[8] The details of valuation are as follows :

Corporation of Calcutta ; Assessment Department.

Statement of Details of Valuation.

Intermediate Re-valuation with effect from the 3rd quarter of 45-46. Premises No. 52, Gopal Chandra Chatterjee Road.

33000 × 12 ...	...	396000
10% ...	...	39600
		356400
Land about 10 B @ 1/- p. k. p. m. ...	...	2400
		358800
10% ...	...	35880
		322920.

[9] In the memorandum of appeal filed by the appellant, the grounds are thus stated :

"Buildings standing on this premises were not erected for letting nor are ordinarily let. The respondent body did not consider what they ought to have considered. The appellant claims that the assessment of the annual value as made by the respondent body under S. 127 (a), Calcutta Municipal Act, 1923, is illegal and should be cancelled."

[10] The case was taken up on 7th May 1947, and evidence was closed on that date. The case then stood over for arguments, on 26th May 1947. On 13th June 1947 the Corporation filed a petition praying for allowing it to adduce evidence on the question of valuation under S. 127 (b) of the Act. This prayer was refused. The case was taken up on 27th June 1947 and one witness was examined for the appellant and the memorandum of terms was marked as Ex. 4, on behalf of the appellant. The Corporation filed a petition that it has been prejudiced by the refusal of the Court to allow evidence of valuation under S. 127 (b). Arguments were then heard.

[11] The learned Small Cause Court Judge dismissed the appeal by his order dated 30th June 1947.

[12] In this judgment, the learned Judge pointed out that the quantum of assessment was not challenged, that the appellant did not plead that it could not be taxed in respect of the structures, because it was neither the owner nor the occupier thereof, that the only contention raised was that the principle of assessment was wrong, the assessment should have been made under S. 127 (b) and not under S. 127 (a) of the Act.

[13] As already stated this appeal is by the Dominion of India. Mr. Sen appearing for the appellant has argued that the basis of the assessment is wrong that the assessment should have been made not under S. 127 (a), but under S. 127 (b) of the Act and that as such the assessment made should be set aside.

[14] Mr. Banerjee for the respondent, on the other hand, has contended that S. 127 (b) of the Act only applies where the land and the building belong to the same person. Mr. Banerji has further submitted that if the land is held on a lease, any superstructure built by the lessee must be taken to be a part of the land for the purpose of assessment of rates and the land and the superstructures should both be deemed to be held for letting purposes.

[15] To deal with the contentions raised, it would be profitable to refer to some portions of Chap. X of the Act which is headed as "The consolidated rate."

[16] Broadly speaking, the chapter first deals with the imposition of the consolidated rate and then deals with apportionment thereof between owners and occupiers.

[17] Section 124 is the charging section and runs as follows:

124. A consolidated rate not exceeding twenty three per cent on the annual valuation determined under this chapter may be imposed by the Corporation upon all lands and buildings in Calcutta for the purposes of this Act.

[18] Section 127 provides for the ascertainment of the annual value.

127. For the purpose of assessing land and buildings to the consolidated rate,

(a) the annual value of land, and the annual value of any building erected for letting purposes or ordinarily let, shall be deemed to be the gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year, less, in the case of a building, an allowance of ten per cent for the cost of repairs and for all other expenses necessary to maintain the building in a state to command such gross rent; and

(b) the annual value of any building not erected for letting purposes and not ordinarily let shall be deemed to be five per cent. on the sum obtained by adding the estimated present cost of erecting the building, less a reasonable amount to be deducted on account of depreciation (if any) to the estimated present value of the land valued with the building as part of the same premises."

[19] In the Court below this case proceeded on the footing that it was a case of general revision of assessment at the end of six years prescribed by S. 131 (1) of the Act.

[20] The present case is, however, different. Here there was a revised assessment of the premises in 1942-1943, to remain in force for 6 years i. e., till 1948-1949. At that time, the owner and occupier was the same, being the B. A. Railway. There was then no structure on the land. The land was bare land and the assessment must have been made under S. 127 (a). When the structures were raised about the year 1945, the Corporation assessed the same presumably under S. 131 (2) (d). This would appear from the notice EX. 3 issued under S. 138 of the Act.

[21] If this is the correct position, the Corporation can only value the new building. The details of valuation, already referred to, show that the entire premises was revalued, the bare land 10 bighas at a hypothetical rent of Re. 1 per katta per month less deduction of 10 p. c. and the remaining portion being the building portion and appurtenant land, at a hypothetical rent less deduction of 10 p. c. both under S. 127 (a).

[22] Such a course is, in our opinion, not permissible under the Act. The revised assessment of the entire premises before the expiry of the statutory period of 6 years is therefore illegal.

[23] Mr. Banerjee does not dispute that the structures erected are new buildings as defined in S. 3 (46) but his only answer is that the true import of S. 131 (2) (d) is that when a new building is erected during the currency of the period prescribed by S. 131 (1), the Executive Officer may value the entire premises i. e. the building and the surrounding lands anew. This argument overlooks two facts, viz., (1) that the valuation is to be made of "such building" i. e. "the new building" and (2), that the valuation is of a temporary duration i.e.. for the unexpired portion of the period referred to in S. 131 (1); it is, therefore, not a case of a fresh assessment under S. 131 (1). Mr. Banerjee's contention cannot therefore be accepted.

[24] But assuming that it was permissible for the Corporation to revalue the entire premises, viz., the land and buildings included in premises NO. 52, Gopal Chandra Chatterjee Road, the question is how should the assessment be made.

[25] The Corporation has valued the premises by sub-dividing the same into two parts, viz. the building and land appurtenant thereto (i. e. the portion of land necessary for the convenient enjoyment of the building) and the portion of bare land not so appurtenant. Both have been valued as held for letting purposes i. e. under S. 127 (a).

[26] The assessment, even assuming that S. 127 (a) was applicable, should have been made as one unit. The unit of assessment in this case is admittedly the entire premises NO. 52, Gopal Chandra Chatterjee Road. There was no application for sub-division of the unit, nor were any proceedings taken for that purpose. This is another ground for holding that the assessment is bad.

[27] There is a further and more serious objection to the mode of assessment followed by the Corporation. The land is a leasehold one and its annual value has to be determined under S. 127 (a) but the building was not intended to be let nor was used for letting purposes and would not come within S. 127 (a) but might come under S. 127 (b) but such a mode of assessing one unit of assessment, viz. partly under S. 127 (a) and partly under S. 127 (b), is not permissible, *Corporation of Calcutta* v. *Motichand*, 66 I. A. 42 : (A. I. R. (26) 1939 P. C. 20). It is true that this case related to the assessment of a hybrid building, occupied in equal moieties by the owner and his lessees. The principle was extended in the *Corporation of Calcutta* v. *Province of Bengal*, 44 C. W. N. 165 at p. 169 : (A. I. R. (27) 1940 Cal. 47). Mitter J. observed there that it would not be legitimate for the Corporation to determine separately the annual value of the lands under the building and of the compound, the building under S. 127 (b) and the compound under S. 127 (a).

[28] A choice has therefore to be made between S. 127 (a) and S. 127 (b).

[29] Mr. Banerjee has contended that in a case like the present, the building being attached to the land, should be regarded as a part of the land, and the user of the land should by a fiction of law determine the user of the building, al-

though in fact this may not be so. It has therefore been argued that even though the building might have been erected by the lessee at his own cost and used by the lessee himself, the law will imply that for purposes of assessment, the building belongs to the owner of the land and as the land was let out, the building must also be deemed to have been let out.

[30] In our opinion, such implications should not be made.

[31] The fiction of English law that buildings erected on land become, by the mere accident of their attachment to the soil, the property of the owner, compendiously embodied in the maxim *quicquid inædificatur solo solo cedit*, is not in consonance with the usages and customs of this country, *Thakoor Chunder Pramanick* v. *Ramdhun Bhattacharjee*, 6 W. R. 228 at p. 229, *F. B*; *Narayandas Khetry* v. *Jatindranath*, 54 I. A. 218 : (A. I. R. (14) 1927 P. C. 135).

[32] The further assumption that because the land is used for letting purposes, the building though used by the lessee himself should be regarded as held for letting purposes, is equally unwarranted. Section 127 does not speak of hypothetical user but of actual or intended user.

[33] The view contended for is opposed to the scheme of the land. (sic Act).

[34] In the preliminary stage of assessment the Corporation has to find out the annual value of buildings dependent on the actual or intended user. It is not concerned with the ownership of the building.

[35] As regards bare land, the actual user is not considered, a hypothetical letting value is taken. In India, bare ownership of land sustains the liability to be rated. In this respect, it differs from the law in England where rateability depends on beneficial occupation (Ryde on Rating, 8th Edn. pp. 17-18).

[36] In such a case no difficulty arises. The annual value is determined by the hypothetical rent which a hypothetical tenant who is free to use the land would pay in respect of the land. *Bengal Nagpur Railway* v. *Corporation of Calcutta*, 51 C. W. N. 336 : (A. I. R. (34) 1947 P. C. 50).

[37] In regard to buildings, S. 127 makes the annual value dependent on user, actual or intended. It is more logical to hold that where a building with land has to be rated, the user of the building ought to determine the basis on which the building and the land which forms with it one unit of assessment, should be valued.

[38] If the land is covered by buildings, erected by the owner of the land or a lessee of the land, the entire land and the building has to be assessed as one unit of assessment, the annual value being determined by the user of the building, viz., the building is held if for letting purposes under S. 127 (a) but if for personal use under S. 127 (b).

[39] If the land and building both belong to the owner of the land, such assessment cannot be complained of. If the land and the building belong to two different persons, e. g., owner and lessee of the land, the owner of the land is rated in respect of both land and building. This does not entail any hardship on the owner of the land because he gets relief in respect of the assessment of the building as against the owner of the building under S. 150.

[40] We hold, therefore, that the scheme of S. 127 is that if the land be bare land, it is to be valued under S. 127 (a); if there be a building upon it, the case would be governed by S. 127 (a) if the building was erected for letting purposes or was ordinarily let or by S. 127 (b) if the building was not erected for letting purposes or was not ordinarily let.

[41] The case of the *Corporation of Calcutta* v. *Province of Bengal*, 44 C. W. N. 165 : (A. I. R. (27) 1940 Cal. 47), was referred to by both parties. The case related to the assessment of the Writers Buildings which was mainly occupied by the Province of Bengal with the exception of a few rooms which had been let out to a Co-operative Bank and two Co-operative Societies. The Chief Judge, Presidency Small Cause Court, had valued the premises partly under S. 127 (a) and partly under S. 127 (b). This basis was not accepted by this Court and it was held that the assessment should be made under S. 127 (b). On so holding, Mitter J. observed as follows :

"If the subject be bare land or building erected for letting purposes or ordinarily let. The annual value is to be what a hypothetical tenant would pay as rent from year to year, less a certain deduction. This is cl. (a) of S. 127. Clause (b) deals with what may, for brevity's sake, be called residential buildings, buildings erected for the use of and actually used by the owner" (p. 167).

[42] Mr. Banerji has relied on the last sentence and has argued that cl. (b) only applies to a case where the owner of the land is also the owner of the building.

[43] The observation has to be read in the light of the facts of the case and does not support the contention of Mr. Banerji.

[44] On the other hand, the view taken by us is supported by the following observations of Mukherjee J. in *the Governor-General of India in Council* v. *Corporation of Calcutta*, 52 C. W. N. 173 at p. 176: (A. I. R. (35) 1948 Cal. 116):

"Section 127 lays down the procedure for ascertaining the annual value of lands and buildings. The principle adopted by this section is that if the property is vacant land it is valued on the basis of annual rental at which it could be expected to be let., less certain deductions.

If any building stands upon the land and the building has been erected for letting purposes or is ordinarily let, the annual value has to be ascertained on the rental basis as provided for in cl. (a) of the Section. Otherwise the annual value is determined under cl. (b) on the basis of the cost of construction of the building and the value of the land. In either case the building is taken along with the land and the two are assessed together as one unit. This is the scheme adopted by the Calcutta Municipal Act. There is no rule here of valuing a building separately from the land upon which it stands and for the purposes of assessment, the building is taken as a part of the land."

[45] The result of the above discussion leads us to hold that the assessment made by the Corporation under S. 127 (a) was illegal and must be set aside.

[46] Mr. Banerji has finally submitted that the case may be remitted to the Court below for finding out whether the assessment made would be justified, on the basis that the case came within S. 127 (b). He has referred us to the two petitions filed by the Corporation for allowing it to lead evidence on the point. We have already referred to these petitions and to the orders passed thereon. In our opinion the Court below rightly rejected the petitions. As the basis of the assessment has been held by us to be erroneous, the assessment cannot stand. The Corporation has to proceed according to law and reassess the premises. This contention cannot be given effect to and must be overruled.

[47] The appeal therefore succeeds, the assessment made by the Second Deputy Executive Officer and the order of the Judge of the Court of Small Causes Sealdah are vacated.

[48] The appellant is entitled to costs in this Court and the Court below. Hearning fee in this Court is assessed at 10 gold mohurs.

Lahiri J.—I agree.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 125 *[C. N. 36.]*

DAS GUPTA AND GUHA JJ.

Umesh Chandra Pal — Appellant v. *The King.*

Appeal No. 129 of 1949, Decided on 15th September 1949.

(a) West Bengal Black Marketing Act (XXXII [32] of 1948), S. 2 (h) — Bread coupons forged — Intention to use them as genuine is proved—Bread coupons whether are necessary in law, is not relevant.

Where a person makes bread coupons, there is no doubt that the person has the intention to commit fraud by deceiving the officers concerned that they are genuine bread coupons. Whether it is necessary or not to have bread coupons in law, is of no relevancy on this question. [Para 5]

(b) West Bengal Black Marketing Act (XXXII [32] of 1948), S. 26 — Effect on offences committed before Act—Section 26 has not the result of making offences under the West Bengal Black Marketing Ordinance also offences under the West Bengal Black Marketing Act. [Para 7]

(c) West Bengal Black Marketing Act (XXXII [32] of 1948), S. 12 — Tribunal — Jurisdiction — Tribunal constituted under Act has no jurisdiction to try offences under West Bengal Black Marketing Ordinance. [Para 9]

(d) West Bengal Black Marketing Act (XXXII [32] of 1948), Ss. 12 (2) and 14 — Special Tribunal —Jurisdiction — No jurisdiction to try offences under S. 474, Penal Code.

The cases for trial which can be allotted under S. 12 by the Provincial Government are cases of offences under the Act. The Tribunal constituted under the Act has no jurisdiction to try an offence under S. 474, Penal Code. [Paras 14 and 15]

Gopal Chandra Narayan Choudhury —for Appellant.

Nirmal Kumar Sen and Amaresh Chandra Roy —for the Crown.

Das Gupta J.—The appellant was tried by a Special Tribunal of Alipore constituted under the West Bengal Black Marketing Act, 1948 and convicted under S. 3 read with S. 2 (h) of that Act, also under S. 3 read with S. 2 (h) and S. 6 of the Act, and under S. 474, Penal Code, and was sentenced to two years rigorous imprisonment for the first mentioned offence and rigorous imprisonment for one year for the second offence. No separate sentence was passed under S. 474, Penal Code. The two sentences under the two offences under the West Bengal Black Marketing Act were ordered to run concurrently. It was further ordered that the hand-printing press together with the printing outfit seized were forfeited under sub-s. (3) of S. 3 of the Act.

[2] The prosecution case was that on the night of 25th April 1948, a Sub-Inspector of the Enforcement Branch, Calcutta, accompanied by certain other Police Officers and some search witnesses went to premises No. 18, Fakir Chand Mitra Street and on search of the portion where this accused lived found under the bed and also in a trunk a large number of bread coupons which, according to the prosecution, are forged documents. A hand-printing machine was also found in one of the rooms and certain blocks from which it is said these bread coupons had been printed. There were some bread coupons the printing of which was only partly finished.

[3] The accused pleaded not guilty, his suggestion being that these bread coupons said to have been forged had been planted in his house by his landlord as an easy way for evicting him from the building.

[4] On the question of recovery of these coupons from the rooms in the possession of the accused evidence has been given by the Police Officer and two search witnesses Ganesh Chandra Ghosh and Priyanath Choudhury. I have no doubt from the evidence that these coupons were

actually found in the possession of the accused. The suggestion that they were planted there by the landlord Naresh seems to me to be highly improbable.

[5] It is not disputed that these bread coupons were not the genuine coupons issued by the rationing department, and evidence has also been given by the Assistant Controller of Rationing to that effect. I have no hesitation in accepting this evidence as correct and find that these documents were prepared by some person with the intention of causing it to be believed that they were made by the rationing authorities. There cannot be the slightest doubt that in doing so, the person who made it had the intention to commit fraud by deceiving the officers concerned that they were genuine bread coupons. Whether or not Act XXIV [24] of 1946 which introduced rationing and the consequent bread coupons has legal validity after 31st March 1948, is of no relevancy on this question. For it is clear that whether it was necessary or not to have bread coupons in law, the person who made these coupons must have made them with the purpose of so using them and thereby deceiving certain persons to believe that they were genuine coupons and thereby gaining an advantage. I find it proved therefore that these documents that were seized were forged documents.

[6] Before the act of the accused could be held as blackmarketing within the meaning of S. 2 (h), it is also necessary for the prosecution to prove that the accused made these documents. Certainly the mere fact that they are found in his house is not sufficient to show that he made them. There is, however, on this point a confession made by him, though since retracted, that he printed a number of bread coupons on his machine, which is corroborated by the circumstances disclosed by the evidence of prosecution witness No. 1. As regards some samples which were printed on the machine then and there, I have examined these samples and find the printing there exactly similar to the printing on the forged coupons except for the fact that the base printing is absent. In my opinion the presence of the hand-machine in the accused's room together with the evidence as regards the samples is sufficient corroborative evidence of the accused's retracted confession. I would, therefore, have no hesitation in holding the accused guilty under S. 3/2 (h) of the Act and also for an attempt as regards the half finished coupons under Ss. 3/2 (h) and 6 of the Act, had these acts been committed after the West Bengal Black Marketing Act came into force. This Black Marketing Act came into force after 17th October 1948. The acts of the accused were in April 1948. They were, therefore, offences under the West Bengal Black Marketing Ordinance 1948, which was in force at the time, and they would continue to be offences under this Ordinance in view of the provisions of S. 6, General Clauses Act, in spite of the fact that the Ordinance has ceased to operate. The decision of the question whether the acts in law are offences under the West Bengal Black Marketing Act also depends on the interpretation of S. 26 of the Act. The section runs thus:

"Any rule, order or appointment made or any notification issued or anything done or any penalty, forfeiture or punishment incurred or imposed or any action taken or any proceedings commenced in exercise of any power conferred by the West Bengal Black Marketing Ordinance, 1948, shall, on the said Ordinance ceasing to be in operation, be deemed to have been made, issued, done, incurred, imposed, taken or commenced in exercise of the powers conferred by this Act as if this Act had commenced on the 1st day of January 1948."

[7] It is sought to be argued on behalf of the Crown that where this section speaks of penalty incurred, it must mean penalty incurred under the West Bengal Black Marketing Ordinance and that the result of S. 26 is that if a penalty had been incurred under the West Bengal Marketing Ordinance, the penalty would continue as a penalty under the Act. It may very well be that the intention of the legislature was to make acts which were offences under the West Bengal Black Marketing Ordinance also acts under the Act. In my opinion, however, the words in S. 26 have not produced that effect. It seems to me to be clear that the words "in exercise of any power" have to be read with the words "penalty, forfeiture or punishment" as much as with the words "proceedings commenced" etc. The grammatical structure of the section falls altogether unless this is done, and it becomes impossible to understand what penalty, forfeiture or punishment is being spoken of. The result, therefore, is that any penalty incurred in exercise of any power conferred by the West Bengal Black Marketing Ordinance shall be deemed to have been incurred in exercise of the powers conferred by the Act. This presupposes that some authority had exercised some powers under the West Bengal Black Marketing Ordinance and it was as a result of such exercise that the penalty was incurred. When a person incurs the penalty by doing the act which is an offence under the Ordinance, he cannot reasonably be said to have incurred the penalty "in exercise of', a power conferred by the Act. I am unable to agree therefore that S. 26 of the Act has the result of making offences under the West Bengal Black Marketing Ordinance also offences under the West Bengal Black Marketing Act.

[8] My conclusion, therefore, is that while the making of forged bread coupons and the attempt

to make forged bread coupons would, if committed after the West Bengal Black Marketing Act came into force, be offences under the Act, they are not offences under this Act inasmuch as they were committed before this Act came into force.

[9] The learned Advocate for the Crown suggests that we may alter the conviction to one under the Ordinance. It is to be noticed however that the Tribunal who tried the accused person was constituted under the Black Marketing Act and was not a Tribunal constituted under the Ordinance. Consequently, this Tribunal itself had no jurisdiction to try an offence under the Ordinance.

[10] It is also worth mentioning that the sanction which had been obtained was also for an offence under the Black Marketing Act. This cannot by any stretch of imagination be considered to amount to sanction for a prosecution under the Black Marketing Ordinance. In these circumstances it is not possible for us to alter the conviction to one under the Black Marketing Ordinance.

[11] The conviction of the accused person under S. 3/2 (b), West Bengal Black Marketing Act and also under S. 3/2 (b) and S. 6 of the Act should, therefore, in my opinion, be set aside and the accused acquitted of the charges.

[12] There remains for consideration the conviction of the accused under S. 474, Penal Code. As I have already said, the evidence is sufficient in my opinion to show that a number of forged bread coupons were found in a room in the possession of the accused. I would have no hesitation, therefore, in agreeing with the learned Tribunal that the accused was in possession of forged documents. In view of the confession of the accused already mentioned I would have no hesitation also in agreeing that the accused knew these to be forged and intended that these would be fraudulently and dishonestly used as genuine. The acts that have been proved would, therefore, make out an offence under S. 474, Penal Code.

[13] It is, hovever, contended by the learned advocate for the appellant that this conviction cannot stand inasmuch as the Tribunal had no jurisdiction to try an offence under S. 474, Penal Code. An offence under S. 474, Penal Code, is triable by a Court of Session. The question is whether anything in the Black Marketing Act has given the Tribunal constituted under this Act any jurisdiction to try an offence under S. 474, Penal Code. Section 12, Black Marketing Act provides thus:

"(1) The Provincial Government may, from time to time by notification in the Official Gazette, allot cases for trial to each Special Tribunal, and may also from time to time by like notification transfer any case from one Special Tribunal to another or withdraw any case from the jurisdiction of a Special Tribunal or make such modifications in the description of a case (whether in the names of the accused or in the charges preferred or in any other manner) as may be considered necessary.

(2) The Special Tribunal shall have jurisdiction to try the cases for the time being respectively allotted to them under sub-s. (1) in respect of such of the charges as may be preferred against the several accused and any such case which is at the commencement of this Act or at the time of such allotment pending before any Court or another Special Tribunal shall be deemed to be transferred to the Special Tribunal to which it is so allotted."

[14] In the absence of anyting pointing to a different conclusion I would myself be inclined to think that the cases for trial which can be allotted by the Provincial Government are cases of offences under this Act. It is, however, contended by the learned Advocate for the Crown that the provision in sub-s. (2) read with S. 14 of the Act justifies the conclusion that other offences, whether triable by a Sessions Judge or otherwise, than the offences under this Act can also be tried by the Special Tribunal constituted under this Act. Section 14 provided that a Special Tribunal may take cognizance of offences without the accused being committed to it for trial. I am unable to hold that this gives the Special Tribunal a jurisdiction to try offences which are triable by a Court of Session. The right of trial by a Jury in a Court of Session is a very valuable right which can certainly be taken away by legislature by express words, but in the absence of express words it would be improper to impute to the legislature the intention that this right was intended to be taken away.

[15] Sub-section (2) of S. 12 speaks of the jurisdiction of the Special Tribunal. According to this the Special Tribunal shall have jurisdiction to try cases allotted to them in respect of such charges as may be preferred against the accused. It is said that these charges may be for offences not under this Act. Assuming that this may so happen, it is necessary to find whether in this case when the Tribunal began the trial, any charge under S. 474, Penal Code, was preferred. The order of the Provincial Government allotting the case for the trial of this Tribunal mentions only an offence under S. 3, Bengal Black Marketing Act. The sanction of the local Government was also with respect to an offence under S. 3, Black Marketing Act. There is nothing on the record to show that any charge was at any stage preferred before the Special Tribunal for any offence under S. 474, Penal Code. The mere fact that a charge was actually framed by the Special Tribunal under S. 474, Penal Code or evidence was adduced before them does not justify the conclusion

that a charge under S. 474, Penal Code was actually preferred. I am accordingly of opinion that the Special Tribunal constituted as it was under the Black Marketing Act, had no jurisdiction to try the offence under S. 474, Penal Code. That conviction also must, therefore, be set aside.

[16] I would accordingly allow the appeal, set aside the convictions and sentences passed against the accused, and order that the accused be acquitted.

[17] The order for forfeiture is also set aside.

[18] Let the accused be released at once.

Guha J.—I agree.

V.B.B. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 128 *[C. N. 37.]*

R. P. MOOKERJEE J.

Krishna Chandra Kabiraj and others — *Appellants* v. *Sankarsan Kabiraj and others* —*Respondents.*

A. F. A. D. No. 1966 of 1945, Decided on 26th August 1949, against decree of Dist. Judge, Zillah Birbhum, D/- 4th August 1945.

Civil P. C. (1908), O. 2, R. 3—Multifariousness—Suit for accounts — No common cause of action against several defendants — Suit is bad —Plaintiff allowed to amend plaint on payment of costs of defendants at stage of second appeal.

The plaintiffs who were co-sharer landlords brought a suit for accounts against their other co-sharers impleading certain officers and employees connected with the estate and other proprietors of different estates. The causes of action were different not only for the different groups but even for different persons within the same group in some cases. It was not the case of the plaintiffs that all the defendants were by any one transaction made jointly and severally liable for rendering accounts:

Held that the suit was bad for misjoinder of causes of action and defendants: [Para 2]

Held further that as the plaintiffs had not taken the necessary steps to amend their plaint at the earliest possible opportunity in the lower Courts they should be allowed to amend the plaint only on condition of their depositing the costs of the contesting defendants within certain time. [Para 5]

Annotation: ('44-Com.) Civil P. C., O. 2 R. 3 N. 8 and 14.

Girija Prasanna Sanyal and Prafulla Kumar Chatterjee (Jr.)—for Appellants.

Anukul Chandra Dutta, Lala Hemanta Kumar and Phanindra Nath De—for Respondents.

Judgment. — This appeal has to be allowed on the short ground that the suit is bad for misjoinder of the parties and of causes of action. This objection was raised by the defence in Courts below.

[2] The plaintiffs are co-sharer landlords and they filed the present suit against a large number of defendants who may be grouped under the following heads: defendants 1 to 16 were their co-sharers; Nos. 17 and 18 were two lawyers of the estate; Nos. 19 to 25 were officers, tahsildars, gomosthas and other employees of the estate; No. 26 is alleged to have intermeddled with the property as on behalf of defendant 1; and Nos. 27 to 38 were other proprietors of different estates. The claim was one for accounts against all these persons.

[3] A reading of the plaint itself would at once show that the causes of action were different not only for the different groups but even for different persons within the same group in some cases. It is impossible to allow the plaintiffs to bring such a suit merely because the claims against the different parties are in respect of the same property. It is not the case of the plaintiffs that all these defendants were by any one transaction made jointly and severally responsible for rendering accounts. The plaintiffs must elect against which of the defendants they want to proceed and specifically state in the plaint as to the common cause of action giving rise to their claim against such defendants. If, for instance, they want to proceed against the co-sharers, or some of them for having been placed in the management of the estate, the lawyers to whom separate payments had been made on definite accounts as alleged in the plaint, the suit is not maintainable against the latter. As against the tahsildars and other officers, if there is a separate engagement or kabuliyat with any one or more of those, then a suit for accounts so far as those officers are concerned must be separated according to the arrangement made between the plaintiffs and particular officers. This should be the principle for determining whether the suit as framed is maintainable in the present form or not. *Prima facie*, the suit is bad for misjoinder of parties and causes of action. The plaintiffs should have taken the earliest opportunity of making the necessary amendments and for giving up *such* of the parties as they wanted to, so that the suit might have been heard on the merits. Unfortunately, both the Courts below misdirected themselves in coming to a conclusion that the suit as framed is maintainable.

[4] The judgments and decrees of the Courts below are accordingly set aside and the case is remitted to the trial Court for giving an opportunity to the plaintiffs to amend the plaint and to elect against which of the defendants they would proceed to trial. After such a prayer is made, the defendants will have the opportunity to file additional written statements. In the interest of the parties it will be desirable to raise a preliminary issue at that stage for deciding whether the suit as then framed after amendment is maintainable or not. The parties ought not to be asked to spend further money in this litigation before deciding this preliminary question.

[5] As already stated, the plaintiffs had not taken the necessary steps at the earliest possible opportunity; they must be put to terms for having an opportunity of amending the plaint. The plaintiffs should within 15 days of the re-opening of the Court after the next Pujah Vacation deposit in the trial Court the entire costs of all the three Courts, namely, the Munsif, the District Judge and this Court, to the credit of the contesting defendants and only after such deposit is made that an application by the plaintiffs for amendment of the plaint will be entertained. If the deposit is not made within the date mentioned this appeal will stand allowed and the plaintiffs' suit dismissed with costs to the appearing respondents. If the deposit is made, the defendants will be entitled to withdraw the same and to retain it irrespective of the result of the suit.

[6] In view of the order passed allowing the appeal and remitting the case to the trial Court on the condition mentioned, it is not necessary to pass any order on the application filed by the defendant Baidyanath Banerjee on 25th August 1949, for transposition to the position of an appellant in this appeal.

K.S. *Case remanded.*

A. I. R. (37) 1950 Calcutta 129 *[C. N. 38.]*

BLANK AND LAHIRI JJ.

Bankim Chandra Paira and another — Petitioners v. *Anand Bazar Patrika and another—Opposite Party.*

Criminal Misc. No. 132 of 1949, Decided on 5th and 8th September 1949.

(a) Contempt of Courts Act (1926), S. 2 — Comments—Identity of case or "cause"—Sufficiency—Comment on case pending prejudicing any party is punishable — Naming of party is not essential ingredient—Contempt of Court.

What is punishable under the law is comment on a case while it is pending actually prejudicing or calculated to prejudice any party. If the party is named it adds to the gravity of the offence but the naming of the party is not an essential ingredient.

Where a publication gave the name of the place of occurrence, the date of the occurrence and also the name of the person whose paddy was alleged to have been looted :

Held that the description left no doubt as to the case to which the publication related and under the law that was all that was necessary. It was not necessary to mention the names of the accused in the case. [Para 8]

Annotation : ('46-Man.) Contempt of Courts Act, S. 2, N. 1, 2.

(b) Contempt of Courts Act (1926), S. 2 — Publication in newspaper — Comments affecting case pending before Magistrate — Accused referred to as Communists and desirability of cancelling their bail bonds expressed — Publication held had effect of deterring person from deposing in favour of defence and amounted to interference with course of justice—Offence held was more than technical and called for action — Contempt of Court.

Where a publication in a newspaper ran as follows : "Narayangarh (Midnapore) Trouble created by Communists — The Communists looted away about 70 maunds of paddy in broad day-light from a paddy granary of Lakshmi Narayan Prodhan in village Kajichak within the police station of Narayangarh during his absence on 17th May 1949, last.

The police men of the *Thana* came to investigate and on their taking one of the accused persons into custody the extremists attacked the Police and the owner of the house in an organised manner and surrounded the village. Late in the night higher police officials with 50 armed police-men came and rescued them and left behind 12 police-men in apprehension of a breach of the peace in the village. At present 50 accused persons who are on bail are creating panic in various ways within the village. It is only a few days that the Police force for maintaining peace had been withdrawn elsewhere, meanwhile, paddy was stolen from the granary of a witness named Gobind De on 28th June last, during the night. It is desirable that either the bail bonds of the accused persons should be cancelled till their trial is finished or arrangements made for providing Police guards."

Held that (i) the description referred to the accused in a pending case before a Magistrate. The description referring to the accused as Communists was calculated to create a lot of prejudice against the accused in the mind of the local public and might have the effect of deterring a person from deposing in favour of the defence, if the accused chose to call any defence evidence ; [Para 15]

(ii) the mention of words "at present 50 accused who are on bail·····village" was another attempt to create local prejudice against the accused and amounted to real interference with the course of justice. [Para15]

(iii) the passage "It is desirable . . . . . police guards" had the effect of interfering with the free exercise of his judicial discretion by the trying Magistrate ; [Para 15]

(iv) the offence was more than technical and was of such a character as to call for action: A. I. R. (30) 1943 Lah. 329 (F.B.), *Foll.* ; (1907) 2 Ir. R. 260 and A.I.R. (18) 1931 Cal. 257, *Disting.* [Paras 15, 16]

Annotation : ('46-Man.) Contempt of Courts Act, S. 2, N. 1, 2.

(c) Contempt of Courts Act (1926), S. 3—Apology —Grounds for—Lack of supervision — Accidental slip can be taken into account.

The essence of the offence being publication in the newspaper the Court cannot encourage the belief that lack of supervision is any defence to a proceeding for contempt but nevertheless, the Court will take into account the fact that the publication may have been the result of an accidental slip over which nobody could have any control. Apology in such cases may be accepted. [Para 18]

Annotation : ('46-Man.) Contempt of Courts Act S. 3, N. 2.

S. K. Das and Benode B. Haladar—for Petitioners.

Manmatha N. Das and Manishi K. R. Das — for Editor, Printer and Publisher of "Swaraj O Sangathan."

Sudhansu S. Mukherji and Haridas Chatterji — for Editor, Printer and Publisher of "Ananda Bazar Patrika."

Chandra S. Sen and Jajneswar Majumdar —for the Province.

(5th September 1949.)

Lahiri J.—This Rule was issued upon the Editor, Printer and Publisher of the Ananda Bazar Patrika and the Swaraj O Sangathan to show cause why they should not be committed

for contempt for publications in their respective newspapers of news items published on 5th July 1949 and 8th July 1949 respectively under the captions "Narayangarh—Midnapore" and "Paddy looted during broad day light". The Ananda Bazar Patrika is a very influential and popular Bengali daily published from Calcutta and enjoying a very large circulation amongst the Bengali speaking population of this province and also beyond its borders. The Swaraj O Sangathan is also an influential Bengali Weekly published by the District Congress Office, Midnapore.

[2] An official translation of the publication in the Ananda Bazar Patrika runs as follows:

"Narayangarh (Midnapore)

Trouble created by Communists—The Communists looted away about 70 maunds of paddy in broad daylight from a paddy granary of Laxmi Narayan Prodhan in village Kajichak within the police station of Narayangarh during his absence on 17th May 1949 last.

The Police-men of the *Thana* came to investigate and on their taking one of the accused persons into custody the extremists attacked the Police and the owner of the house in an organised manner and surrounded the village. Late in the night higher police officials with 50 armed police-men came and rescued them and left behind 12 Police men in apprehension of a breach of the peace in the village. At present 50 accused persons who are on bail are creating panic in various ways within the village. It is only a few days that the Police force for maintaining peace had been withdrawn elsewhere, meanwhile, paddy was stolen from the granary of a witness named Gobinda De on 28th of June last, during the night. It is desirable that either the bail bonds of the accused persons should be cancalled till their trial is finished or arrangements made for providing Police guards'.

[3] The corresponding publication in the Swaraj O Sangathan runs thus:

"Paddy looted during broad day light.

The Communists looted away about 70 maunds of paddy from the paddy granary of Lakshmi Narayan Prodhan, in village Kajichak, in broad day-light on 17th May 1949 last. The Police Officers of the *thana* who came to investigate took one of the accused persons into custody, whereupon the extremists attacked the Police men and the owner of the house in an organised manner and surrounded the village. Late in the night higher police officials with 50 armed constables came and rescued them. They left behind 12 constables in apprehension of a breach of the peace in the village. At present 50 accused persons who have been released on bail are creating panic in various ways in the village. It is only a few days that the Police force for maintaining peace had been withdrawn elsewhere, meanwhile paddy was stolen from the granary of a witness named Gobinda De on 28th June 49 last, during the night. In the circumstances some are of opinion that either the bail-bonds of the accused persons should be cancelled till their trial is over or arrangements made for providing police guards.

Sri Priyanath Prodhan
Head Pandit Arjuni Deshabandhu Vidyapith,
P. O. Belda,
Dt. Midnapore."

[4] The publication in the Ananda Bazar Patrika is described in the foot note as a letter received from a reporter whose name is not printed. We are told that this reporter is not a reporter employed by the newspaper itself but an external reporter as distinguished from a reporter who exclusively represents the newspaper. The publication in the Swaraj O Sangathan, on the other hand appears over the signature of one Priyanath Prodhan who describes himself as Head Pundit, Deshbandhu Vidyapith—P.O—Belda—District Midnapore.

[5] Two persons named Sri Bankim Chandra Poira and Sri Hara Prasad Jana sent by post an application addressed to the Registrar, Original Side drawing attention to the fact that the aforesaid publications related to matters which were awaiting decision by the Sub-divisional Officer, South Midnapore. The complaint made in the petition is to the effect that in the aforesaid publications the accused persons have been described as communists, although they had no affiliation with any communist organisation and in the second place there was a recommendation for the cancellation of the bail bonds of the accused persons on the ground that they had created a panic in the locality after their release on bail The two petitioners accordingly apprehend that the publications may have the effect of creating an atmosphere of prejudice not only in the mind of the witnesses but also in the mind of the trying Magistrate.

[6] Under the Rules of Business of this Court this petition was sent to us to be dealt with according to law. As from the petition it does not appear whether the two petitioners are on their trial we directed the original petition to be sent to the S. D. O. (South) Midnapore requesting him to inform us if the two petitioners mentioned above are on their trial before him and, if so, whether the signatures appearing on the body of the petition tally with the signatures of the prisoners before him. By his letter dated 5th August 1949 the S. D. O. Sadar (South) Midnapore has informed us that the signatory Bankim Chandra Poira is an under-trial prisoner in Case No. G. R. 913 (S)/49 under S. 148/461/380, Penal Code pending in his Court and that the signature of the accused on the bail bond tallies with his signature on the petition to this Court. Secondly, the signatory Haraprasad Jana is also an under-trial prisoner in Case No. 914 (S) of 49 under Ss. 148, 342, 353, 307, Penal Code and that his signature on the muktearnama tallies with his signature on the petition to this Court. It is clear therefore that the two petitioners are on their trial before a Court of law for offences which may or may not involve trial by a Jury. The S. D. O. has further reported that both the cases are under investigation by the police and that the two petitioners have

been enlarged on bail. On receipt of this report we issued the present Rule.

[7] The Ananda Bazar Patrika has been represented before us by Mr. Sudhangsu Sekhar Mookerjee and the Swaraj O Sangathan by Mr. Manmathanath Das. At the hearing of the Rule the petitioners prayed for permission to be represented by Mr. Sisir Kumar Das which was granted and the Government of West Bengal was represented by the Senior Government Pleader.

[8] Mr. S. S. Mookerjee has argued in the first place that the information published in the Ananda Bazar Patrika is too vague to give any indication as to the identity of the case to which it relates, as it does not mention the names of the accused; consequently the publication does not, according to Mr. Mookerjee, amount to contempt of Court. We regret we cannot accept this contention. The publication gives the name of the place of occurrence, the date of the occurrence and also the name of the person whose paddy is alleged to have been looted. This description leaves us in no doubt as to the "cause" to which it relates and under the law that is all that is necessary. What is punishable under the law is comment on a cause while it is pending actually prejudicing or calculated to prejudice any party. If the party is named it adds to the gravity of the offence but the naming of the party is not an essential ingredient.

[9] The second point raised by the Ananda Bazar Patrika is that the publication does not amount to contempt because according to the celebrated utterance of Lord Atkin in the case of *Ambard* v. *A. G. of Trinidad*, 40 C. W. N. 801 : (A. I. R. (23) 1936 P. C. 141)

"the path of criticism is a public way: the wrong headed are permitted to err therein provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice . . . . . Justice is not a cloistered virtue: She must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."

It was argued that the passage lays down the law with regard to pending cases. If that had been the case, the entire law of contempt of Court in this country would have to be rewritten: but an examination of the facts will show that Lord Atkin was making the observations in connection with a public criticism of a judgment after it had been delivered. A proceeding for contempt was drawn up against the defendant of that case for criticising a judgment which was under appeal, and the proceeding as drawn up included charges of contempt of the appellate Court as well as of the Court of first instance. The Supreme Court of Trinidad and Tobago acquitted the defendant of contempt in respect of the pending appeal but found him guilty of contempt of the Subordinate Court and the appeal to the Privy Council was directed against that order. So the only matter that was before the Judicial Committee was whether the defendant was justified in criticising the judgment of the Subordinate Court after it had been delivered and the Privy Council held that he was as he did not exceed the limits of legitimate criticism. This contention must therefore be overruled.

[10] The next argument advanced by Mr. Mookerjee was that the principle enunciated by Jenkins C. J. in the case of *Legal Remembrancer* v. *Motilal Ghose*, 41 Cal. 173 : 17 C. W. N. 1253: (A. I. R. (1) 1914 Cal. 69 : 14 Cr. L. J. 321 S. B.) should apply to the facts of the present case and it should be held that there was no contempt. This case was decided in 1913 long before the enactment of the Contempt of Courts Act (XII [12] of 1926) at a time when there was a considerable doubt as to whether the High Court had any jurisdiction to punish for contempt of a Subordinate Court situate beyond the limits of the Presidency Town. Section 3 of Act XII [12] of 1926 invested the High Courts established by Letters Patent with the same jurisdiction, power and authority in respect of contempt of Courts subordinate to it as it has in respect of contempt of itself. Sir Lawrence Jenkins pointed out that the High Court might possibly have the power to punish for contempt of a Mofussil Court only when the acts complained of amounted to deterring witnesses from giving evidence or prejudicing the Jury. It is fairly clear that the jurisdiction which this Court possesses under Act XII [12] of 1926 is considerably wider than the jurisdiction which it possessed in 1913. On the merits of the Amrita Bazar Patrika case it appears that the conduct of the Criminal Investigation Department was bitterly criticised by the Editor in connection with certain house searches and the treatment of the accused. Sir Lawrence Jenkins observed :

"I am unable to hold that witnesses would be deterred from giving evidence by reason of this attack on the police. I have examined and re-examined the articles to see if they could reasonabley produce this consequence but I come without doubt to the conclusion that they could not."

Mookerjee J. went a step further and said

"I must emphatically repudiate the astonishing proposition that the Criminal Investigation Department is the prosecutor in this case."

It is extremely difficult for us to see how the the facts of the Amrita Bazar Patrika case can have the remotest analogy to the facts of the case with which we have to deal This argument based upon this ruling must accordingly be held to be entirely misconceived.

[11] The fourth point argued by Mr. Mookerji that the contempt, if any, in the present case

is of such a technical and trivial character that no action is necessary. Mr. Mookerji has relied upon the cases of *King* v. *Dolan* (1907)-2 Ir. R. 260 and *Ananta Lal Sing* v. *A. H. Watson*, 35 C. W. N. 189 : (A. I. R. (18) 1931 Cal. 257 : 32 Cr. L. J. 675, in support of this point. The facts of both the cases appear to us to be entirely different from the facts of the present case. In the former case, Mr. Walter Long, a member of the Parliament who had filled many important offices of the State in the past delivered a speech criticising the Parliamentary policy of Mr. Bryce, the then Chief Secretary of Ireland with regard to certain Irish questions and more particularly the attitude of the Parliament in minimising acts of intimidation prevalent in certain parts of Ireland. Mr. Long's point was that on account of the unsatisfactory policy of the Parliament acts of intimidation had become very common and as an illustration of this point, Mr. Long referred to a case recently tried in Ireland in which the Jury had returned a divided verdict on a charge of unlawful assembly and criminal intimidation, as a result of which the presiding Judge discharged the jury and ordered a new trial. Mr. Long concluded his speech by saying that if the Parliamentary policy of the Chief Secretary continued to be what it was, it was not a matter of surprise that the jury would return a divided verdict in an indictment for the offence of criminal intimidation. The speech was extensively reported in certain newspapers as a sequel to which a proceeding for contempt was started both against Mr. Long and the newspapers concerned. The defence of Mr. Long which was accepted by the Court was that his dominant object was political, viz., to bring about a change in the policy of the Parliament and the reference to the case was made incidentally without any realization of the fact that the case was pending in the sense that a new trial had been ordered. In these circumstances the Court held that though technically both Mr. Long and the newspapers had been guilty of contempt no action was required to be taken. A remarkable feature of this case was that the Attorney-General when moved to take action against Mr. Long and the newspapers refused to do so on the ground that the speech as reported could not have any effect upon the jurors. Though the refusal of the Attorney-General was by no means a conclusive or decisive factor in the case—Lord O'Brien L. C. J. observed as follows :

"There is no instance in our books in the whole range of criminal law, from the Year Books to the present day when on a summary motion of this sort, the Attorney General having refused to interfere, the Court inflicted punishment either by committal or by fine."

[12] In the case of *Ananta Lal Sing* v. *A. H. Watson* 35 C. W. N. 189 : (A. I. R. (18) 1931 Cal. 257 : 32 Cr. L. J. 675), the conduct of counsel for the defence in the Chittagong Armoury Raid case was criticised by the Editor of the Statesman, because counsel after having made a public declaration of his intention to give up practice at the Bar to devote himself exclusively to the service of the Indian National Congress subsequently accepted the brief of the accused and the Editor of the Statesman ironically asked whether the defence of the accused in that case was a part of the work of the Congress. In a subsequent issue of the Statesman, the Editor expressed his regret if that criticism was interpreted in such a way as to prevent counsel from undertaking the defence and pointed out that his intention was merely political, i. e., to criticise the policy of the Congress party and not to prevent counsel from accepting the brief of the accused. Upon these facts Rankin C. J., pointed out that the action of the Editor was "singularly ill advised" and amounted to a contempt but it was of such a technical character as not to call for any action. Sir George Rankin further pointed out in this case that the law of contempt was the same whether the proceeding pending involved trial by jury or trial by a Judge or Magistrate.

[13] None of the exceptional circumstances present in *Dolan's case* : (1907-2 Ir. R. 260) or *Anant Sing's case* : (35 C. W. N. 189 : A. I. R. (18) 1931 Cal. 257 : 32 Cr. L. J. 675) appear to be present in the case before us. As we shall presently show, the description of the accused as communists is, in our judgment, certainly a matter of great prejudice in the present political atmosphere of the country and a recommendation for cancellation of their bail bonds is a direct interference with the judicial discretion of the trying Magistrate. It has been said by high authorities that if trials of individuals by Courts of law are not to be replaced by trials by anonymous and irresponsible correspondents of newspapers publications of the present description have to be deprecated.

[14] After an exhaustive review of the English and Indian authorities on the law of contempt Sir Arthur Harries as Chief Justice of the Lahore High Court laid down the law in the following terms in delivering the judgment of the Full Bench in the case of *In the matter of Tribune*, Lah. I.L.R. (1944) 25 Lah. 111 at p. 122 : (A.I.R. (30) 1943 Lah. 329 : 45 Cr. L. J. 445 F.B.).

"Any publication which is calculated to poison the minds of the jurors, intimidate witnesses or parties or to create an atmosphere in which the administration of justice would be difficult or impossible, amounts to contempt."

Again at p. 123 :

"It is also clear that a person may be guilty of contempt though there was no intention to commit con-

tempt. It is sufficient if the effect of the article complained of is to create prejudice and to interfere with the due course of justice."

[15] We respectfully propose to apply the above principles to the facts of the present case and the result at which we have arrived can be summarised as follows: (a) The publication commences with the sub-heading "Trouble created by communists" and then goes on to state "the communists looted away about 70 maunds of paddy in broad day light" etc. If we attach to these words their plain and natural meaning without the assistance of laborious commentary the passage means that whoever may have done the act or acts, is a communist. To say that this description does not refer to the accused is to trifle with truth; because whatever doubt may arise upon the opening sentence is completely dispelled by the following sentences where express reference is made to the accused persons. This description, in our judgment, is certainly calculated to create a lot of prejudice against the accused in the mind of the local public and may have the effect of deterring a person from deposing in favour of the defence, if the accused choose to call any defence evidence. (b) The writer then says "At present 50 accused persons who are on bail are creating panic in various ways in the village." This is another attempt to create local prejudice against the accused and amounts to real interference with the course of justice. (c) The writer concludes by saying:

"It is desirable that either the bail bonds of the accused should be cancelled till their trial is finished or arrangements made for providing police guards."

This passage has the effect of interfering with the free exercise of his judicial discretion by the trying Magistrate.

[16] It cannot and has not been suggested that the anonymous writer of the Ananda Bazar Patrika had any alternative motive of furthering a public or political cause as was held in the cases of *King* v. *Dolan*: (1907-2 Ir. R. 260) and *Ananta Lal Singh* v. *A. H. Watson*: (35 C.W.N. 189: A. I. R. (18) 1931 Cal 257: 32 Cr. L. J. 675). We accordingly hold that the offence in the present case is more than technical and is of such a character as to call for action.

[17] The Editor, printer and publisher of the Swaraj O Sangathan has filed through Mr. Manmatha Nath Das an affidavit expressing sincere regret for the publication of the letter and offering his unqualified apology for the same. In the circumstances of the case we accept this apology under S. 3 of the Act XII [12] of 1926 and direct that he may be discharged.

[18] With regard to the Ananda Bazar Patrika Mr. Mookerjee said in opening the case that in case it was held that the action of his client amounted to contempt and in case it was further held that the contempt was of such a character as to call for action his client was prepared to express regret for what was done through inadvertence and absence of supervision. Before the commencement of the second day of the hearing, we pointed out that if the Ananda Bazar Patrika was sincere in its expression of regret we might at once accept it and dispose of the matter on that footing: but Mr. Mookerjee expressed his embarrassment whereupon he was allowed full opportunities of advancing his arguments on all the points. Mr. Mookerjee was certainly within his rights in placing all the points that could possibly be urged in support of his client and he has done it. At the conclusion of his arguments, Mr. Mookerjee again said that his client was prepared to offer apology and pointed out that the publication was the result of inadvertence and appeared in an obscure place of the newspaper. It is not for us to say whether it is proper for a newspaper of the eminence and influence of the Ananda Bazar Patrika to publish a news item on the basis of a report received from an anonymous reporter over whom, presumably the paper has no control, all that we can say is that if such a report is published it is published at the risk of the Editor, printer and publisher. The essence of the offence being publication, we do not for a moment encourage the belief that lack of supervision is any defence to a proceeding for contempt, but nevertheless, we have to take into account the fact that the present publication may have been the result of an accidental slip over which nobody can have any control. We have accordingly come to the conclusion that the present one is not a case for committal or fine and we accept the apology under S. 3 of Act XII [12] of 1926; but in the circumstances of the case we direct that the editor, printer and publisher of the Ananda Bazar Patrika, should pay the costs of this proceeding to the two petitioners to be divided equally between them. Hearing fee is assessed at 20 gold mohurs.

[19] The rule is accordingly made absolute in the manner indicated above.

[20] **Blank.** — I agree.

(8th September 1949.)

[21] **Order.**—By consent of the parties expressed through their learned advocates, we order that the Editor, Printer and Publisher of "The Ananda Bazar Patrika" pay to the learned Advocate for the petitioner the amount of the costs including the hearing fee. Mr. Benode B. Haldar is authorised to grant a receipt which, when granted, will be kept on the record.

D.H. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 134 *[C. N. 39.]*

R. P. MOOKERJEE J.

Uday Chand Mahatab—*Plaintiff-Appellant* v. *Dibakar Sen and another*—*Defendants*—*Respondents.*

A. F. A.D. No. 192 of 1946, Decided on 24th August 1949, against decree of Dist. Judge, Zillah Bankura, D/- 22nd June 1945.

Tenancy Laws—Bengal Tenancy Act (VIII [8] of 1885), Sch. III, Art. 2—Applicability—Suit for arrears of putni rent—Article applies—Limitation Act (1908), Art. 110.

In a suit for recovery of arrears of putni rent, the relevant provisions for determining the period of limitation are those to be found in Art. 2, Sch. III of the Act; the provisions of Art. 110, Limitation Act, will not be attracted: 23 Cal. 191, *Foll.*; A I.R. (5) 1918 Cal. 265; 19 Cal 504 and A. I. R. (13) 1926 Pat. 465, *Rel. on*; 37 Cal. 747 and A. I. R. (24) 1937 Cal. 587, *Dissent.* A I. R. (29) 1942 Cal. 222, *Disting.*

[Paras 1 and 13]

Sarat Kumar Mitra and Amiya Kumar Mukerjee —for Appellant.

Siddheswar Chakravarty—for Respondents.

Judgment.—The only question which arises for decision in this appeal is whether in a suit for recovery of arrears of putni rent the provisions of Art. 110, Limitation Act or those of Art 2 of Sch. III, Bengal Tenancy Act will be attracted.

[2] The plaintiff filed the suit on the 15th April 1944 for the realisation of arrear putni rent due before the said putni was sold under the Putni Regulation on 1st Jaistha 1348 B. S.

[3] The defence was that a portion of the claim was barred by limitation as the plaintiff was entitled to claim arrears which had accrued due within three years of the filing of the suit. Both the Courts have disallowed the claim for the period antecedent to the Chaitra Kist of 1347 i. e. mid-April, 1941 holding that this suit is governed by Art. 110, Limitation Act. Hence this second appeal on behalf of the plaintiff.

[4] We shall consider in the first instance the argument advanced on behalf of the appellant that Art. 2 of Sch. III, Bengal Tenancy Act would apply in this case.

[5] Section 195, Clause (e) saves the laws relating to putni tenures from the operation of the Bengal Tenancy Act subject to certain limitations. The relevant portion of the section is in the following terms:

> Nothing in this Act shall affect
>
> (e) any enactment relating to putni tenures in so far as it relates to those tenures except that
>
> (i) the provisions of S. 67 and of clause (i) of subsection 1 of S. 178 shall apply to all putni tenures and,
>
> (ii) the expression "Khudkast *raiyat* or resident and hereditary cultivator" in sub-section (3) of S 11 the Bengal Putni Taluk Regulation 1819 shall be deemed to include all *raiyats* having the right to occupancy."

Where the Putni law is silent, the provisions of the Bengal Tenancy Act may be attracted for supplementing those provisions. There is no provision in the Putni Regulation as to the realisation of rent beyond one year. It was therefore held in *Satyasankar* v. *Monmohan*, 43 I. C. 996: (A. I. R. (5) 1918 Cal. 265), *Durgaprosad* v. *Brindaban*, 19 Cal. 504 and *Abdul Gaffar* v. *F. B Downing*, 5 Pat. 415 at p. 430: (A. I. R. (13) 1926 Pat. 465) that the Zamindar will be entitled to bring a suit for the realisation of the arrears as under the provision contained in the Bengal Tenancy Act.

[6] Section 65 of this Act, practically similar to ss. 11 and 15, Patni Regulation, does not contradict S. 17 of that Regulation. Therefore S 65 applies to putni tenures: *Pearymohan* v. *Sreeram Chandra*, 6 C. W. N. 794, *Basant Kumar* v. *Khulna Loan Co.*, 20 C. L. J. 1: (A. I. R. (2) 1915 Cal 24).

[7] Although there are clear decisions to the effect that in spite of the provisions contained in the Patni Regulations, it is open to the landlord to file suits under the provisions contained in the Bengal Tenancy Act for the realisation of arrears, there has recently been an expression of doubt as to the correctness of those decisions. This Bench as constituted is not entitled to go behind the Bench decisions of this Court. I would, however, indicate the nature of the difference and the foundation, if any, in support of either contention.

[8] Section 195, Cl. (e), definitely attracts Ss. 67 and 178 (1) (i), Bengal Tenancy Act for all patni tenures. A long line of decisions, some of which are referred to above, support the view that provisions contained in the Bengal Tenancy Act so far as they did not contradict the specific provisions as in the Patni Regulation, are attracted so far as Putnis are concerned.

[9] The point which arises in the present case is almost similar and founded on the same set of facts as is *Burnamoyi Dassee* v. *Burmamoyi Choudhurani*, 23 Cal. 191. In that case, the Patni Taluk had been sold and purchased by the landlord on 14th May 1891, but the entire amount due as arrears were not realised from out of the sale proceeds. The landlord filed a suit for the balance arrear of Patni rent as upto the end of the year 1297 B. S, i. e., 12th April 1891. Sir Comer Petherem C. J. and Beaverly J. held that the suit was governed by the provisions of the Bengal Tenancy Act as contained in S. 184, and Sch. III, Art 2 (d), the period of limitation being three years from the last day of the Bengali year in which the arrear fell due.

[10] The view that suits for recovery of Patni rent come within the purview of the Bengal

Tenancy Act and are governed by Sch. III thereof, finds support from *Basanta Kumar Bose* v. *Khulna Loan Co.*, 19 C. W. N. 1001 : 20 C. L. J. 1 : (A. I. R. (2) 1915 Cal. 24), *Wazed Ali Khan* v. *Brojendra Kumar*, 36 C. W. N. 833 : (A. I. R. (20) 1933 Cal. 90). A contrary view has been expressed in *Jagannath* v. *Mohiuddin Mirza*, 37 Cal. 747 : (6 I. C. 371), and *Alauddin Ahammed* v. *Tomizuddin*, 41 C. W. N. 1001 : (A. I. R. (24) 1937 Cal. 587). An attempt was made by Biswas J. in the last of the cases mentioned above, to distinguish the earlier decisions in the view that either some of the opinions were merely *obiter* or that the learned Judge dissented from the earlier view. It would have been more satisfactory and in accordance with the Rules if the question had been referred to a larger Bench, if the learned Judge wanted to lay down a proposition contrary to the one which had been held in a long series of cases from at least 1892. Reliance is placed by Biswas J. on the following observation by the High Court which was affirmed by the Judicial Committee in *Satya Niranjan Chakravarty* v. *Suraju Bala Debi* 33 C. W. N. 865 at p. 870 : (A. I. R. (17) 1930 P. C. 13):

"This was the creation of a tenancy for the purpose of realisation of rent from the cultivating tenants and therefore the provisions of the Transfer of Property Act apply to it."

[11] This observation was made while interpreting the provisions of the particular Ijara Patta and there is no reference or discussion in the short judgment delivered by the Judicial Committee to this stray sentence in the judgment of the High Court. Consideration which may generally apply in the case of an ordinary Ijara Patta, are not always relevent when the suit is based on a Patni settlement. The lease in the case before Biswas J. was that of a registered Ijara lease for five years. The attempt made by the learned Judge to explain away or even to dissent from the earlier decisions relating to Patni tenures, are with due respect not justified or even supported by the reasons given.

[12] Another more recent decision and relied upon on behalf of the defendants is that of the *Official Trustee of Bengal* v. *Bejoy Chand Mahatab*, 45 C. W. N. 787 : (A. I. R. (29) 1942 Cal. 222). The facts in this case, however, are not only peculiar but altogether different from those in the present case. A Patni was sold under the Patni Regulation for arrears of rent for a particular year and purchased by a third party. That sale was set aside and the Patnidar was restored to possession. The Zamindar thereafter filed a suit for the recovery of the arrears of rent and cess for which the Patni had been previously sold, along with arrears for a subsequent period. The defence was that the claim for the arrears for which the previous Patni sale had been held was barred by limitation. The only question argued before the Court was limited to the question whether Article 110 or Article 115 of the Limitation Act was attracted. Dr. Basak appearing on behalf of the respondent in that case had conceded that the suit was governed by Article 110. In the view that the Patnidar had recovered the Patni with meane profits from the auction purchaser, it was only equitable that he should pay the amount of rent which was in arrears. The amount of rent did not accrue until the sale of the Patni had been set aside and it was accordingly held that the statute should not run until that time. The Court was, therefore, not called upon to express any opinion on the point which is now in issue in the present case.

[13] I respectfully agree with the view expressed by this Court in *Burnamoyi Dassee* v. *Burmamoyi Choudhurani*, 23 Cal. 191 and must hold that the relevant provisions for determining the period of limitation in the present case are those to be found in Art. 2 of Sch. III, Bengal Tenancy Act. The appeal is accordingly allowed and the suit decreed with costs in this Court.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 135 *[C. N. 40.]*

G. N. DAS AND GUHA JJ.

Asgarali and others—*Appellants* v. *Dinanath Kumar and others*—*Respondents.*

A. F. A. D. No. 985 of 1948, Decided on 8th September 1949, against decree of Dist. Judge, Zillah Maldah, D/- 24th May 1947.

(a) Civil P. C. (1908), S 11 — Mortgage suit — Decision of question of nature of mortgagee's possession necessary for passing decree — Decision operates as res judicata in subsequent proceeding under Bengal Money-lenders Act — Debt Laws — Bengal Money-lenders Act (X [10] of 1940), S. 30.

A decision in the mortgage suit that the mortgagee went into possession of the property in respect of another loan, which decision was necessary to sustain the decree in that suit, would operate as *res judicata* in the later proceedings under the Bengal Money-lenders Act wherein the question of the nature of mortgagee's possession was at issue : A. I. R. (34) 1947 Cal. 447, *Rel. on* ; A. I. R. (30) 1943 Cal. 629, *Disting.* [Para 3]

Annotation : ('44-Com.) Civil P. C., S. 11, N. 7.

(b) Debt Laws — Bengal Money-lenders Act (X [10] of 1940) S. 31 — Interest up to decree not contravening S. 30 (1) — Decree providing post decree interest—Decree need not be reopened.

If the interest due up to the decree does not contravene S. 30 (1), the fact that the decree provided for post decree interest is not material. Such a decree is not liable to be reopened: 48 C. W. N. 200, *Rel. on.* [Para 4]

(c) Debt Laws — Bengal Money-lenders Act (X [10] of 1940), S, 31—Mortgage suit—No interest

claimed—Total sum decreed together with interest already paid not contravening S. 30—Sum awarded as interest together with sum already paid as interest less than principal and also less than amount calculated at statutory rate of 8 per cent. per annum—Bare fact that decree awards 12 P. C. P. A. pendente lite interest held did not entitle debtor to reopen decree.

In the mortgage suit no interest was claimed on the sums claimed as being due on the mortgages. The total sum decreed together with the interest already paid did not contravene the provisions of S. 30. The sum awarded as interest including the interest already paid was less than the principal of the loans. It was also less than the sum which would be due as interest if interest were calculated on the principal sum advanced at the statutory rate of 8 per cent. per annum:

Held that the bare fact that the Court awarded interest pendente lite at 12 per cent. per annum, that is, in excess of the statutory rate of 8 per cent. per annum, did not entitle the borrower to re-open the mortgage decree: A.I.R. (29) 1942 Cal. 39, *Foll.*; A.I.R. (31) 1944 Cal. 325, Affirmed in A. I. R. (36) 1949 F. C. 60, *Disting.*; *Observations of Sen J. in* A.I. (29) 1942 Cal. 367, *Doubted in view of* A. I. R. (27) 1940 F. C. 20.

[Paras 5 & 6]

Amaresh Chandra Roy—for Appellant.

Girija Prasanna Sanyal and Baidyanath Banerjee — for Respondents.

Das J. — This appeal is on behalf of the plaintiff and arises out of a suit under S. 36, Bengal Money-lenders Act. The suit has been dismissed by the Courts below. The plaintiff now appeals to this Court.

[2] The facts are more or less admitted and may be stated as follows: On 20th December 1921, the plaintiff borrowed a sum of Rs. 1493-8-0 on a mortgage of certain properties. The interest stipulated to be paid was Re. 1 per cent. per month. On 7th July 1922, the plaintiff again borrowed a sum of Rs. 995. The interest stipulated Re. 1-4-0 per cent. per annum with annual rests. A sum of Rs. 408.15.0 was paid by the plaintiff towards the interest due on the aforesaid mortgages. In 1934 the defendants instituted a suit for recovery of the sums due on the said mortgages. The claim was laid at Rs. 1300 on the first mortgage and a sum of Rs. 700 on on the second mortgage. No interest was claimed. On 12th February 1936, a preliminary decree was passed in the mortgage suit for a sum of Rs. 2773 9-3 on account of principal, and interest. This sum included the claim in the mortgage suit viz: Rs. 2000 and a sum of Rs. 773-9-0 as interest pendente lite. The decree carried interest at 6 per cent. per annum. On 26th August 1936 a final decree was passed. The mortgagees started execution proceedings in 1939 and the mortgage properties were brought to sale on 21st September 1942. The plaintiff thereafter brought the present suit for relief under S. 36, Bengal Money-lenders Act. As already stated both Courts have dismissed the plaintiff's suit.

[3] Mr. Roy appearing on behalf of the plaintiff appellant has first contended that after the execution of the mortgages the mortgagees went into possession of Lot No. 8 and certain other lots and profits of these properties should be taken into account. As regards the other lots it appears that the mortgagees purchased the same in execution of a certificate and went into possession. As such, so far as these lots are concerned no question arises as the plaintiff cannot get restoration of possession of these lots, the mortgagees being in possession under independent title. This view is supported by the decision in the case of *Kamalakshya Choudhury* v. *Joychand Lal Babu*, 48 C. W. N. 105 since affirmed by the Judicial Committee in the case of *Joychand Lal* v. *Kamalakshay Choudhury*, 53 C. W. N. 562 : (A. I. R. (36) 1949 P. C. 239). As regards Lot No. 8, Mr. Roy's contention is that as the defendants-mortgagees possessed the same qua mortgagee in order to find out the sums due on the loans the profits received by the defendants mortgagees should be taken into account and if this amount is taken into account it would appear that the mortgage decree was for a sum which exceeded the limits provided for in S. 30, Bengal Money-lenders Act. The case of the defendants mortgagees is that the defendants mortgagees were put in possession not qua mortgagee but in satisfaction of their dues in respect of another loan of Rs. 4000 which was due by the plaintiff to the defendants. In order to establish this fact the defendants relied on the decision on this point in the mortgage suit and submitted that this was *res judicata* between the parties. Mr. Roy on the other hand, contended that the finding in the mortgage suit on this point is not *res judicata* because in order to ascertain the principal of the loan the Court has to enquire in this proceeding what sum was really due as principal of the loan. Mr. Roy relies on the decision in the case of *Provabati Mitra* v. *Anil Kumar Das*, 47 C. W. N. 645 : (A. I. R. (30) 1943 Cal. 629). The facts of that case are somewhat different. In that case in a previous suit the question arose whether a sale of the properties of a minor was justified by legal necessity. The Court in deciding the question of the legal necessity came to the finding that the loan was incurred for purposes of joint family business. Thereafter proceedings were taken under the Bengal Money-Lenders Act. In this proceeding a question arose whether the finding in the previous suit operates as *res judicata*. This Court held that as the question was not directly and substantially in issue in the earlier suit the finding that the loan was for business purposes was not *res judicata*. This decision does not therefore touch the present question. On the

other hand in the case of *Indra Sekhar* v. *Rati Kanta Haldar*, 50 C. W. N. 703 : (A. I. R. (34) 1947 Cal. 447) it has been held that a decision in the mortgage suit which was necessary to sustain the decree in that suit would operate as *res judicata* in the later proceedings under the Bengal Money-lenders Act. This decision covers the present point. The first contention raised by Mr. Roy must therefore be overruled.

[4] The second contention raised by Mr. Roy was that as the mortgage decree provided for interest after decree, the decree is liable to be reopened under S. 31, Bengal Money-lenders Act. This question arose in the case of *Devraj Ray Pandey* v. *Lalji Morarji Ranchord*, 48 C. W. N. 200. It was held by this Court that if the interest due up to the decree does not contravene S. 30 (1), Bengal Money-lenders Act, the fact that the decree provided for post decree interest is not material. At p. 201 their Lordships make the following observations :

"Section 36 does not give the power to the Court to re-open a transaction or a decree simply because the provision of S. 31, Bengal Money-lenders Act, had been contravened."

The second contention raised by Mr. Roy must also be overruled.

[5] The third contention raised may be stated as follows : It is argued that as the decree provided for interest pendente lite at 12 per cent. per annum this fact is sufficient to entitle the borrower to re-open the decree. It is to be noted that in the mortgage suit no interest was claimed on the sums claimed as being due on the mortgages. It is also admitted that the total sum decreed together with the interest already paid did not contravene the provisions of S 30, Bengal Money-lenders Act. The sum awarded as interest including the interest already paid is less than the principal of the loans. It is also less than the sum which would be due as interest if interest was calculated on the principal sum advanced at the statutory rate of 8 per cent. per annum. The question therefore is whether the bare fact that the Court awarded interest for the period in suit at 12 per cent. per annum, that is, in excess of the statutory rate of 8 per cent. per annum, entitles the borrower to re-open the mortgage decree. This question arose in the case of *Romesh Chandra* v. *Jnanada Prosanna*, 45 C. W. N. 772 : (A. I. R. (29) 1942 Cal. 39) Mukherjee and Roxburgh JJ. were of the opinion that in order to find out whether the interest decreed contravenes S. 30 (1) the total interest which was allowed by the decree has got to be taken into account. Mr. Roy relies on the decision of this Court in the case of *Sanat Kumar* v. *Pramatha Nath*, 48 C. W. N. 551 : (A. I. R. (31) 1944 Cal. 325). In that case the appeal arose out of an application under S. 38, Bengal Money-Lenders Act. The facts were that interest had been paid for a certain period at less than the statutory rate and for a certain other period in excess of the statutory rate. The total interest paid did not exceed 8 per cent per annum. In taking the account between the parties this Court held that during the period when interest was paid at more than 8 per cent per annum the excess payment of interest must be taken towards satisfaction of the principal of the loan and the amount should be adjusted on this basis. No decree on the mortgage had been passed. The case therefore came within S. 30 (1), Bengal Money-Lenders Act and not under S. 30 (2), Bengal Money-Lenders Act. Before this Court on behalf of the creditor reliance was placed on the decision in the case of *Ramesh Chandra* v. *Jnanada Prasanna*, 45 C. W. N. 772 : (A. I. R. (29) 1942 Cal. 39), already referred to. Nasim Ali J. delivering the judgment of the Court observed that the facts of that case were different and that decision was not applicable to the case then before this Court. The decision in the case of *Sanat Kumar* v. *Pramatha Nath* (48 C. W. N. 551 : (A. I. R. (31) 1944 Cal. 325) therefore does not cover the present suit. It may be stated that the decision of this Court in the case of *Sanat Kumar Mukherjee* v. *Pramatha Nath Roy*, (48 C. W. N. 551 : A. I. R. (31) 1944 Cal. 325) has since been affirmed by the Federal Court *Pramatha Nath* v. *Sanat Kumar*, 53 C. W. N. (F. R.) p. 12 : (A.I.R. (36) 1949 F. C. 60).

[6] The only other case which bears on this question is a decision of Sen J. in the case of *Mohini Mahan Roy* v. *Ashutosh Ghose Bahadur*, 46 C. W. N. 159 : (A.I.R. (29) 1942 Cal. 367). In that case which arose out of proceedings under S. 36, Bengal Money-lenders Act, the interest which was awarded upto the date of the preliminary decree did not contravene the provisions of the Bengal Money-lenders Act, but if the interest upto the period of grace was taken into account, the total interest awarded under the decree exceeded the limits imposed by S. 30, Bengal Money-lenders Act. The question that was agitated was whether the interest since the preliminary decree down to the date fixed for payment is interest within the meaning of S. 2(8), Bengal Money-lenders Act. This question was answered in the affirmative by the learned Judge. In so holding Sen J. relied on the decision in the case of *Kusum Kumari* v. *Debi Prosad*, 63 I. A. 114:(A.I.R. (23) 1936 P. C. 63) and observed that the contract embodied in the mortgage bond remains effective up to the period of grace and after that date the matter passes from the domain of contract to the domain of judgment. How far the observations relied on are good law in view of

the decision of the Federal Court in the case of *Jai Gobind Singh* v. *Lachmi Narain Rim* 44 C. W. N. (F. R.) p. 21 : (A.I.R. (27) 1940 F. C. 20) is a question with which we are not concerned in this appeal. We may observe that the decision of the Federal Court has since been followed by this Court and the authorities bearing on the point are discussed in the case of *Kumar Pramatha Nath Roy* v. *Ramani Kanta Roy*, (unreported decision of this Court in F. A 186 of 1941). The decision of Sen J., however, did not specifically decide the present question. All that was decided was whether the sum awarded as interest since the date of the preliminary decree down to the date of grace could be regarded as interest within the meaning of the Bengal Money-lenders Act. The view which was taken in the case of *Ramesh Chandra* v. *Jnanada Prasanna*, 45 C. W. N 772 : (A. I. R. (29) 1942 Cal 39) is a Bench decision of this Court and having regard to the terms of S. 30 (2), Bengal Money-lenders Act which speaks of the interest included in the decree, we are not inclined to dissent from it. The third contention raised by Mr. Roy must also be overruled. The result is that this appeal fails and must be dismissed with costs.

Guha J. — I agree.

R.G.D. *Appeal dismissed.*

A. I. R (37) 1950 Calcutta 138 *[C. N. 41.]*

DAS GUPTA AND GUHA JJ.

Suchandra Kumar Samanta — *Accused-Petitioner* v. *The King and others* — *Opposite Party.*

Criminal Misc. Case No. 145 of 1949, Decided on 12th September 1949.

(a) Criminal P. C. (1898), S. 190 (1) (a) and (c)— Complaint of offence under Ss. 417/420 read with S. 120B, Penal Code—During trial, Magistrate issuing process against person not named in complaint under Ss. 465/109, Penal Code—Cognisance held was taken under cl. (c) of section.

Where the petition of complaint was as regards an offence under Ss. 417/420 read with S. 120B, Penal Code and on the basis of the evidence heard in the case the Magistrate issued process against a person not named in the original complaint not under S. 417 or under S. 420 but under S. 465 read with S. 109, Penal Code :

Held that it could not be said that cognisance had already been taken of the offence for which the person was being summoned and consequently cognisance was taken against him under cl. (c) and not cl. (a) of S. 190 (1). A. I. R (1) 1914 Cal. 801, *Disting.* ; 1 C. W. N. 105, *Ref.* [Paras 4 and 5]

Annotation: ('49-Com.) Criminal P. C., S. 190 N. 23.

(b) Criminal P. C. (1898), S. 351 — Effect of section is to dispense with issuing of process under S. 204 of Code —Under this section it is necessary for Magistrate to take cognisance of offence.

The only effect of the section is that the preliminary procedure of issuing processes under S. 204 of the Code is dispensed with. The section in terms says that the offence must be one of which the Court can take cognisance and there is no justification for reading into this clause the meaning that it is sufficient merely that it should be such that the Court can take cognisance of and that it is not necessary for the Court to take cognisance. [Para 7]

Annotation : ('49-Com.) Criminal P. C., S. 351, N. 1.

S. S. Mukherji —for Petitioner.

Debabrata Mukherji —for Opposite Party.

Das Gupta J.—This Rule was issued on the District Magistrate of Howrah to show cause why proceedings under Ss. 465/109, Penal Code pending in the Court of Mr. Ghatak should not be transferred to some other Court. Two persons, Pramatha Harabab and Haradhan Banerjee were summoned under S. 417, Penal Code on a complaint of one Amulya Charan Harabab, filed on 26th July 1948. After the case was transferred to Mr. Ghatak for trial, several witnesses were examined and the present petitioner Suchandra Kumar Samanta was actually examined as a witness on 28th April 1949. On 6th June, an application appears to have been filed on behalf of the complainant that Suchandra and another person should be summoned to take their trial. The order passed by the Magistrate on 6th June does not indicate that the learned Magistrate did read this petition carefully for he appears to have read it only as a petition for examination of the lawyer Bejoy Krishna Roy Choudhury. On 29th June, he discussed the question "whether P. W. 9, Suchandra Kumar Samanta should stand his trial after what has transpired in evidence" and said,

"I am now satisfied that he should be brought to trial, for his complicity with the forged document is beyond question, without of course entering into the merit of it, that is, whether his act was of a *bona fide* nature. Since he is attached to the Civil Court as a *Moharir* he should be summoned under Ss. 465/109 Penal Code for to-morrow."

Suchandra appeared on the following date and was released on bail. An application for transfor of the case filed before the District Magistrate failed.

[2] The first question for consideration is whether the Magistrate before issuing summons against the present petitioner under Ss. 465/109, Penal Code had taken cognisance of the case under S. 190 (1) (a), Criminal P. C. or under S. 190 (1) (c), as contended by Mr. Sudhansu Sekhar Mukherji on behalf of the petitioner, or was merely acting under S. 351, Criminal P. C. without having taken cognisance of the case at all under S. 190 (1), Criminal P. C.

[3] There has been some divergence of judicial opinion on this question whether when a person is summoned by the Magistrate on the basis of the evidence he has already heard in the case, he is to be considered as to have taken cognisance

under S. 190 (1) (a) or under S. 190 (1) (c), Criminal P. C. In the case of *Khudiram Mookerjea* v. *The Empress*, 1 C. W. N. 105, the view was taken that the Magistrate in such a case was proceeding under S. 191 (c), Criminal P. C. which is the same as 190 (1) (c) of the present Code. In a later case reported *Dedar Bux* v. *Syamapada Malakar*, 18 C. W. N. 921 : A. I. R. (1) 1914 Cal. 801: (15 Cr. L. J. 546), Sharfuddin and Teunon JJ. appeared to have taken a different view. In this case a complaint had been filed against several persons under Ss. 342 and 363, Penal Code. The Magistrate ordered the complainant to prove his case but before the date fixed the complainant filed a petition for withdrawal of the complaint. The Magistrate thereafter examined witnesses on the date fixed and found that there was no satisfactory evidence against the persons complained against, but summoned two other persons under Ss. 342, 363 and 353, Penal Code. The Court held that cognisance had been taken under S. 190 (1) (a) of the Code.

[4] It is not necessary for us in this case to decide the question whether one of these two cases, namely, *Khudiram Mookerjea* v *The Empress*, 1 C. W. N. 105 or *Dedar Bux* v. *Syamapada Malakar*, 18 C. W. N. 921 : (A. I. R. (1) 1914 Cal. 801), was wrongly decided. It seems quite clear that the decision in the case of *Dedar Bux* v. *Syamapada Malakar*, 18 C. W. N. 921 : (A. I. R. (1) 1914 Cal. 801), proceeded on the consideration that under S. 190 (1) (a), Criminal P. C. cognisance is taken of an "offence" and once cognisance has been taken of an offence, the fact that processes may be issued against certain persons not named in the original complaint does not amount to a fresh taking of cognisance. In that case cognisance had already been taken of an offence under Ss. 342 and 363, Penal Code and two persons who were summoned later on though not named in the petition were summoned to take their trial under these sections, though an additional section was also added. In the present case, the petition of complaint was as regards an offence under Ss. 417/420 read with S. 120B. Penal Code. If the present petitioner had been summoned under any of these sections, there would be scope for the conclusion that cognizance having already been taken of the offence, it was open to the Magistrate to proceed against him without taking any fresh cognisance. Process, however was not issued against this person either under S. 417 or under S. 420 but under S. 465 read with S. 109, Penal Code. It cannot, therefore, be said that cognisance had already been taken of the offence for which the accused was being summoned.

[5] Consequently, unless it could be held that the accused was being proceeded under S. 351, Criminal P. C. the only possible conclusion would be that cognisance had been taken against him under S. 190 (1) (c), Criminal P. C.

[6] Under S. 351, Criminal P. C. :

"any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognisance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned."

[7] Two decisions of the Judicial Commissioner's Court, Sind, were cited in support of the view that a Magistrate proceeding under S. 351, Criminal P. C. need not at all take cognisance of the offence. As at present advised, I am not inclined to agree with this view. It seems to me that the only effect of S. 351, Criminal P. C. is that the preliminary procedure of issuing processes under S. 204, Criminal P. C. is dispensed with. Section 351 in terms says that the offence must be one of which the Court can take cognisance. I do not see any justification for reading into this clause the meaning that it is sufficient merely that it should be such that the Court can take cognisance of and that it is not necessary for the Court to take cognisance.

[8] In any case, it seems to me clear that in the present case at least, the learned Magistrate did not proceed under S. 351, Criminal P. C. He does not himself purport to act under that section and there is no reason why we should ascribe to him the intention of proceeding under the special procedure of S. 351, Criminal P. C., unless there are clear indications that he did so. Nor did he take any notice of the complaint in the petition filed by the complainant, on 6th June 1949.

[9] My conclusion, therefore, is that the learned Magistrate before issuing process against the present petitioner under Ss. 465/109, Penal Code, had taken cognisance of this offence under S. 190 (1) (c), Criminal P. C. consequently, since the accused objects to be tried by this learned Magistrate, it is necessary in law that the case should be tried by some other Magistrate. I would accordingly order that the case be transferred by the learned District Magistrate to the file of some other Magistrate and make the rule absolute.

Guha J.—I agree.

V.R.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 140 *[C. N. 42.]*

SEN J.

Badridas Goenka and others — *Accused* — *Petitioners* v. *Corporation of Calcutta* — *Complainant* — *Opposite Party.*

Criminal Revn. No. 666 of 1949, Decided on 15th September 1949.

(a) Municipalities — Calcutta Municipal Act (III [3] of 1923), Ss. 363, 493 and 534 — Proceedings under S. 363 — Fine cannot be inflicted under S. 493.

Section 534 does not relate to proceedings under S. 363 but to proceedings under S. 493. Hence, in proceedings under S. 363, no fine can be inflicted under the provisions of S. 493. [Para 7]

(b) Municipalities — Calcutta Municipal Act (III [3] of 1923), Ss. 363 and 493 — Application under S. 363 — Magistrate has no jurisdiction to convert it as one under S. 493.

Where the proceedings have been instituted under S. 363 it is not open to the Magistrate to convert the proceedings to one under S. 493: Cri. Rev. No 285 of 1948, *Rel. on*; A. I. R. (25) 1938 Cal. 36, *Expl.* [Para 8]

(c) Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 363 — Magistrate can refuse demolition if it would be against equity and justice — High Court's powers on revision are same as that of Magistrate.

Under S. 363 the Magistrate is not bound to order a demolition even if he finds that a building is unauthorised or that it has infringed the building rules but he has a discretion in the matter. He can refuse demolition if he thinks it would be against equity and justice: 33 Cal. 267 and 34 Cal. 341, *Rel. on.* [Para 11]

The High Court on revision has the power to exercise all the powers which the Magistrate has and it is open to that Court either to order demolition or to prohibit demolition if such demolition has been ordered by the Magistrate: 34 Cal. 341, *Rel. on.* [Para 11]

Where a party is allowed to be in possession of an unauthorised building for a period of 3 years with full knowledge of the Corporation it is unfair and unjust to direct the party to demolish the building especially where the building has not infringed any of the building bye-laws of the Corporation and has not affected adversely any rights of the neighbours. [Para 11]

Bireswar Chatterjee and Gaganendra Krishna Deb —for Petitioners.

A. C. Sarkar and Sunil Kumar Basu —for Opposite Party.

Order.— This Rule has been obtained by the petitioners against an order passed by Sri N. K. Ghose, Municipal Magistrate, Calcutta, whereby the petitioners have been directed to pay a fine of Rs. 100 each, the fine purporting to have been inflicted under S. 493, Calcutta Municipal Act.

[2] The facts briefly are as follows: On 15th September 1948, the Corporation of Calcutta filed an application before the aforesaid Municipal Magistrate under S. 363, Calcutta Municipal Act. The Corporation prayed for the demolition of certain structures constructed at 43 Netaji Subhas Road on the ground that these constructions were made without the sanction of the Corporation and also on the ground that the constructions infringed certain bye-laws framed for buildings under the Calcutta Municipal Act. It was stated in the petition that the Corporation detected this unauthorised building on 10th January 1948. Before the learned Magistrate the persons complained against, that is to say, the present petitioners adduced evidence to show that none of the building regulations had been infringed and the Municipal Magistrate has found in favour of the petitioners on this point.

[3] Next, the petitioners took up the position that the constructions had been made more than five years prior to this petition and that therefore no demolition order could be passed. The evidence on this point was not believed by the learned Magistrate and he has held that the building was constructed in 1945, that is to say, within three years of the application and therefore the Corporation was not barred from applying for its demolition. The learned Magistrate also found that the building had been made without the sanction of the Corporation. All these finding are now not challenged.

[4] The learned Magistrate after arriving at these findings has held that the unauthorised construction has not injured or in any way affected the rights of the neighbouring owners. I may mention here that these proceedings were initiated pursuant to letters written to the Corporation by one Kashi Nath Mallik, witness No. 4 for the Corporation. He complained that his rights regarding air and light have been affected as a result of this unauthorised construction. The learned Magistrate has dealt with this point and has found that the unauthorised building could not possibly affect the rights of this witness regarding light and air inasmuch as his building is mostly a one-storied one and this unauthorised construction was built on the top of the third floor of the petitioners' building. This finding also is not challenged and indeed it could not be challenged.

[5] After arriving at these findings the learned Magistrate took up for consideration what order he should pass in view of the fact that the building was without sanction. He says that having regard to all the circumstances of this case he saw no reason to demolish the building as it affected nobody's rights, but he added that as the building was unauthorised, he should dispose of the proceedings under S. 493, Calcutta Municipal Act and relying on that section he fined the petitioners in the manner stated above.

[6] On behalf of the petitioners, it was argued that no fine under S. 493, Calcutta Municipal Act could be passed by reason of the provisions of S. 534 of the aforesaid Act which says that no person shall be liable to punishment for any offence under this Act or any rule or bye-law made thereunder unless complaint of such offence is made before a Magistrate within three

months next after the commission of the offence or if such date is not known, after the date on which commission or existence of such offence was first brought to the notice of the Corporation or the Executive Officer. He points out that in this case if the proceedings are considered to be one under S. 493, Calcutta Municipal Act, the learned Magistrate had no power to inflict any fine on the petitioner because the proceedings were started more than three months after 10th January 1948 when according to the petition of the Corporation itself the offence was detected. He points out further that from the letters put in it is clear that the offence was brought to the notice of the Corporation long prior to 10th January 1948, as it was brought to the notice of the City Architect on 24th August 1945 by Kashi Nath Mallik.

[7] On behalf of the opposite party, it is contended that S. 534 of the aforesaid Act has no application as these were not proceedings under S. 493 but proceedings under S. 363 of the aforesaid Act. .Learned counsel pointed out that S. 534 of the said Act dealt with punishment for an offence and that therefore it related to proceedings under S. 493 which deals with the infliction of a fine and not with the proceedings under S. 363 which deals with a mandatory injunction to demolish a building. He contended therefore that S. 534 of the Act had no application. He further contended that the learned Magistrate was wrong in dealing with the case under S. 493 of the Act. I am of opinion that the contention of learned counsel that S. 534 does not relate to proceedings under S. 363 but to proceedings under S. 493 of the Act is sound; but if these proceedings are considered to be proceedings under S. 363, then it follows that no fine can be inflicted under the provisions of S 493. So, in any case the order of fine passed by the learned Magistrate cannot be upheld. Learned counsel accepts this position and he suggests that the case should be sent back to the Municipal Magistrate with a direction that he should deal with it under the provisions of S. 363, Calcutta Municipal Act.

[8] In my opinion, having regard to the law as it stands, the Magistrate had no jurisdiction to treat the application as being one under S. 493 of the Act. This has been clearly laid down by the Chief Justice in the case of *Farrukh Sayer* alias *Mannoo Miah* v. *The Corporation of Calcutta*, in Criminal Revision No. 285 of 1948. In S. 363 there is a proviso that where the Corporation have instituted proceedings under S. 493, no application shall be made under S. 363. There is a similar proviso in S. 493 which says that where an application has been made under S. 363 or S. 364, no proceedings shall be instituted by the Corporation under S. 493. The proceedings having been instituted under S. 363 of the Act it was not open to the learned Magistrate to convert the proceedings to one under S. 493. If the parties could not do so, I do not see how the learned Magistrate could do so. The learned advocate for the petitioners referred to the case of *Corporation of Calcutta* v. *Bangshidhar*, 41 C. W. N. 1373 : (A. I. R. (25) 1938 Cal. 36) which he said supported the view that the Magistrate had the power to convert proceedings under S. 363 to proceedings under S. 493 although the parties themselves could not do so. I have been through the case and I find that this is what was argued before Biswas J. but Biswas J. did not express any definite opinion on the point. He expressly says so in the judgment. There is therefore only the case decided by the Chief Justice on this point and having regard to the decision in that case and the express words in the provisos of Ss. 363 and 493, I am of opinion that the learned Magistrate had no jurisdiction to invoke the aid of S. 493 of the Act in these proceedings. To hold that a party could not invoke the aid of S. 493 and that the Magistrate could do so seems to me on the face of it to be illogical.

[9] The learned Magistrate was induced to do this by reason of the conduct of both the parties in this matter. The learned lawyer for the Corporation in his argument stated that "the defendant should be penalised. The Court may pass an order of demolition or impose a penalty under S. 493." This was the conclusion of the argument of the lawyer for the Corporation. Thereafter the learned Magistrate passed an order that the case should be put up for judgment on 1st June 1949. Prior to that date on 24th May 1949 a petition was put in by the present petitioners asking the Court to treat the case as one under S. 493 if the Court held the view that the unauthorised structures were made within five years prior to the institution of this case. No order was passed on this petition, but in the judgment the learned Magistrate seems to have accepted the views expressed by the lawyers of both parties that he had power to deal with this application either in accordance with the provisions of S. 363 or in accordance with the provisions of S. 493. As I have said before the Magistrate had no power to do this. He should have dealt with the application as it was made, that is to say, dealt with it in accordance with the provisions of S. 363.

[10] The next question which arises is what order should be passed in this case. The order for fine obviously cannot stand and it is hereby set aside. The application having been made according to the provisions of S. 363 it must be dealt with in accordance with those provisions.

The learned Magistrate in the major portion of his judgment has dealt with the petition on the footing that it was a petition for action under S. 363 but it is only at the time of considering what final order he should pass the learned Magistrate said that the fine under S. 493 would be the proper order to pass inasmuch as the building was unauthorised. He held however in the main part of his judgment that no ground had been made out for demolition of the structures. Learned counsel for the Corporation argues that having regard to all the circumstances of this case the case should be sent back to the learned Magistrate and he should be asked to treat it with sole reference to S. 363. He contended that the learned Magistrate refrained from passing an order of demolition because he thought that he had some other power of punishing the petitioner, namely, the power of fining the petitioners namely, under S. 493. He suggested that this was the reason why the learned Magistrate did not order demolition. I have been through the judgment and I am of opinion that this contention is not sound. The learned Magistrate did not refuse to order demolition because he thought he could fine the petitioners. He refused to order demolition on the ground that the structure harmed nobody and that it was just and equitable that demolition should not be ordered. This is what he says:

"I consider where no infringement of the building rules is involved and where as in this case no adjoining owner has been affected, it will be just and equitable for the Court not to make an order of demolition. I, therefore, allow the unauthorised structure to remain."

[11] Thereafter he goes on to say that this is a proper case where a fine should be passed under the provisions of S. 493. Another contention of learned counsel was that under the provisions of S. 363 the Magistrate had no option. Once he found that the building was without the sanction of the Corporation, he was bound to order its demolition and he said that the word 'may' appearing in S. 363, should be construed as 'shall'. In my opinion, this contention cannot be supported and it is against two decisions of two Benches of this Court in cases under the old Calcutta Municipal Act, S. 449. The words of S. 449 of the old Act and S. 363 of the present Act so far as this matter is concerned are exactly the same. In both these cases, it was held that the magistrate was not bound to order a demolition even if he found that a building is unauthorised or that it infringed the building rules but that he had a discretion in the matter. I refer to the case of *Abdul Samad* v. *Corporation of Calcutta*, 33 Cal. 287: (3 Cr. L. J. 211) and to the case of *Chuni Lal Dutt* v. *Corporation of Calcutta*, 34 Cal. 341: (4 Cr. L. J. 408). In both these cases it was held that the magistrate had a discretion in the matter and he could refuse demolition if he thought it would be against equity and justice. In the latter case it was also decided that this Court on revision had the power to exercise all the powers which the Magistrate had and that it is open to this Court either to order demolition or to prohibit demolition if such demolition had been ordered by the learned Magistrate. In this connection I would refer to the observations made by the learned Judges in the case of *Chuni Lal Dutt* v. *Corporation of Calcutta*, 34 Cal. 341 at p. 344. I therefore hold that I have jurisdiction to decide whether there should be demolition or not. Upon the evidence which has been adduced I am of opinion that there should be no demolition. The building was constructed so far back as 1945 and it is quite clear from the correspondence between Kashi Nath Mallik and the City Architect that the Calcutta Corporation was apprised of this unauthorised building on 24th of August 1945. The Corporation did nothing during all these years and it was not until 15th September 1948, that they started these proceedings. Where a party is allowed to be in possession of a building for such a period, with full knowledge of the Corporation it seems to me to be unfair and unjust to direct the party to demolish the building especially as the building has not infringed any of the building bye-laws of the Corporation and has not affected adversely any rights of the neighbours. I do not think therefore that there is any necessity for me to send this case back to the Municipal Magistrate for considering whether there should be an order for demolition or not. I hold in agreement with him that the facts would not justify an order of demolition. As the Corporation chose to proceed under S. 363 there can be no other punishment inflicted on the petitioners.

[12] Having regard to what has been said above I set aside the order of fine and make this rule absolute. The fine, if paid shall be refunded.

V.B.B. *Order set aside.*

A. I. R. (37) 1950 Calcutta 142 *[C. N. 43.]*

R. P. MOOKERJEE AND P. N. MITRA JJ.

Abani Mohan Mukerjee—Defendant No. 1 — Appellant v. *Biswanath Mukherjee and others—Respondents.*

A. F. O. D. No. 1 of 1945, Decided on 9th September 1949, against decree of Sub-Judge, 2nd Court, Zillah Howrah, D/- 31st August 1944.

Hindu law—Maintenance — Dayabhaga School —Partition between son and grandson through predeceased son—Maintenance of latter's widow—Charge for, must be placed on her sons' share and not on entire estate.

Under the Dayabhaga School of law the duty of the husband is to maintain his wife and after his death it

is the duty of the son to maintain the mother. The son cannot shirk his liability because of the fact that his mother had become a widow during the life-time of his grand-father. Hence the maintenance of a daughter-in-law who has either inherited sufficient property from her husband or has got a son herself who is possessed of property cannot be made a charge on the entire estate left by her father-in law. When, therefore, partition is effected between a son and a grandson, through a predeceased son, the charge for maintenance for the widow of the predeceased son must be placed on the share allotted to her son and not on the entire estate left by the father-in-law: *Case law discussed.* [Paras 21, 23 and 24]

Ranjit Kumar Banerji and Sachindra Chandra Das Gupta—for Appellant.

Gurudas Bhattacharjee (for No. 1) Deputy Registrar, Biswanth Naskar (for No. 2); Sambhunath Banerji, Senior, and Manishi Kumar Das (for No. 3)—for respondents.

R. P. Mookerjee J.—This appeal on behalf of Defendant 1 is directed against a preliminary decree for partition passed by the Subordinate Judge, Howarah.

[2] The property in suit originally belonged to one Narasinga Mukherjee who died on 16th October 1935, leaving his son Abani Mohan, who is defendant 1 in the present suit and Biswanath, the son of a predeceased son Suranath. Biswanth is the plaintiff and his mother Parul Bala is defendant 2. Biswanath brought the present suit for partition by metes and bounds in respect of his 8 anna share in the joint properties.

[3] Various points were raised by Abani by way of defence but it is not necessary to refer to all those in the present appeal. The plaintiff's mother, Parul Bala, did not file any written statement. The learned Subordinate Judge decreed the suit declaring an 8 anna share in the suit properties in favour of the plaintiff and defendant 1 respectively. The decree further provided:

"Defendant 2 be declared to have a right of residence in the family dwelling house, and to have a charge therefore on the said properties."

There was a further direction for the appointment of a Commissioner for partition.

[4] The only point urged before us on behalf of defendant 1 who is the appellant in this Court, is that the right of defendant 2 for maintenance and for residence cannot be made a charge on the entire joint estate. It is only the allotment in favour of the plaintiff which can be charged for the maintenance and residence of his mother, defendant 2.

[5] At the very outset it ought to be noted that Narasingha died in October 1935 i. e. before the Hindu Women's Right to Property Act, 1937, had been passed. The provisions of that Act have no retrospective effect and they will not be attracted in the present case. This case is to be decided on the law as it stood before 1937.

[6] The interest of Parul Bala which has to be safeguarded is that for maintenance and residence. The question whether the charge for the maintenance is to be on the entire estate left by her father-in-law or on that portion of the estate which devolves after the partition on her son is to be considered.

[7] The right of the mother to a share on partition is founded upon the following passage in the Dayabhaga:

"When partition is made by brothers of the whole blood after the demise of the father an equal share must be given to the mother. For the text expresses "the mother should be made an equal sharer" (Ch. II S. 3 para 29.)"

[8] There is now no doubt that the mother, though not entitled to enforce a partition so long as her sons remain united, is entitled, if a partition takes place between her sons, to receive the share of a son in property which is ancestral. This is the legal position irrespective of the question whether the parties are governed by the Dayabhaga or the Mitakshara School of Hindu Law, (*Chowdhury Ganesh Dutt* v. *Mt. Jewach*, 31 I. A. 10 at p. 15 : (31 Cal. 262 P. C.) *Jogendra Chunder* v. *Fulkumari*, 27 Cal. 77 : (4 C. W. N. 254)).

[9] The share so allotted to the mother is carved out of the portion given to her sons. Only if the mother has got more than one son that any occasion can arise for a partition amongst her sons. There is no occasion for a mother, with an only son, being allotted a separate share in lieu of maintenance.

[10] In the case of a partition between sons by different mothers and when more than one mother is alive the procedure to be followed is that the property is to be divided in the first instance into as many shares as there are sons and then to take the share allotted to the sons of a particular mother as one unit and to divide that unit amongst those sons and their mother, the mother getting a share equal to that of each of her sons. The shares allotted to the step-sons is not made responsible for the maintenance of a step-mother who has got her own sons. This has been the law since the days of the supreme Court (*Calley Churn Mullick* v. *Janova Dassee* 1 Ind. Jurist (NS) 284, *Damoodur* v. *Senabutti*, 8 Cal. 537 at p. 542 and *Kristobhabiney* v. *Ashutosh*, 13 Cal. 39). It is not necessary for us to discuss how far this rule under the Dayabhaga school is modified under the Mitakshara school as the case now before us is one under the Bengal School. Ramesh Chandra Mitter J., has indicated the points of difference in *Damoodur* v. *Senabutti*, (8 Cal. 537) referred to above.

[11] On the death of the step-mother after partition the share allotted to her out of her sons' allotments reverts back to her sons and not the corpus of the entire estate. In this case also a mother gets her maintenance out of the share of her sons and on partition the maintenance becomes a charge not on the entire estate but only on that portion which comes to her sons.

[12] If there are several groups of sons left by a deceased Hindu by different mothers the maintenance of all the mothers, so long as the estate remains joint, is undoubtedly upon the entire estate. But as soon as there is a partition amongst the sons each mother becomes entitled to maintenance against the share allotted to her own son or sons and she can have no claim against the share of her step-sons. *Hemangini Dasi* v. *Kedar Nath Kundu*, 16 I. A. 115 at p. 123 : (16 Cal. 758 P. C.), (*see also* Colebrook's Digest Book v. Chap. 5, v. 89.).

[13] If a man dies leaving two widows and three sons by one and one son by the other, this other widow is not entitled to any separate property upon a partition made between her only son and his three step-brothers; she must look to her son for maintenance out of the share allotted to him on partition. *Sree Mottee Jeeomony Dossee* v. *Atma Ram Ghose*, a decision of the Supreme Court referred to by Sir F. Macnaghten in his considerations on Hindu law p. 62.

[14] A sonless step-mother is not entitled to a share on partition between step-sons (*Hemangini* v. *Kedar Nath*, 16 I. A. 115 : 16 Cal. 758 P. C.) :

"The right of a widow to maintenance is founded on relationship, and differs from debts. On the death of the husband his heirs take the whole estate, and if a mother on a partition among her sons takes as hare it is taken in lieu of maintenance. Where there are several groups of sons, the maintenance of their mother must, so long as the estate remains joint, be a charge upon the whole estate, but when a partition is made, the law appears to be that their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her. The step-sons are not under the same obligation."

[15] Under the Mitakshara School, however, no distinction is made between a mother and a step-mother (*Damoodur* v. *Senebutti*, 8 Cal. 537).

[16] In the present case, however, the pre-deceased son left an only son Biswanath. Biswanath's mother Parulbala, therefore, is not entitled to a separate share on partition of the joint family property. The question is when a partition is effected between a son and a grandson, through a pre-deceased son, whether the widow of the pre-deceased son must have her maintenance from the share belonging to her son or out of the entire estate. There is no direct autority on this point.

[17] If the right of Parulbala to maintenance is to be on the basis on the relationship between Biswanath and Parulbala, that is, between a son and a mother, there can be no question that her son must be made responsible for the maintenance of his mother.

[18] On behalf of Parul Bala, however, it is urged that her rights are to be considered not as the mother of Biswanath but on the basis of her claim, as the widowed daughter-in-law on the estate of her father-in-law, Narasingha. The rule of law is that on the death of a son, during the life time of his father leaving a widow, it is the moral duty of the father-in-law to maintain the widowed daughter-in-law. This moral duty of the father-in-law matures into a legal liability of his heirs when his property descends to the latter. It is for consideration whether the moral duty of the father-in-law to maintain a widowed daughter-in-law is an absolute rule independent of the question whether the legal liability to maintain her is on somebody else or not.

[19] The right to claim maintenance depends upon relationship as indicated in *Hemangini* v. *Kedarnath*, 16 I. A. 115 : (16 Cal. 758 P. C.). So long as a daughter remains unmarried, the liability is on her father and if at the time of his death she still remains unmarried, the liability is on her brothers or on other persons under certain circumstances. After a daughter is given in marriage and during the life time of her husband the liability for maintenance is on the latter. If the husband dies leaving sufficient property there can be no question that it is against that property that she can prefer a claim for her maintenance. Only if the husband leaves no property or, if her own resources are not sufficient for her maintenance, that the question of enforcing her claim for a maintenance against somebody else arises. It has been held that even when no property is left by the husband, or in case the property in which her husband was a coparcener at the time of his death, is sufficient for her maintenance, she has no legal claim for maintenance either against her father-in-law or against his estate in the hands of his heirs and not even against the husband's relations. (*Gangabai* v. *Sitaram*, 1 ALL 170 (F. B.), *Savitribai* v. *Luximibai*, 2 Bom. 573 (F. B.) and *Baiday* v. *Natha*, 9 Bom. 279).

[20] The moral obligation of the father-in-law to maintain the daughter-in-law was recognised in *Kalu* v. *Kashi Bai*, 7 Bom. 127, *Meenakshi Ammal* v. *Rama Aiyar*, 37 Mad. 396: (A. I. R. (1) 1914 Mad. 587). But it is no legal obligation. An heir is legally bound to provide out of the estate, which descends to him, maintenance for

those persons whom the late proprietor was either legally or morally bound to maintain. (*Khetramani Dasi* v. *Kashinath Das*, 2 Beng. L. R. (A. C.) 15 at pp. 34, 38 : (10 W. R. 89 F. B.), *Kamini Dassee* v *Chandra Pode Mondle*, 17 Cal. 373). If the husband leaves sufficient property the question of the existence of any moral obligation of the father-in-law, far less of any legal liability on his heirs, cannot arise.

[21] Neither any text nor any authority has been placed before us in support of the proposition that the maintenance of a daughter-in-law who has either inherited sufficient property from her husband or has got a son herself who is possessed of property is to be made a charge on the entire estate left by her father in-law. The principles underlying the law of maintenance under the Dayabhaga School of Hindu Law clearly fix the liability on different persons dependent on different sets of circumstances. The responsibility of the father-in-law to maintain a widowed daughter-in-law is contingent upon the fact that his son has left no sufficient separate property for her maintenance. The liability of a son to maintain his mother cannot be got rid of or modified by introducing the rule which makes a father-in-law under certain circumstances liable for the maintenance of a daughter-in-law. The primary responsibility depends on the relationship between the mother and the son. There can be no question of certain other relations being also made liable or responsible for the same. It is not merely the presence of certain relations but it may sometimes be the capacity of such relations to maintain which will have to be considered.

[22] When, therefore, a person dies during the life time of his father leaving a widow and a son, such widowed daughter-in-law and the grandson become entitled under the Dayabhaga School of law to maintenance from the father of the predeceased son. This is so as under the Dayabhaga School of law as the son at the time of his death had no right to any share of the ancestral property in the hands of his father. Under the Mitakshara School of law, the position may be different, as even after the death of his father the son continues to be a member of the co-parcenary and the latter is entitled, as of right, to participate in the income of the co-parcenary property and the widowed daughter-in-law is, of right, entitled to maintenance out of the co-parcenary estate,

[23] Under the Dayabhaga School of law, it is the duty of the father to maintain the daughter so long as she is unmarried. The duty of the husband is to maintain his wife and after his death it is the duty of the son to maintain the mother. The son cannot shirk his liability because of the fact *(sic)* his mother had become a widow during the life time of his grandfather.

[24] The charge for maintenance for Parul Bala must, therefore, when the ancestral estate is being partitioned, be placed on the share allotted to her son Biswanath and not the entire estate left by Narasingha. The direction given in ordering portion of the judgment by the Trial Court must, therefore, be set aside.

[25] The appeal is accordingly allowed in part. The judgment and decree passed by lower Court be varied to this extent only that defendant 2 Parul Bala be declared to have the right of maintenance from Biswanath and the right of residence in the family dwelling house in the portion allotted to Biswanath and to have a charge on the allotment made in favour of the plaintiff Biswanath. There will be no order for costs in this Court.

[26] **P. N. Mitra J.** — This case, in my opinion, is governed by the principle laid down in *Hemangini* v. *Kedar*, 16 I. A. 115 : (16 Cal. 758 P. C.). When Suranath died during the life-time of his father Nara Singha, the latter came under a moral obligation to maintain his widowed daughter-in-law Parulbala. On Nara Singha's death his estate devolved on his son Abani Mohan and his grandson Biswanath and the moral obligation which had rested on Nara Singha to maintain Parulbala matured into a legal liability of his heirs when his estate devolved on them. This liability could be enforced against the entire estate of Nara Singha in their hands so long as the estate remained undivided amongst them. When, however, they proceed to partition the estate amongst them, the principle laid down in the case of *Hemangini* v. *Kedar*, 16 I. A. 115 : (16 Cal. 758 P. C.) comes into play. In that case the question was whether on a partition taking place between her son and stepsons of property inherited by them from her husband, a co widow's maintenance was to remain a charge on the entire estate of his husband or was to be a charge only on the portion allotted to her son, and it was held that it would be a charge only on the latter. The principle is that the two groups of sons become separate families on the partition, and each mother is a member of the family comprising her own son or sons and must thenceforth look to her own family for her maintenance. No distinction can on principle be drawn, in my opinion, between the case of property inherited by sons by different mothers and the case of property inherited by a son and a grandson by a pre-deceased son. A pre deceased son's widow, whose maintenance became a charge on the entire estate of the father-in-law on his death and whose son stands in the shoes of his father and inherits the share

which his father, if then alive, would have inherited, cannot stand in a higher position than a co-widow having a son. Parulbala, in my opinion stands in the same position as Hemangini did in the case referred to above. Just as Hemangini had on the partition to look to her son's share for her maintenance, so Parulbala on the partition must look to Biswanath's share for her maintenance. And the right of residence must stand on the same footing as the right to maintenance. For these reasons I agree with the decree proposed by my learned brother.

V.R.B. *Appeal partly allowed.*

A. I. R. (37) 1950 Calcutta 146 *[C. N. 44.]*

G. N. DAS J.

Upendra Nath Sinha—Petitioner v. *Maharajadhiraj of Burdwan, Decree-holder and another—Opposite Party.*

Civil Rule No. 19 of 1949, Decided on 7th September 1949, against order of Dist. Judge, Birbhum, D/- 28th September 1948.

Debt laws—Bengal Agricultural Debtors Act (VII [7] of 1936), S. 37 A (1) (b) (iii)—Non-occupancy holding—Transferee of, has no locus standi to apply under S. 37A.

The liability contemplated by the clause has reference to the liability of the tenant *vis a vis* the landlord and not merely as between the tenant and his co-sharers. By reason of a transfer of a non-transferable occupancy holding the transferee does not become liable to pay the rent due since the transfer to the landlord. In this view, the transferee cannot be said to be liable with any other person for the arrears of rent due to the landlord. The condition mentioned in S. 37A (1) (b) (iii) is not therefore fulfilled in such a case. The transferee therefore has no *locus standi* to make the application under S. 37A: A. I. R. (6) 1919 Cal. 167, *Rel. on.* [Para 4]

Hari Prosanna Mukherjee—for Petitioner.

Lala Hemanta Kumar and Purushottam Chatterjee —for Opposite Party Nos. 2 and 1, respectively.

Order.—This rule was obtained by an applicant under S. 37A, Bengal Agricultural Debtors Act and is directed against an order dated 28th September 1948 passed by the learned District Judge of Birbhum.

[2] The facts are not in dispute and may be stated as follows: The disputed land formed part of a non-transferable occupancy holding which was held under the opposite party No. 1. On 10th March 1927 one Panchanan Singh, the predecessor-in-interest of the petitioner, purchased a share in the said holding. In execution of a certificate for arrears of rent obtained by the landlord opposite party No. 1 against the recorded tenant, the disputed holding was brought to sale on 22nd November 1938 and was purchased by the certificate-holder. Thereafter the purchaser at the certificate sale took possession on 2nd July 1942. To these proceedings Panchanan Singh or the present petitioner was not made a party, presumably because the purchase by Panchanan Singh was not recognised by the landlord. After the coming into operation of S. 37A, Bengal Agricultural Debtors Act an application was filed under that section by the present petitioner who had succeeded to the interest of Panchanan Singh on 24th May 1943. On 31st January 1945 opposite party No. 2 was impleaded as an occupant in possession. The proceedings under S. 37A, Bengal Agricultural Debtors Act continued before the Special Debt Settlement Board. The application was ultimately allowed by the Board. An appeal was taken against the decision of the Board. The appeal was dismissed. Against the order of the Appellate Officer the opposite party moved the District Judge who allowed the same. A petition in revision against the order of the District Judge was filed in this Court and a rule was obtained which was registered as C. Rule 412 of 1948. This rule was heard by Mukherjee J. on 28th August 1948. The rule was made absolute, the order of the learned District Judge was set aside and the case was remitted to the learned District Judge for a decision of the other points which arose on the petition filed before the District Judge which had not been previously disposed of by him. After the matter went back on remand, the learned District Judge held that the petitioner being the successor-in-interest of transferee of a non-transferable occupancy holding had no *locus standi* to make the application in view of the terms of S. 37A (1) (b) (iii). The reason given was that Panchanan Singh or his successor, the present petitioner had not been recognised as a tenant and therefore it could not be said that the petitioner or Panchanan Singh was jointly liable with any other person in respect of a debt for arrears of rent. It is the propriety of this order which is challenged in this Rule.

[3] The question which arises in this rule turns on the interpretation of S. 37A (1) (b) (iii) which runs thus:

"before the commencement of the Bengal Agricultural Debtors (Amendment) Act 1940, in the case of a debt for arrears of rent in respect of which such person was liable jointly with any other person."

[4] In order to ascertain the meaning of the words "was jointly liable with any other person in respect of a debt for arrears of rent" the primary question is whether the liability contemplated by the clause has reference to the liability of the tenant, and his co-sharers *inter se* or whether the liability is one vis a vis the landlord. Section 2, cl. (15), Agricultural Debtors Act says that the words "landlord", "rent" and "raiyat" shall bear the same meaning as these words bear in the Bengal Tenancy Act. When therefore S. 37A (b) (iii) speaks of joint liability

for arrears of rent the obvious implication is that the liability is one vis a vis the landlord and not merely as between the tenant and his co-sharers. This view also receives support from S. 37A cl. (5) where it is stated that the applicant is required to pay the sum due under the award in certain instalments and also to continue to pay the current rent to the landlord. The section therefore connotes that the liability for arrears of rent should be a liability towards the landlord. Under the old S. 73, Bengal Tenancy Act, in case of a transfer of an occupancy holding either in whole or in part the transferor and the transferee became jointly liable for the rent due in respect of the occupancy holding since the transfer. It was held in the case of *Jatindra Nath* v. *Binode Behari*, 52 I. C. 289: (A. I. R. (6) 1919 Cal. 167) that the old S. 73, Bengal Tenancy Act had no application to non-transferable occupancy holdings. By reason of the transfer therefore the transferee of a non-transferable occupancy holding did not become liable to pay the rent due since the transfer to the landlord. The definition of the words "landlord", "tenant" and "raiyat" in the Bengal Tenancy Act which applies to the Bengal Agricultural Debtors Act also indicates that the transferee of a non-transferable occupancy holding cannot be regarded as jointly liable with the old co-sharer tenants for rent. In this view it cannot be said that Panchanan Singh or his successor-in interest, the present petitioner was liable with any other person for the arrears of rent due to the landlord. The condition mentioned in S. 37A (1) (b) (iii) has not therefore been fulfilled in the facts of the present case. The view taken by the learned District Judge is, therefore, correct. The applicant has no *locus standi* to make the application under S. 37A, Bengal Agricultural Debtors Act.

[5] This rule must therefore be discharged but in the circumstances of this case I make no order as to costs.

V.B.B *Rule discharged.*

A. I. R. (37) 1950 Calcutta 147 *[C. N. 45.]*

HARRIES C. J.

Messrs. Badruddin and Sons — Appellant v. *Corporation of Calcutta — Respondent.*

Criminal Appeal No. 151 of 1949, Decided on 9th November 1949.

(a) Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 533 — Accused absent at adjourned hearing—Case not covered by S. 533 — Conviction in accused's absence is bad.

Under S. 533 if the accused fails to appear at the first hearing, that is, at the time and place mentioned in the summons the Magistrate may proceed in his absence. But if the accused fails to appear at some subsequent hearing then the case does not fall within the words of S. 533, because he does not fail to appear at the time and place mentioned in the summons. Hence where an accused person failed to appear at an adjourned hearing of a case and the Magistrate proceeded in his absence and convicted him, the conviction is bad: A. I. R. (36) 1949 Cal. 589, *Foll.*; A. I. R. (24) 1937 Cal. 218 and A. I. R. (32) 1945 Cal. 103, *Rel. on.* [Para 6]

(b) Municipalities — Calcutta Municipal Act (III [3] of 1923)S., 386 (1) (a)—Electroplating does not fall within Sch. XIX — No offence to carry on such business without licence.

Electroplating is not the manufacture of chemical preparations within Item (8), Sch. XIX. It is merely covering copper or some such metal with a thin film of silver or nickel and this is done by electrolysis. This business does not fall within Sch. XIX and therefore it is not an offence to carry on such a business without a licence. [Para 8]

(c) Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 488 (2)—Previous wrong conviction —Subsequent conviction under S. 488 (2) for continuing to do act for which accused was wrongly convicted is illegal.

Where the accused had been previously wrongly convicted then he cannot be convicted under S. 488 (2) for continuing to do the act for which he was wrongly convicted. Sub-section (2) provides, 'whoever, after having been convicted of any offence continues to commit such offence.' That obviously must mean being rightly convicted. [Para 10]

Sudhangsu Sekhar Mukherjee and Mihir Kumar Sarkar — for Appellant.

Pashupati Ghose — for Respondent.

Judgment.—This is an appeal from an order of a Municipal Magistrate convicting the appellant of an offence under S. 386 (1) (a), Calcutta Municipal Act read with Sch. 19 of the Act.

[2] The charge was that the appellant conducted the business of electroplating or nickel-plating at certain premises without the necessary permission or license from the Corporation.

[3] It seems that two previous prosecutions had been brought against the appellant and in each case he had pleaded guilty and was convicted. On this occasion, however, he pleaded not guilty. He was found guilty by the learned Magistrate, convicted and sentenced to pay a fine of Rs. 25 per diem over a period of time.

[4] Mr. Sudhangshu Mukherjee has taken a number of points and I shall deal with the points seriatim. He first contended that the trial was invalid by reason of the fact that the Magistrate on one day heard the case or arguments in the case in the absence of the accused person. It appears that on 19th May which was a date to which the hearing had been adjourned the accused was absent and a medical certificate was tendered with a view to showing that he was too ill to attend. The learned Magistrate did not accept this explanation and insisted on proceeding with the case.

[5] Normally a criminal trial cannot proceed in the absence of the accused, but there is

a special provision in the Calcutta Municipal Act, namely, S. 533 which is as follows :

"If any person summoned to appear before a Magistrate to answer a charge of an offence against this Act or against any rule or by-law made thereunder fails to appear at the time and place mentioned in the summons, the Magistrate may, if—

(a) Service of the summons is proved to his satisfaction and

(b) no sufficient cause is shown for the non-appearance of such person,

hear and determine the case in his absence."

[6] It is quite clear that if the accused fails to appear at the first hearing, that is, at the time and place mentioned in the summons the Magistrate may proceed in his absence. But if the accused fails to appear at some subsequent hearing then the case does not fall within the words of S. 533, because he does not fail to appear at the time and place mentioned in the summons. It has been held by a Bench of this Court, to which I was a member, in the case of *Ashutosh Roy* v. *Corporation of Calcutta*, A. I R. (36) 1949 Cal. 589 : (53 C. W. N. 847), that where an accused person failed to appear at an adjourned hearing of a case and the Magistrate proceeded in his absence and convicted him the conviction was bad as the case was not covered by S. 533, Calcutta Municipal Act. This case followed earlier cases of this Court: *Kusum Kumari Debi* v. *Corporation of Calcutta*, A. I. R. (24) 1937 Cal. 218 : (38 Cr. L. J 632) and *Bhupendra Nath Roy* v. *Corporation of Calcutta*, 48 C. W. N. 630 : (A. I. R. (32) 1945 Cal. 103 : 46 Cr. L. J. 480). Quite clearly, I am bound by these authorities and therefore must hold that the learned Magistrate could not at the adjourned hearing proceed with this case in the absence of the accused and that being so the whole trial is vitiated and the conviction must be set aside.

[7] Mr. Sudhangsu Mukherjee also has urged that his client committed no offence at all. Section 386 (1) (a), Calcutta Municipal Act is as follows :

"No person shall use or permit to be used any premises for any of the following purposes without or otherwise than in conformity with the terms of a license granted by the Corporation in this behalf, namely,

(a) any of the purposes specified in Sch. 19."

[8] It appears to me that the business of electroplating cannot fall within any of the items in Sch. 19 and the learned Magistrate has not found that this business falls within the ambit of Sch. 19 at all. Learned advocate for the Corporation suggested that possibly this business might fall within item (8), namely, manufacturing chemical preparations. But electropating is not the manufacture of chemical preparations. It is merely covering copper or some such metal with a thin film of silver or nickel and this is done by electrolysis. It seems to me that this business does not fall within Sch. 19 and therefore it is not an offence to carry on a business without a licence.

[9] Learned counsel for the Corporation however stated that it was wholly unnecessary to show in this case that the business fell within Sch. 19, because this was a continuation of operations for which the accused had already been convicted. He relied upon S. 488, Calcutta Municipal Act, which is in these terms :

"(1) Whoever commits any offence by

(a) contravening any provision of any of the sections, sub-sections, clauses of sections, provisos or rules of this Act mentioned in the first column of the following table, or

(b) contravening any provision of any rule made under any of the said sections, sub-sections, clauses, or provisos, or

(c) failing to comply with any direction lawfully given to him or any requisition lawfully made upon him or under any of the said sections, sub-sections, clauses, provisos or rules,

shall be punished with fine which may extend to the amount mentioned in that behalf in the third column of the said table.

(2) Whoever, after having been convicted of any offence referred to in clauses (a), (b) or (c) of sub-s. (1), continues to commit such offence shall be punished, for each day after the first during which he continues so to offend, with fine which may extend to the amount mentioned in this behalf in the fourth column of the said table."

[10] Learned advocate for the Corporation contends that as the accused had been previously convicted the Court could go on convicting him by reason of S. 488 (2), Calcutta Municipal Act. In my view, however, if the accused had been wrongly convicted then he cannot be convicted for continuing to do the act for which he was wrongly convicted. Sub-section (2) provides "Whoever, after having been convicted of any offence continues to commit such offence." That, I think, obviously must mean being rightly convicted. All that one can say here is that the accused was convicted, but not for an offence under the Act. He was wrongly convicted of an offence under the Act and it appears to me that a man who has been wrongly convicted cannot be convicted thereafter for merely continuing to do that for which he was wrongly convicted. If it is shown that he was wrongly convicted, then he cannot be convicted for continuing to do that Act. It is quite clear that this business did not fall within Sch. 19, and that the appellant wrongly pleaded guilty and was wrongly convicted. He has now been advised, and it seems to me quite clear, that as he was wrongly convicted S. 488, Calcutta Municipal Act, cannot possibly cover the case. That being so the Corporation cannot get any assistance from S. 488.

[11] Lastly Mr. Sudhangsu Mukherjee contended that the prosecution was barred by

limitation and he relied upon S. 534, Calcutta Municipal Act. Shortly that section provides that if the offence with which an accused is charged is continuous in its nature, the prosecution must be brought within three months from the date on which the commission or existence of such offence was first brought to the notice of the Corporation or the Executive Officer. Mr. Mukherjee has urged that there is here evidence that the offence was brought to the notice of the Corporation on 22nd September 1948, and indeed he was prosecuted for an offence committed on that day and succeeding days. The present prosecution was not launched until 2nd March 1949 and therefore it is urged that it was beyond three months of the date upon which the commission of this offence was brought to the notice of the Corporation or its Executive Officer. However, it appears to me that this period of limitation cannot apply where a charge could rightly be made under a section read with S. 488. Otherwise, very little scope would be given for a prosecution under S. 488 (2). It seems to me that the period of limitation in S. 534 is the period prescribed for the first prosecution. But it is not necessary to consider the point any further, because I am satisfied that the conviction cannot be maintained for the reasons already given.

[12] In the result, therefore, I would allow this appeal, set aside the conviction and sentence and acquit the appellant. If the fine or any part thereof has been paid such must be refunded forthwith.

V.B.B. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 149 *[C. N. 46.]*

HARRIES C. J. AND SARKAR J.

Messrs. Ralyaram Melaram, a Firm and another — ***Defendants*** — ***Petitioners*** **v.** ***Kaluram Agarwalla and others*** — ***Plaintiffs*** — ***Opposite Party.***

Civil Rule No. 982 of 1948, Decided on 16th September 1949, from order of Sub-Judge, Asansol (Burdwan), D/- 19th May 1948.

Civil P. C. (1908), S. 115 (c) — Question whether certain particulars should be ordered — Decision as to, cannot be revised — Civil P. C. (1908), O. 6, R. 5.

A Court has jurisdiction to decide a case rightly or wrongly : 11 Cal. 6 (P. C.) and A. I. R. (4) 1917 P. C. 71, *Foll.* [Para 13]

A wrong decision upon the question whether in the circumstances certain particulars should be ordered or not has nothing whatsoever to do with jurisdiction and cannot be revised under S. 115 : A I.R. (36) 1949 P. C. 156 and A. I. R. (36) 1949 P. C. 239, *Considered.* [Para 15]

Annotation:('44-Com.) Civil P. C., S. 115 N. 12 Pt. 7; N. 13, Pt. 2.

Atul Chandra Gupta and Sailendra Nath Banerjee — for Petitioners.

Sir S. M. Bose, Apurbadhan Mukherjee and Chandra Narain Laik — for Opposite Party.

Harries C. J. — This is a petition for revision of an order made by a learned Subordinate Judge of Asansol ordering the defendants to supply certain particulars of the written statement filed by them.

[2] A suit was filed by the plaintiffs in the Court of the Subordinate Judge in which they prayed for the cancellation of a lease dated 21st May 1946, executed and registered by a predecessor of the plaintiffs. It was alleged that on 22th April 1946 the predecessor of the plaintiffs as *karta* of a joint family entered into an agreement with defendant 2 for the grant of a lease of certain coal bearing lands. On 21st May 1946, this lease was actually executed by the predecessor of the plaintiffs.

[3] The plaintiffs alleged that at the time of the agreement another lease was produced and it was agreed that the terms of the proposed lease would be the same as those in the lease which was produced. Defendant 2, it is said, was to draft the lease which he did. The allegation is that he presented a draft lease to the plaintiffs' predecessor representing that its terms were in accordance with the lease which had been produced by the plaintiffs earlier. The plaintiffs relying upon the representation executed the lease which was later registered, but then found that the terms were very different from the terms of the lease which were to be copied in the lease in question.

[4] The defence was a denial of these allegations and it was pleaded that the final draft was actually settled by the plaintiffs' own pleader and that the pleader was present when the lease was executed and registered. Unfortunately, however, in the written statement a good deal of matter was pleaded which was in fact nothing more than evidence. The application for particulars was an application for particulars of these statements which really amounted to the pleading of evidence. The defendants however invited this application by pleading in the manner in which they did.

[5] The learned Subordinate Judge disposed of the matter in a rough and ready method. He seems to have held that particulars could be ordered of any matters within the knowledge of the defendants, whereas particulars could not be ordered of any matters known to the plaintiffs. This appears to me to be a somewhat odd rule to apply on the question of particulars. Strictly, many of these allegations made in the written statement should have never been there as they merely amounted to a statement of the evidence

which the defendants proposed to produce. That being so, I do not think that on the merits any of the particulars should have been ordered.

[6] The Advocate-General however on behalf of the plaintiffs has contended that this Court cannot interfere by way of revision under S. 115, Civil P. C. and his argument is that at most all that can be said is that the learned Subordinate Judge decided this application wrongly, and such a decision does not give this Court a right to interfere in revision.

[7] Order 6, R. 2, Civil P. C. provides :

"Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures."

[8] As I have already stated, the written statement offends against R. 2 of O. 6 in that the defendants pleaded evidence which the rule forbids them to do.

[9] Order 6, R. 5 provides :

"A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just."

[10] The learned Advocate-General has contended that if the learned Subordinate Judge has erred in this case, which he does not concede, he merely erred in applying the provisions of O. 6, R. 5. In other words, he failed to decide the case in accordance with this rule, but decided it wrongly and not in accordance with law. That, the learned Advocate General contends, does not give this Court a right to interfere under S. 115, Civil P. C.

[11] Section 115, Civil P. C. is in these terms :

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears —

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

[12] Mr. Atul Gupta on behalf of the petitioners does not contend that this case comes within S. 115 (a) or (b). He has urged however that the case falls within S. 115 (c) as the learned Subordinate Judge acted in the exercise of his jurisdiction illegally. There can be no doubt that the learned Subordinate Judge had jurisdiction to entertain this application and no complaint can be made that he did entertain it. All that can be said is that he did not decide the application correctly and that he ordered particulars to be given by the defendants where such particulars ought not to have been ordered. The question arises whether in those circumstances it can be said that the learned Subordinate Judge acted in the exercise of his jurisdiction illegally. If a Judge who decides a case wrongly and not in accordance with law can be said to act in the exercise of his jurisdiction illegally then the present case would fall within S. 115 (c), Civil P. C. But it has been expressly held by their Lordships of the Privy Council that a Court has jurisdiction to decide a case not only rightly but wrongly. In *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh*, 11 I. A. 237: (11 Cal. 6 P. C.). it was held by their Lordships that where the Judges of the lower Courts have jurisdiction to decide a question and decide it, no appeal lying from such decision, the Judicial Commissioner has no power under S. 622 of Act X [10] of 1877, as amended by S. 92 of Act XII [12] of 1879 (similar to S. 115), to call for the record of the case and pass an order therein, unless the Judges of the lower Court have acted illegally or with material irregularity. At page 239 Sir Barnes Peacock, who delivered the judgment of the Board, observed:

"But S. 622 of Act X (10) of 1877 enacted that "the High Court", and in this respect the Judicial Commissioner, exercises the same powers as the High Court— 'may call for the record of any case in which no appeal lies to the High Court if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, and may pass such order in the case as the High Court thinks fit'. By S. 92 of Act XII (12) of 1879 that section was amended by the insertion after the words 'so vested' of the following words, 'or to have acted in the exercise of its jurisdiction illegally or with material irregularity.' The question then *is*, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

[13] It will be seen from these observations that the Board were considering the meaning of the words "or to have acted in the exercise of its jurisdiction illegally or with material irregularity," the words which appear in S. 115 (c). Their Lordships held that deciding a case wrongly was not acting in the exercise of jurisdiction illegally. The meaning of that phrase was the only point before the Board and the case is a clear decision on the question as to whether or not a Court can be said to have jurisdiction to decide a case or a point wrongly. The decision establishes beyond all doubt that

a Court has jurisdiction to decide a case rightly or wrongly.

[14] The meaning of S. 115 was again considered by their Lordships of the Privy Council in the case of *Balakrishna Udayar* v. *Vasudeva Aiyar*, 44 I. A. 261: (A. I. R. (4) 1917 P. C. 71). At page 267 Lord Atkinson who delivered the judgment of the Board observed:

"As to the preliminary objection, S. 115, Civil P. C., enables the High Court, in a case in which no appeal lies, to call for the record of any case if the Court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, or to have exercised its jurisdiction illegally or with material irregularity, and further enables it to pass such an order in the case as the Court may think fit.

It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

[15] Again the Board make it clear that the section is not concerned with erroneous conclusions of law or fact in which the question of jurisdiction is not involved. In the present case no question of jurisdiction is involved. All that was involved was whether in the circumstances certain particulars should be ordered or not. It seems to me that a wrong decision upon this question has nothing whatsoever to do with jurisdiction and cannot be revised under S. 115, Civil P. C.

[16] Mr. Atul Gupta, however, referred to two very recent cases decided by their Lordships of the Privy Council, the first being *N. S. Venkatagiri Ayyangar* v. *Hindu Religious Endowments Board, Madras*, 76 I. A. 67: (A. I. R. (36) 1949 P. C. 156). In that case a Bench of the Madras High Court consisting of Mockett and Kuppuswami Ayyar JJ. in revision had interfered with the order of a subordinate Court. Mockett J. was of the view that the decision of the case depended entirely on the construction of a certain will. He considered that the conclusion of the learned Judge on the construction of the will was so entirely out of accord with the meaning of the document that it required interference by the High Court and that the wrong construction put on the will by the learned District Judge involved such material misuse of jurisdiction as to involve interference by the High Court. Kuppuswami Ayyar J. in a concurring judgment expressed the view that the High Court was justified in interfering in revision under sub-cl. (c) of S. 115, Civil P. C.

[17] In this case it seems clear that in the view of the High Court the learned District Judge had clearly decided the case wrongly. He had misconstrued a will and had been guilty, in the view of the High Court, of a serious error of law, the error being so serious that according to Mockett J. it was a material misuse of jurisdiction. Their Lordships of the Privy Council, however, held that the case did not fall within S. 115, Civil P. C. and allowed the appeal and restored the order of the District Judge. At p. 73 Sir John Beaumont who delivered the judgment of the Board observed:

"Section 115 applies only to cases in which no appeal lies, and, where the legislature has provided no right of appeal, the manifest intention is that the order of the trial Court, right or wrong, shall be final. The section empowers the High Court to satisfy itself on three matters, (a) that the order of the Subordinate Court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied on those three matters, it has no power to interfere because it differs, however, profoundly, from the conclusions of the subordinate Court on questions of fact or law. No such matters arose in this case, and the order of the High Court on the petition was without justification."

[18] Mr. Atul Gupta has relied upon Sir John Beaumont's paraphrase of S. 115 (c). Sir John Beaumont reads it as meaning "that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law." Mr. Gupta has contended that in the present case the learned Subordinate Judge in exercising jurisdiction acted illegally, that is, in breach of the provisions of O. 6, R. 5. That being so, it is urged that the case clearly falls within S. 115 (c).

[19] It is unnecessary for this Court to decide exactly what this phrase used by Sir John Beaumont actually means. But I think it is clear that it does not mean that a case falls within S. 115 (c) because the Court has decided a point not in accordance with law if the point does not involve jurisdiction. That I think is clear from the concluding words of Sir John Beaumont where he points out that if the High Court is satisfied on the three matters to which he has referred, it has no power to interfere because it differs, however, profoundly, from the conclusions of the Subordinate Court on questions of fact or law. In other words, this Court cannot interfere even if it is of opinion that the decision of the Subordinate Court is grievously wrong either in law or in fact, unless of course the mistake concerns jurisdiction. Further it is clear that Sir John Beaumont could not possibly have meant that deciding a case wrongly is within the provisions S. 115 (c), because there is an express decision of the Board to the contrary.

[20] Reference was also made to a more recent decision of their Lordships of the Privy

Council in the case of *Joy Chand Lal Babu* v. *Kamalaksha Chaudhury*, 53 C. W. N. 562 : (A. I. R. (36) 1949 P. C. 239). In that case a subordinate Court dismissed an application under Ss. 30 and 36 (a) (ii), Bengal Money-lenders Act, 1940, on the view that loan in question was a commercial loan within the meaning of the Act and the High Court disagreeing with the lower Court held that the loan was not a commercial loan and set aside the aforesaid order. Their Lordships held that the High Court had power to interfere in revision under sub-s. (b) of S. 115, Civil P. C. At p. 566 Sir John Beaumont who delivered the judgment of the Board refers to the case of *Rajah Amir Hassan Khan*, 11 I. A. 237: (11 Cal. 6 P.C.) and the case of *Balakrishna Udayar*, (44 I. A. 261 : A. I. R. (4) 1917 P. C. 71) and states that the principle laid down by those cases is firmly established. He then proceeds:

"A Court has jurisdiction to decide a case wrongly as as well as rightly. Mr. Pringle maintained that the learned Subordinate Judge had jurisdiction to decide that the loan was a commercial loan and in so doing he did not act illegally or with material irregularity, and the High Court had no power to interfere in revision merely because it disagreed with his decision. So far Mr. Pringle is on safe ground, but the learned Subordinate Judge having held that this was a commercial loan, was bound to go on to consider what effect that decision had upon the respondent's application, and, since the Act in terms does not apply to commercial loans, the learned Judge was bound, upon his finding, to dismiss the application without determining whether or not the respondents brought themselves within Ss. 30 and 36 of the Act as they claimed to do. In so doing, on the assumption that his decision that the loan was a commercial loan was erroneous, he refused to exercise a jurisdiction vested in him by law, and it was open to the High Court to act in revision under sub-s. (b) of S. 115."

[21] It is to be observed that this is not a case of S. 115 (c) at all. It was contended that the decision of the subordinate Court that the loan was a commercial loan was at most a wrong decision which gave this Court no right to interfere. However, their Lordships pointed out that it was a decision relating to jurisdiction. A decision that a loan was a commercial loan made it impossible for the learned Judge to consider the application under Ss. 30 and 36, Bengal Money-lenders Act as that Act did not apply to commercial loans. The effect of the finding was that the subordinate Court failed to exercise a jurisdiction which was vested in it. Therefore the case fell within S. 115 (b) and the High Court rightly interfered.

[22] In the present case there is no question that the Court by some erroneous finding exercised or failed to exercise the jurisdiction vested in it. Admittedly it had jurisdiction to entertain this application and admittedly it entertained it. All that can be said is that the decision of the learned Subordinate Judge was clearly erroneous. That, however, does not bring the case within the purview of S. 115, Civil P. C. and that being so, I am bound to hold that no revision lies.

[23] In the result, therefore, I would dismiss this application and discharge the Rule with costs.

Sarkar J.—I agree.

V.R.B. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 152 *[C. N. 47.]*

P. B. MUKHARJI J.

Gour Mohan Roy and others—*Plaintiffs* v. *Sailendra Nath Saha Chowdhary*—*Defendant.*

Suit No. 1716 of 1948, Decided on 27th July 1949.

(a) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), Ss. 13, 2 (11) and 11 (3)—"Tenant"—Tenancy terminated by notice to quit or decree or both — Decree or notice not satisfied—Ex-tenant continuing in possession — He is 'tenant' within meaning of Ss. 13 and 2 (11) — Sub-tenant under him under monthly tenancy for over seven years and not expiring on 1st October 1946, and still continuing as sub-tenant is tenant holding directly under landlord Legality of sub-letting is immaterial: (1921) 1 (K. B. 49; A. I. R. (15) 1928 P. C. 227 and A. I. R. (9) 1922 Cal. 391, *Rel. on.* [Paras 12, 14 and 18]

(b) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), S. 13 — Monthly tenancy lasting for seven years and expiring on or after 1st October 1946—S. 13 applies: 50 C. W. N. 461 and A. I. R. (30) 1943 Bom. 306, *Rel. on.* [Para 8]

(c) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), S. 13—Monthly tenancy—It is tenancy commencing with month and can last *ad libitum* for any period with no *terminus ad quem* — Only limitation is that it is terminable by 15 days' notice on either side. [Para 8]

(d) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), S. 13—Rights vested in landlord on passing of decree or order for possession under law prevailing before Act, are taken away [Para 16]

(e) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), Ss. 11 (3) and 13 — Sub-lessee can be direct tenant under S. 11 (3) and S. 13—S. 13 makes no distinction between lawful and unlawful sub-letting—S. 11 does. [Para 18]

A. K. Hazra—for Plaintiffs.

Asoke K. Sen and S. Roy—for Defendant.

Judgment.—The plaintiffs in this suit claim to be sub-tenants in respect of certain portions of the premises in suit. Defendant 1 is the superior landlord and defendants 2 and 3 are alleged to be the tenants of such superior landlord.

[2] This is a suit by the plaintiffs for a declaration that the order for possession of the Small Causes Court, Calcutta, dated 2nd March

1948, passed against defendants 2 and 3 Bhupen Chandra Ghose and Lalan Chandra Ghose (hereinafter referred to as the Ghose defendants) does not bind the plaintiffs and for a declaration that the plaintiffs are the sub-tenants of the premises in suit entitled to reside therein until the lawful termination of their sub-tenancy and for injunction restraining defendant 1 Sailendra Nath Saha Chaudhury (hereinafter referred to as the landlord defendant) from executing the Small Causes Court decree or order for possession against the plaintiffs.

[3] The case of the plaintiffs is that they are and have been the sub-tenants of the Ghose defendants. The landlord defendant Sailen is the owner of the premises in suit under whom the Ghose defendants were the tenants. A notice to quit was given by the Ghose defendants to the plaintiffs on or about the 24th October 1946. The landlord defendant Sailen instituted proceedings in the Calcutta Small Causes Court being suit No. 1691 of 1947 against the Ghose defendants for possession of the said premises In the Small Causes Court proceedings the landlord defendant Sailen did not implead the plaintiffs and the plaintiffs were not parties to such proceedings. The landlord defendant Sailen obtained an order for possession against Ghose defendants in those proceedings on 8th December 1947. In execution of the said order defendant Sailen has obtained a further order for eviction on 2nd March 1948. The Ghose defendants have not entered appearance in this suit. The landlord defendant Sailen has filed his written statement and disputes the plaintiff's claim to occupy the said premises.

[4] Mr. A. K. Hazra learned counsel for the plaintiffs abandoned the plea of conspiracy and and collusion laid in the plaint. The only issue raised was :

Have the plaintiffs been in possession of the premises as sub-tenants for a period not less than seven years and not expiring on the 1st October 1946?

If so, are they liable to be evicted under the West Bengal Premises Rent Control Act, 1948, by the landlord defendant Sailen in pursuance of the decree and order of possession of the Small Causes Court?

Mr. Hazra called plaintiff Gour Mohan Roy as his first witness to prove the fact of (1) sub-tenancy and (2) its duration for not less than seven years and not expiring on 1st October 1946. During the examination in chief and after the said witness had adduced proof, Mr. A. K. Sen learned counsel for the landlord defendant Sailen conceded that the plaintiffs were the sub-tenants for over seven years and not expiring on 1st October 1946 and still continuing as such sub-tenants upon that concession. Mr. Hazra did not proceed further with the examination of the said witness and Mr. Sen did not cross-examine him. I have directed the concession to be recorded in the minutes and it disposes of the first part of the issue.

[5] The arguments of learned counsel have naturally therefore centred round the legal effect of such sub-tenancy and whether having regard to such sub-tenancy the plaintiffs are entitled to claim the protection of the West Bengal Premises Rent Control Act, 1948.

[6] Mr. Hazra appearing for the plaintiffs has argued that S. 13 of the Act protects his clients. The plaintiffs according to him were persons to whom the said premises had been sublet for a period of not less than seven years and such period did not expire on or after 1st October 1946. In such a case, he argues, that the Ghose defendants as tenants are not entitled to the benefit of S. 11 of the Act and his clients the plaintiffs shall be deemed to be the tenants holding directly under the landlord defendant Sailen on the same terms and conditions on which his clients held under the Ghose defendants. According to Mr. Hazra that is the irresistible conclusion from the concession made by Mr. Sen appearing for the defendant Sailen.

[7] Mr. Sen on the other hand contends that S. 13 of the Act does not apply in this case. His argument is that S. 13 applies only to leases and not to monthly tenancies. He draws this conclusion by an interpretation of the words "period" and "expires" used in that section and he submits that the word 'period' must be construed as meaning a term in a lease. I cannot accept the construction put forward by Mr. Sen.

[8] The nature of a monthly tenancy is not such which can be said to be a tenancy for a specified or any limited period. It is a tenancy for an indefinite time which can last *ad libitum* for any period whether of seven years or more or less with no *terminus ad quem*, the only limitation being that a monthly tenancy is terminable by fifteen days notice given either by the landlord or the tenant. Subject to that limitation, monthly tenancy as such cannot in my judgment be said to be a tenancy not for a period less than seven years so as to be excluded always from the operation of S. 13, Rent Control Act, 1948. Monthly tenancy is a periodical tenancy which does not come to an end by efflux of time at all for the obvious reason that no time is fixed or limited by the tenancy itself. In my judgment it commences with a month and without any further step on the part of the lessor or the lessee continues until either party terminates it by giving the requisite notice to quit under S. 106, T. P. Act. It is not a new tenancy every month but a part and parcel of the original tenancy. If any authority is required for the views which

I express on the nature of monthly tenancy I need only refer to the decision, *Usharani Debi* v. *Research Industries Ltd.*, of Gentle J. in 50 C. W. N. 461, and to *Utility Articles Manufacturing Co.* v. *Raza Bahadur Motilal Bombay Mills Ltd.*, I. L. R. (1943) Bom. 553: (A. I. R. (30) 1943 Bom. 306) and I rely on the observations of Beaumont C. J. generally and of Kania J. particularly at p. 556 of the Report. I, therefore, am unable to accept the construction put forward by Mr. Sen that S. 13 of the Act does not apply to monthly tenancy at all. The words 'period' and 'expire' are not necessarily connotative of a lease. The expression 'lease' is a well-known word with well defined meaning and it has not been used in that section. In this context of S. 13 of the Act I do not feel justified in putting the limitation on the meaning of this section as argued by Mr. Sen and confining its operation only to leases of not less than seven years and excluding the class of monthly tenancies even though they had lasted for the requisite period from the operation of this section. In my opinion, for the reasons I have given and on the authorities I have referred to, I hold that S. 13 of the Act does apply to the case of a monthly tenancy provided it has lasted for a period of not less than seven years expiring on or after 1st October 1946.

[9] Then the question is that S. 13 of the Act came into operation only on 1st December 1948. The decree or order for ejectment was made long before the Act came into operation. Mr. Sen has stated to the Court that his client the landlord defendant Sailen has not yet succeeded in getting possession from the Ghose defendants in pursuance of the order of the Small Causes Court and that the Ghose defendants are still in possession and the plaintiffs also are in possession. It also appears to be so from the last sentence in para. 5 of his client's written statement and also from the facts pleaded in the plaint. It also appears from the evidence of plaintiff Gour Mohan Roy that not only the plaintiffs are still in actual possession (Qs. 13 and 31) but also the Ghose defendants are collecting rents from the plaintiffs (Q. 16) and themselves still paying rent to the landlord defendant Sailen every month (Qs. 33 and 35). Mr. Sen has not cross-examined or challenged this evidence. If the decree or order for possession had been executed by recovery of possession before 1st December 1948, when the Rent Control Act, 1948, came into force the plaintiffs could certainly have not been able to resist the eviction under the law prevailing at that time namely the Calcutta Rent Ordinance, 1946.

[10] Not having recovered possession before 1st December 1948 the problem is, can the landlord defendant Sailen do so now that S. 13, Rent Control Act 1948, is in operation.

[11] The word "tenant" under S. 13 of the Act should in my judgment be read with S. 2 (11) of the Act, which defines the tenant under the Act as including "a tenant" who continues in possession after the termination of tenancy in his favour". In my opinion therefore a tenant who continues in possession even though a notice to quit and/or a decree has terminated his tenancy, but which notice or decree has not been satisfied by recovery of possession from the tenant is a tenant under the Act. On the facts of this case the Ghose defendants answer to this description of a tenant under the Rent Control Act.

[12] On a proper construction of S. 13 of the Act, I have come to this conclusion that the Ghose defendants as tenants sublet for a period not less than seven years within the meaning of S. 13 of the Act to the plaintiffs and as the plaintiffs and the Ghose defendants are still in possession and the decree or order of the Small Causes Court had not been satisfied prior to coming into operation of the Rent Control Act, 1948, and still remains unsatisfied the plaintiffs must be deemed to be tenants holding directly under the landlord defendant Sailen on the same terms and conditions as they did under the Ghose defendants.

[13] Holding this as I do it follows as a necessary sequel that S. 11 (3) of the Act will apply to the plaintiffs so that the plaintiffs would be deemed to be tenants of defendant Sailen in respect of the portion of the said premises let out to the plaintiffs. It is conceded on behalf of the landlord defendant Sailen that the decree in the Small Causes Court did not proceed on the ground provided in sub-s. (8) of S. 11 (1) of the Rent Act.

[14] Mr. Sen then argues that on the basis of a decision of Banerji J. in *Priyambada Mitter* v. *Jogesh Chandra Basu*, in Suit No. 604 of 1946, delivered on 16th June 1949 the plaintiffs cannot get the benefit of S. 13 of the Act. That decision of the learned Judge, I find, was not given with reference to S. 13 of the Act at all. The learned Judge in that case was construing S. 11 (3) of the Act and *inter alia* comes to the conclusion that S. 11 (3) of the Act has no retrospective operation. The question before me for decision is not on S. 11 (3) but on S. 13 of the Act. The consideration of S. 11 (3) in this case comes only incidentally. If S. 13 of the Act applies to the facts of the case then the language of that section itself makes it clear that the provisions of S. 11 (3) shall be applicable. It appears to me immaterial in this context as to whether the sub-lessees' interest fell with the fall of the lessee's interest when the decree or order of the Small Causes Court was made or the notice to quit given. The peculiar definition of a tenant under the Rent Control Act as including "a person who continues in possession even after

the termination of the tenancy in his favour" impels me to the conclusion that it is inconsequential whether under the Common law or under the Transfer of Property Act the tenant's interest fell or disappeared. It may have fell or disappeared under the Common law or under the Transfer of Property Act. Both under the Calcutta Rent Ordinance, 1946, which was the governing law on the subject from the 1st day of October 1946 till the 30th November 1948 as well as under Rent Control Act, 1948, which is the governing law since 1st December 1948 the definition of a tenant includes a person who continues in possession after the termination of tenancy in his favour. This termination of tenancy according to my interpretation of S. 2 (11) of the Act may be the result of a notice to quit or operation of law or even a decree or order of Court. The Statute does not put any limitation or qualification as to how the termination has to take place whether by act of parties or by decree or order of Court or by operation of law. The only limitation is that he must not have lost possession. As long as the test of possession is satisfied, he is a tenant within the extended meaning and definition provided under S. 2 (11) of the Act. Therefore in my judgment such a person must be regarded as a tenant even though his tenancy has been terminated by any cause whatever so long as he continues in possession and the possession has not been recovered by the landlord from him.

[15] Such a result of the construction which makes the word tenant include an ex-tenant is not altogether unknown in the legal history and experience of Rent Registration Acts both in this country as well as in England. Reference may be made in this connection to the observations of Bankes L. J. at p. 54 and Scrutton L. J. at p. 58 in the decision of the Court of Appeal in *Remon* v. *City of London Real Property Co.*, reported in (1921) 1 K. B. 49: (89 L.J.K.B. 1105) and to the observations of Lord Atkin at p. 1099 in the judgment of the Judicial Committee of the Privy Council in the *Karnani Industrial Bank Ltd.* v. *Satya Niranjan Shaw* reported in 32 C. W. N. 1093: (A. I. R. (15) 1928 P. C. 227). Rankin J. also held in *Bithaldas* v. *Lalbehari Dutt & Sons*, in 25 C. W. N. 967 at pp. 969-70 : (A. I. R. (9) 1922 Cal. 391) under the old Calcutta Rent Act of 1920 that the term tenant was used in a special sense and included a person whose tenancy had expired even before that Act came into operation and who could claim benefit under the said Act.

[16] The landlord defendant Sailen could have executed the decree and might have recovered possession in such execution from the plaintiffs and the Ghose defendants before the Rent Control Act of 1948 came into operation. But the moment that Act of 1948 came into force on 1st December 1948 by the combined operation of S. 2 (11) and S. 13 of the Act the plaintiffs in my judgment must be deemed to be direct tenants as contemplated by S. 13 of the Statute. It is true that thereby the landlord loses his vested right to execute the decree or order i. e., the right that vested in him on the passing of such decree or order under the law prevailing before 1st December 1948 But the legislature has the power to override vested rights and while it is settled law that such vested rights must be taken away only by express words I find such express words in S. 13 of the Act when it uses the language "notwithstanding anything contained in any other law for the time being in force". In other words, though the law for the time being in force might have entitled a landlord to execute his decree for possession against his tenant in such a manner as to oust and evict also the sub-tenants and in this case might have therefore enabled the landlord defendant Sailen to execute his decree before the Rent Control Act, 1948, came into force, he lost such right the day when the Act came into operation and in my judgment S. 13 should be applied notwithstanding such law and notwithstanding the fact that by so applying landlord defendant Sailen's vested right is infringed.

[17] It may not be out of place here to refer incidentally to a certain aspect of the nature of tenancy understood in the extended sense of a tenant under S. 2 (11) of the Act as a person who continues in possession even after the termination of the tenancy in his favour. Such a tenant has sometimes been described as a "statutory tenant" an expression severely criticised by Bankes L. J. in *Keeves* v. *Dean*, (1924) 1 K. B. 685 at p. 690 and about which expression Scrutton L. J. claimed the authorship and felt "impenitent" according to the report of the same case in 93 L. J. K B. 203 at p. 207. Bankes L. J. at p. 693 of (1924) 1 K. B. 685 observes without deciding the question that the statutory tenant while could not assign his right may still be entitled to sublet But the question whether the statutory tenant can sublet or assign does not in my view arise in this case and I do not propose to express any opinion on that question in this case. Here the Ghose defendants who were the tenants sublet for a period not less than seven years within the meaning of S. 13, Rent Control Act of 1948. The decree or order of the Small Causes Court either of 8th December 1947 or of 2nd March 1948 did not make the Ghose defendants any the less tenants because they continued and still continue in possession within the meaning of S. 2 (11), Rent Control Act, 1948. The plaintiffs in this case became sub-lessees long before

the decree or order of the Small Causes Court and therefore the Ghose defendants did not in this case, as statutory tenants in the sense of tenants continuing in possession after the termination of tenancy in their favour, sublet the premises to the plaintiffs. That sub-letting was done before the tenancy of the Ghose defendants had been terminated by the decree or order of the Small Causes Court, and *ex concessis* such sub-letting continued thereafter and still continues.

[18] Mr. Sen's next submission is that on the basis of the plaint, the plaintiffs are not persons to whom the premises could have been "lawfully sublet" within the meaning of S. 11 (3) of the Act because a major portion had been sublet to them without the necessary consent in writing of the landlord. I am afraid this argument suffers from a great fallacy. The fallacy in my opinion is this. Section 13, Rent Control Act 1948, makes no difference between lawful subletting and unlawful sub-letting. The distinction between lawful and unlawful sub-letting under S. 11 of the Act has no place in my judgment on a construction of S. 13 of the Act and that for the very simple reason to be found in the express words of S. 13 'notwithstanding anything contained in this Act." Effect must be given to those words and the only way such effect can be given is by saying that even though there was unlawful sub-letting and it was for a period not less than seven years as contemplated in S. 13 of the Act even then the sub-lessee will be deemed to be a tenant holding directly under the superior landlord. It is only after a sub-lessee is so deemed to be a direct tenant that the provisions of S. 11 (3) become applicable to him. In other words, my construction is that a sub-lessee can be a direct tenant in two ways under the Act of 1948. One is under S. 11 (3) of the Act where the premises have been "lawfully sublet" within the meaning of S. 11 of the Act e. g., where there is no breach of proviso (b) (i) or (ii) of S. 11 (1) of the Act, and where the interest of the tenant has been lawfully determined except in the case provided for in proviso (f) of S. 11 (1) of the Act. That is one way by which a sub-lessee can be a direct tenant of the superior landlord. But the other way in which a sub-lessee can become a direct tenant of the superior landlord is under S. 13 of the Act where the sub-lessee has been a sub-lessee for a period of not less than seven years as contemplated therein notwithstanding the fact that such sub-lessee has been a sub-lessee in breach of proviso (b) (i) or (ii) of S. 11 (1) of the Act. That is the meaning I attribute to the words "notwithstanding anything contained in this Act" appearing in S. 13 of the Act.

[19] This disposes of all the arguments made before me and I answer the second part of the issue in the negative. I hold, therefor, that the plaintiffs are entitled to relief under S. 13, Rent Control Act, 1948, and they shall be deemed to be tenants holding directly under defendant Sailen on the same terms and conditions as they did under the Ghose defendants in respect of the portions of the said premises in their possession and occupation. There will be therefore judgment for the plaintiffs accordingly. There will also be a declaration in terms of prayer (1) of the plaint and an injunction in terms of prayer (3) of the plaint. The plaintiffs will also be entitled to the costs in this suit.

R.G.D. *Suit decreed.*

A. I. R. (37) 1950 Calcutta 156 *[C. N. 48.]*

HARRIES C J.

Sachindra Nath—Petitioner v. *Jadunath Roy and others—Opposite Party.*

Civil Rule No. 428 of 1949, Decided on 9th November 1949, from order of 1st Addl. Sub-Jude, Burdwan, D/-6th December 1948.

Tenancy Laws—Bengal Tenancy Act (VIII [8] of 1885), S. 174 (5), Proviso—Deposit when may be made—Deposit required under the proviso to S. 174 (5) need not be made within limitation, but it can be made at any time before the appeal is admitted : 83 C. L. J. 389, *Foll.*; 41 C. W. N. 1299, *Expl.* [Para 5]

Jajneswar Majumdar and Sailendra Nath Banerjee —for Petitioner.

Saurindra Narayan Ghose—for Opposite Party.

Order.—This is a petition for revision of an order of a lower appellate Court dismissing an appeal from an order of a learned Munsif refusing to set aside a sale under S. 174, Bengal Tenancy Act.

[2] It will be unnecessary to deal with the facts of the case in any detail because the case was disposed of on a point of limitation.

[3] Admittedly the last day for preferring an appeal to the lower appellate Court was 22nd March 1948. On that date the appellant presented the appeal, but he did not deposit in Court the amount recoverable in execution as required by the proviso to S. 174 (5), Bengal Tenancy Act. The Court made the following order – that the appeal be registered and the appellant was directed to deposit the amount recoverable in execution of the decree within limitation. The amount recoverable was not deposited for some little time and indeed could not have been deposited within limitation because the case was filed on the last possible day.

[4] Before the lower appellate Court a point was taken that the appeal was barred by time and the learned Judge relying upon a number of cases of this Court upheld that plea and dismissed the appeal.

[5] Before me it has been contended that the matter has now been put beyond all controversy

by a recent decision of this Court in which it was expressly held that the deposit required under the proviso to S. 174 (5) need not be made within limitation, but it could be made at any time before the appeal is admitted. This recent decision is the case of *Sasadhar Ghose* v. *Harihar Kar*, 53 C W. N. 694 : (83 C. L. J. 389) in which it was held by a Bench that the use of the word "admitted" occurring in the proviso to sub-s. (5) of S. 174, Bengal Tenancy Act, was intentional and the legislature provided for the deposit of the money to be in time if it was so done before the appeal is admitted by a judicial act of the Court. It followed that when the legislature had given a definite limit under sub-s. (5) of S. 174 that the deposit must be made before the appeal was admitted, the Court had not only the jurisdiction but was bound to receive the deposit if made before the appeal was actually admitted. The Bench further held that there was a clear distinction between the registration of an appeal or admitting the memorandum on the one hand which was a ministerial Act and the actual admission of an appeal on the other which was a judicial Act. The latter referred to the hearing under O. 41, R. 11, Civil P. C., if the Court was not required at any earlier stage to pass any judicial order.

[6] It is quite impossible to distinguish the facts of this case from the facts of the case before me and as it is a Bench decision I am bound to follow it. It was, however, suggested by learned Advocate for the opposite parties that there is an earlier Bench decision of this Court to the contrary. That is the case of *Bidhubala Dasi* v. *Raishahib Kumud Nath Das*, 41 C. W. N. 1299. There are some observations of Costello J. in that case which might be regarded as in conflict with the later Bench decision. But the decision itself is not in conflict because it is quite clear that in that case no deposit was made at all and certainly not before admission, and therefore the decision itself is not in conflict with the later case of *Sasadhar Ghose*, (53 C. W. N. 694: 83 C. L. J. 389) to which I have made reference.

[7] For these reason I am bound to hold that the appeal was not barred by limitation and therefore it should have been heard on the merits.

[8] In the result, therefore, I would allow this revision, set aside the order of the lower appellate Court and remit the case to that Court to be heard and determined upon the merits and in accordance with law. The costs of this revision will abide the event in the Court below.

V.B.B. *Revision allowed.*

A. I. R. (37) 1950 Calcutta 157 *[C. N. 49.]*

HARRIES C. J.

Sm. Sovarani Roy and another—*Accused*—*Petitioners* v. *The King and another*—*Opposite Party.*

Crimnal Revn. No. 523 of 1949, Decided on 11th November 1949.

Penal Code (1860), S. 339—Landlord preventing tenant from using bath-room and privy by locking it—Offence under S 339 is committed—Dispute of this kind can however be tried more suitably in civil Court — On facts landlord held not guilty of any offence as bath-room and privy were not part of tenancy.

Where a landlord by locking the door prevents a tenant from entering and making use of a bathroom and a privy which he is entitled to use as a tenant, the landlord is technically guilty of the offence of wrongful restraint under S. 339, Penal Code. However, a dispute of this kind can be tried far more suitably in a civil Court than in a criminal Court : [Para 4]

(*Held* on the evidence in the case that as it was not established beyond reasonable doubt that the bath-room and the privy were part of the tenancy the landlord was not guilty of any offence.) [Paras 11 and 12]

Annotation.—('46-Man). Penal Code, S. 339 N. 1.

S. S. Mukherjee and Pritibhusan Barman — for Petitioners.

Jitendra Mohan Banerjee—for the Crown.

Amaresh Chandra Roy—for Opposite Party.

Order.—This is a petition for revision of an order of a learned Presidency Magistrate convicting the accused persons of an offence under S. 341, Penal Code and sentencing each of them to pay a fine of Rs. 50 and in default of payment of the fine each to undergo simple imprisonment for one month.

[2] How this dispute could be made the subject matter of criminal proceedings I find it difficult to understand. The learned Magistrate seems to think that it was not a civil dispute. But if ever there was a civil dispute this is one.

[3] Shortly the case of the complainant was that he was the tenant of certain rooms of the ground floor and of the first floor of the premises concerned, No. 310 Chittaranjan Avenue. According to him there were on the first floor a bath-room and a privy which he as tenant used. He went away according to his evidence on the last Saraswati Puja day and on returning the next morning found that the door of the bath-room and the privy on the first floor had been padlocked. This he said restrained his movements and accordingly he made a complaint under S. 341, Penal Code. That section is in these terms :

"Whoever, wrongfully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both."

And wrongful restraint is defined in S. 339, Penal Code as:

"Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction

which that person has a right to proceed, is said wrongfully to restrain that person."

It is to be observed that there is an exception to S. 339 to the effect that

"the obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence."

[4] It is quite clear that these sections are framed wide enough to cover a case of this kind. But I imagine that the framers of the Penal Code envisaged a very different class of case where the freedom of movement of a person had been affected not by locking a door but by other means. However, if it could be shown that the complainant had been prevented from entering a privy and bathroom of which he was a tenant, there would technically be an offence under this section. However, it appears to me that a dispute of this kind could be tried far more suitably in the civil Court than in a criminal Court.

[5] As many as thirteen witnesses were called to show that the complainant was entitled to use this privy and bathroom; but I think that all the witnesses but the complainant can be eliminated from consideration. As an example, Panchu Gopal Chai, P. W. 7, a milkman who seems to deliver milk to the complainant gave evidence that the complainant used the privy and the bath on the first floor. How on earth would milkman know what privy the tenant of a house used. Other witnesses were guests and such like, and it would appear that if the evidence of these persons be accepted the complainant received his milk and apparently received most of his guests in the bathroom or the privy. Not one of these witnesses except one say that they used the bathroom or the privy themselves which they might have done if they were guests. I imagine that guests would have very little knowledge about the sanitary arrangements of a house unless they found it necessary to make use of such arrangements while they were guests. But nobody says that he had ever used the bathroom or the privy except Subodh Sen, P. W. 12, who says that he once used the bathroom himself.

[6] This case must stand entirely upon the complainant's evidence as the other evidence is not worthy of consideration. The complainant in his examination-in-chief stated:

"I am a tenant under accused No. 1 in respect of the entire first-floor of premises No. 310 Chittaranjan Avenue. Accused 2 is her husband and accused 3 is their son. There is a privy and bath in the first-floor. I have been using this privy and bath in the first-floor since I went there as tenant. I have a dispensary on the ground floor and there is a latrine and water tap for use of my patients and compounders."

[7] That is all the evidence as to the nature of this tenancy and the accused in their written statement deny that this privy and bathroom were included in the tenancy.

[8] There are features which would suggest that this bathroom and privy were not part of the tenancy. There are apparently two staircases leading up to the first and upper floors and the complainant who was a tenant of the first floor had the exclusive use of the western staircase. The privy and the bathroom concerned however opened off the eastern staircase. Further there was a privy on the ground floor and doubtless there could be arrangements for bathing as there was a water tap there. The privy and the bathroom therefore were not essential for the use of a tenant of the first-floor and the whole or part of the ground-floor.

[9] Further, the case for the complainant is very odd. Why should the accused suddenly lock him out of his privy and bathroom? The suggestion made was that this was part of the harassing conduct of the accused to compel the complainant to pay more rent or vacate the premises.

[10] Can a Court upon such evidence find with any certainty that this privy and bathroom formed part of the complainant's tenancy? It seems that there is considerable enmity in this case. For example, the complainant's first supporting witness Gosaidas Rai, P. W. 2, was the brother-in-law of accused 2 and he gives evidence supporting the complainant, he being a person who lived across the road from this house. This witness in cross examination denied enmity with accused 2. But quite obviously he would not have given evidence against his brother-in-law unless there was enmity and when there is enmity these cases have to be examined with the very greatest care.

[11] On the evidence of the complainant standing by itself I do not think that it can be said that it was established beyond all reasonable doubt that this bathroom and privy were part of his tenancy. He might have been allowed to use it as it was on the first-floor in which he was tenant of certain rooms. But the user may have been as a licensee, in which case the right to use the privy and the bathroom could be terminated at any time.

[12] In spite of what the Magistrate thinks I am still of opinion that this was pre-eminently a case to be decided by a civil Court and not a criminal Court, and in my view the evidence is not sufficiently convincing to sustain a conviction on a criminal charge.

[13] That being so, I would allow this petition, set aside the convictions and sentences and acquit the accused. The Rule is made absolute.

[14] I am now informed that a civil suit has been instituted by the complainant and this is

undoubtedly the proper course for him to follow and the decision of the criminal case upon the evidence before the learned Magistrate cannot in any way affect a decision of the civil Court on the evidence tendered before that Court.

K.S. *Accused acquitted.*

A. I. R. (37) 1950 Calcutta 159 *[C. N. 50.]*

HARRIES C. J. AND SARKAR J.

Province of West Bengal — Defendant— Petitioner v. *Midnapore Zemindary Co. Ltd. —Plaintiff—Opposite Party.*

Civil Rule No. 594 of 1949, Decided on 3rd November 1949, from decree of Sub-Judge, Berhampore, D/- 27th January 1949.

Indian Independence Order (1947), Arts. 8 (2), 9— Hospital housed in a house situate in Murshidabad district—Hospital serving residents of that district only—Rent of hospital accruing due before partition of Bengal is payable by Province of West Bengal.

Where a hospital which was housed in a house situate in Murshidabad district served the residents of that district the rent of the house which had accrued due before partition of Bengal and which was payable by the old province of Bengal became, under Art. 8 (2), payable by the Province of West Bengal. The term 'financial obligations' used in Art. 9 has a restricted meaning and it does not cover an obligation to pay rent. The obligation to pay rent is purely a contractual obligation which is covered by Art. 8 (2). Art. 8 (6) will not cover such a case. [Paras 9, 10]

Chandra Sekhar Sen and Jajneswar Majumdar—for Petitioner.

Jnanendra Nath Mukherjee—for Opposite Party.

Harries C. J.—This is a petition for revision of a decree for Rs. 300 made in favour of the plaintiff by the Court of Small Causes at Berhampore.

[2] A suit was brought by the opposite party for recovery of rent of a certain house for the period April 1946 to August 1946 at the rate of Rs. 55 per month and also for the period April and May 1948 at the same rate together with damages amounting to Rs. 34/6. It appears that the petitioners who were the tenants admitted liability for the rent falling due in April and May 1948 and the whole contest between the parties was confined to the liability for rent for the period April 1946 to August 1946. Eventually the learned Small Cause Court Judge held that the petitioners were liable for rent for that period together with a sum of Rs. 25 by way of damages. He accordingly passed a decree as I have said for Rs. 300.

[3] The petitioners have contended before us that the province of West Bengal was not liable for this rent and that the suit had been improperly decreed against them. The property which was the subject matter of the claim for rent was situate in the Murshidabad district which was allotted on partition to West Bengal. It is the contention of the petitioners before us that the house which was let for the purposes of a hospital served not only persons resident in the Murshidabad district but also persons resident in adjoining districts which fell to Eastern Pakistan on partition. It is to be observed however that the petitioners apparently called no evidence to show that this hospital served any area other than areas situate in the Murshidabad district. Further it would appear as if the petitioners admitted that the purposes served by this hospital after the partition were exclusively the purposes of West Bengal because the petitioners admitted liability for the rent in April and May 1948 which was of course rent which had accrued due after the partition. I do not think therefore that it can now be alleged by the petitioners that this hospital served any districts other than districts allotted to West Bengal on partition.

[4] Mr. Chandra Sekhar Sen on behalf of the petitioners has relied upon Art. 8 (2), Indian Independence Order, 1947, and he has urged that this Article clearly shows that the liability for this rent rests on the Government of Eastern Pakistan and not on the Government of West Bengal. It would indeed be strange that the past liability for rent should be that of Eastern Pakistan when the house never became part of Eastern Pakistan on partition. Nevertheless, that is the argument which has been addressed to us on behalf of the Provincial Government.

[5] The Article in question is in these terms:

"Any contract made on behalf of the Province of Bengal before the appointed day shall, as and from that day,

(a) if the contract is for purposes which as from that day are exclusively purposes of the Province of West Bengal, be deemed to have been made on behalf of that Province instead of the Province of Bengal; and

(b) in any other case be deemed to have been made on behalf of the Province of East Bengal instead of the Province of Bengal and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Province of Bengal, be rights or liabilities of the Province of West Bengal or the Province of East Bengal, as the case may be."

[6] It is clear from this Article that if the purposes for which the contract was made were after the appointed day the exclusive purposes of the new Province of West Bengal, then the province of West Bengal would be liable though the contract was made with the old Province of Bengal which had been partitioned. It is further clear that if the contract does not fall within Art. 8 (2) (a) the liability by reason of Art. 8 (2) (b) falls on East Bengal or Eastern Pakistan. Mr. Sen's argument is that as the case does not fall within Art. 8 (2) (a) the liability must be that of Eastern Pakistan.

[7] As I have said earlier, it was never the case of the Provincial Government that this

hospital which was housed in the house in question served any district which is now part of Eastern Pakistan, and as I have pointed out the Provincial Government seemed to have admitted the contrary in paying the rent due after the partition and that they would only be liable if after the partition the hospital was exclusively for the purposes of West Bengal. It seems to have been assumed in the Court below that before partition this hospital was maintained exclusively for the purposes of certain districts which on partition fell to West Bengal, and if that be so I think there can be no doubt whatsoever that Art. 8 (2) (a), Indian Independence Order applies and that West Bengal would be liable for all rent accruing due after the partition and, as I have said, the rent which accrued due after the partition has actually been paid by the Province.

[8] Mr. Sen however contended that the Province could not be made liable for rent which had accrued due before the partition. But it seems to me that the terms of the Article makes the Province which is liable for the rent after the partition liable for the rent which accrued due before the partition, because Art. 8 (2) provides that

"all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Province of Bengal be rights or liabilities of the Province of West Bengal or the Province of East Bengal, as the case may be."

[9] As I have already pointed out, this is a liability which becomes the liability of the Province of West Bengal under Art. 8 (2) (a), Indian Independence Order as the purposes of the hospital on independence day were exclusively the purposes of West Bengal. That being so the rent which had accrued due before independence and which was payable by the old Province of Bengal became under this Article payable by the Province of West Bengal.

[10] Mr. Sen however next urged that effect must be given to sub-cl. (6) of Art. 8, Indian Independence Order. That clause is in these terms:

"The provisions of this Article shall have effect subject to the provisions of Article 9 of this order; and bank balances and securities shall, notwithstanding that they partake of the nature of contractual rights, be dealt with as property to which Artice 7 of this order applies."

[11] Article 9, Indian Independence Order is int hese terms :

"All liabilities in respect of such loans, guarantees and other financial obligations of the Governor General in Council or of a Province as are outstanding immediately before the appointed day shall as from that day:

(a) in the case of liabilities of the Governor General in Council be liabilities of the Dominion of India;

(b) in the case of liabilities of the province of Bengal be liabilities of the Province of East Bengal;

(c) in the case of liabilities of the Province of the Punjab be liabilities of the Province of West Punjab; and

(d) in the case of liabilities of any Province other than Bengal, or the Punjab continue to be liabilities of that Province."

It is contended that this clause will cover contractual obligations and will cover liabilities for rent such as exist in this case. The obligation to pay rent is in one sense a financial obligation but I think it is clear that the words "and other financial obligations of a Province" in Art. 9 must be construed *ejusdem generis* with the words "loans and guarantees". What this clause covers are loans, guarantees and other obligations of a like nature. Clearly, it was not intended to cover purely contractual obligations; otherwise Art. 8 becomes wholly worthless. It is true that loans and guarantees and such like are obligations of a contractual nature and would be covered by Art. 8 but for cl. (6) of that Article which makes the provisions of Art. 8 subject to the provisions of Art. 9 and further makes bank balances and securities, which are also contractual obligations, property to which Art. 7 applies. In other words, cl. (6) exempts from the operation of Art. 8 certain contractual obligations which are dealt with in Articles 7 and 9. Unless the Court is satisfied that the obligation to pay rent for house is a "financial obligation" as the term is used in Art. 9 then quite clearly Art. 8 will apply. If the obligation to pay rent was a financial obligation within Art. 9, then of course by reason of Art. 9 (b) the Province of East Bengal or Eastern Pakistan will be liable. But as I have said previously the term "financial obligations" used in Art. 9 must be given a restricted meaning. The obligations must be of a nature similar to the obligations which are set out previously in that section. In my view, the obligation to pay rent for these premises is a purely contractual obligation which is covered by Art. 8 and as from Indepenence day the purposes of the letting of the house were exclusively the purposes of West Bengal, then West Bengal is liable for rent which accrued due from the old Province of Bengal before partition. That to my mind is clear from the terms of Art. 8, sub-cl. (2). If after Independence day the purposes of the contract can be regarded as exclusively the purposes of the new Province of West Bengal then West Bengal is liable for what accrued due under this contract before partition.

[12] It may be that the case was not presented properly before the lower Court and the truth may be that areas now failing within Eastern Pakistan may have been served by this hospital as well as areas which fell within West Bengal on partition. That is what is suggested in argument before us; but as I have pointed out that

involves investigation into evidence and facts and such a case does not appear to have been made in the Court below and therefore cannot in my view be made in revision here. It seems to have been presumed, if not conceded, in the Court below that the area served by this hospital fell exclusively to West Bengal on partition.

[13] For the reasons which I have given, I am satisfied that the view of the lower Court is right and that the Province of West Bengal is liable for rent for the period April to August 1946 which was of course rent which accrued due before partition.

[14] That being so, this petition fails and is dismissed. The Rule is discharged with costs.

[15] Let the counter affidavit filed in Court today be kept on the record.

Sarkar J.—I agree.

D.H. *Petition dismissed.*

✻ A. I. R. (37) 1950 Calcutta 161 *[C. N. 51.]*

K. C. CHUNDER AND GUHA JJ.

Sm. Champa Devi—Accused—Petitioner v. *Babulal Goenka—Opposite Party.*

Criminal Revn. No. 924 of 1949, Decided on 9th December 1949.

✠ **Criminal P. C. (1898), S. 342 — Applicability — Accused appearing through lawyer — Personal appearance exempted — Personal examination of accused under S. 342 is not necessary —Failure to call upon accused does not vitiate trial.**

Section 342 does not govern S. 205, Criminal P. C., as it also does not govern S. 540A and in a case in which the accused is represented by a pleader in accordance with the permission granted by the Court, it is not necessary to call upon the accused to be personally present to be examined under S. 342, Criminal P. C. Failure to call upon the accused to be present for being examined does not vitiate the trial: A. I. R. (21) 1934 Bom. 212 *Rel. on;* A. I. R. (32) 1945 Cal. 432, *Doubted and Explained* ; A. I. R. (14) 1927 P. C 44, *Ref.*

[Para 8]

Annotation: ('49-Com.) Criminal P. C , S. 342 N 3 and 35.

S. S. Mukerjee — for Petitioner.

Order.—This rule was issued by our learned brother Sen J. on the petition of one Srimati Champa Devi who was an accused under trial on a charge under S. 323, Penal Code, before a Presidency Magistrate of Calcutta on the complaint of one Babulal Goenka, the opposite party. As our learned brother thought that the rule should be disposed of by a Divisional Bench it has been placed before us under the orders of my Lord the Chief Justice.

[2] The petitioner is a purdanashin lady not resident, it is said, in Calcutta. She applied to the Magistrate for permission to appear by an agent. She was rightly granted such permission by the Magistrate and was appearing through her lawyer. Then, an application was filed before the Magistrate by the complainant opposite party asking that she should be required to attend personally to be examined under S. 342, Criminal P. C. The petition was rejected by the trying Magistrate. The complainant came up before this Court and our learned brother Sen J. was of the opinion that the order of the Magistrate should be set aside. Obviously, it appears, he was of the opinion that in view of a decision in the case of *Adeluddin* v. *Emperor*, 49 C. W. N. 537 : (A. I. R. (32) 1945 Cal. 482: 47 Cr. L. J. 302), by a Divisional Bench of this Court consisting of Lodge J. and our learned brother himself, it was essential that the accused should be present at the time of the examination under S. 342, Criminal P. C. It appears that the previous petition was not with notice to the accused. When the accused came to know of it she filed the present petition and obtained this rule from our learned brother who has now sent it to a Divisional Bench as a consideration of other Divisional Bench decisions arises.

[3] Under S. 205, Criminal P. C., whenever a Magistrate issues a summons he has the power to dispense with personal attendance of the accused and permit him to appear by a pleader. This is subject to two qualifications, one contained in sub-s. (2) of the same section, namely, that if the Magistrate considers the presence of the accused necessary at any stage he has got the power to direct personal attendance of the accused and even to enforce the same. It must be made clear that in the present case the Magistrate has not considered this to be necessary. The other is under S. 366, sub-s. (2) which lays down that if a Magistrate passes a judgment of conviction in which the sentence is of imprisonment, then the accused is to be called upon to attend, personally to hear the judgment even if that accused had been previously permitted to appear by an agent. There is nothing in S. 342 itself which requires the personal attendance of the accused. Section 342 is a section which offers an opportunity to the accused to explain the circumstances appearing in evidence against him which the Magistrate considers as requiring such explanation and also to say what he has got to say generally about the case. This is the basic principle of S. 342. The section also enables the Magistrate at any stage of the proceedings to examine an accused person obviously to clear up any difficulties and the section makes it incumbent upon the Magistrate to hold an examination generally on the case at the close of the prosecution case. As this is for the purpose of enabling the Magistrate to know what the accused has got to say and further to enable the accused to given an explanation it does not appear to us to furnish any sufficient

reason why the accused should be compelled to be present if either the Magistrate does not think the presence of the accused necessary or the accused himself does not think that his presence is necessary to offer some explanation. The explanation may as readily be given by an agent as by the accused himself from the dock and in a majority of cases practically what happens is that the accused even when in the dock says nothing and subsequently files a written statement drawn up by a lawyer. So, we do not see why even from practical consideration there is necessity for an insistence upon the presence of the accused.

[4] In the decision reported in the case of *Adeluddin* v. *Emperor*, 49 C. W. N. 537 : (A.I.R. (32) 1945 Cal. 482 : 47 Cr. L. J. 302), no reason was unfortunately given and the other provisions of the Code were not examined. That was a case in which one of the accused in a joint trial with other accused persons had been allowed to be represented by a pleader. Subsequently in an appeal taken against an order of conviction a point was raised that S. 342, Criminal P. C., had not been complied with as the accused had not been personally examined. It was in this connection that the question was examined under S. 540A, Criminal P. C. In such a case, on the state of authorities at that time, it could be urged that there should be an examination of the accused, but none of the previous authorities had laid down that there should be personal examination of the accused.

[5] In view of the decision in the case of *Abdul Rahman* v. *Emperor*, 54 I. A. 96 : (A.I.R. (14) 1927 P. C. 44 : 28 Cr. L. J. 259), it is very doubtful whether the decisions of the Courts as to the mandatory nature of S. 342, Criminal P. C., may not have to be thoroughly reviewed as in that decision a test had been laid down by the Judicial Committee to decide whether violation of a particular provision of the law would altogether vitiate the trial or be a curable irregularity if there is no failure of justice. Whatever may be the state of authorities under S. 342, Criminal P. C., there is no case in which, except that reported in *Adeluddin* v. *Emperor*, 49 C.W.N. 537: (A. I. R. (32) 1945 Cal. 482 : 47 Cr. L. J. 302), referred to above, it has been held that absence of a personal examination of an accused when he is represented by a pleader is also a violation of S. 342. Where S. 342 speaks of an accused, it must be taken, if the accused is represented by a pleader, that the accused means the accused as represented by his pleader. We are unable to agree with the opinion that even under S. 540A the appearance of an accused person represented by a pleader is essential for his examination under S. 342, Criminal P. C. We hold that S. 366, sub-s. (2) governs both Ss. 504A and 205 but S. 342 governs neither.

[6] We would have referred this matter to a Full Bench as, in our opinion, the decision in the case of *Adeluddin* v. *Emperor*, 49 C. W. N. 537 : (A.I.R. (32) 1945 Cal. 482 : 47 Cr. L. J. 302) is not correct, but in the present case it is not necessary to do so because this is not a case in which one out of several accused persons was allowed under S. 540A to be represented by a pleader. In the present case, the permission was granted under S. 205, Criminal P. C., as we have pointed out, and we have pointed out that in the Criminal Procedure Code there are two provisions for ordering subsequent personal attendance of the accused after an order dispensing with such attendance has been previously passed under S. 205 of the Code. Neither of these two applies in the present case. As far as the authorities are concerned, the cases of this Court reported in *In the matter of Kiran Chandra*, 6 C. W. N. lix, *Devendra Nath* v. *Narendra Nath*, 14 C. W. N. cxxxi and *Raj Rajeshwari Devi* v. *Emperor*, 17 C. W. N. 1248: (23 I. C. 489 : 15 Cr. L. J. 281), clearly support what the Magistrate did in dispensing with the personal appearance of the accused in the present case at the initial stage. All these decisions have been reviewed by us in a case recently in the Divisional Bench, as yet unreported, the case being Cr. Revn. No. 543 of 1949. There is a decision fully applicable to the present case of a Divisional Bench reported in *In re Sukhalata Gupta*, 21 C.W.N. clxviii, in which the Divisional Bench dispensed with the personal attendance of the accused until the conclusion of the trial and directed that a plea be taken through her pleader and in case she files a written statement the same may be accepted as embodying her plea. In our opinion, the order passed in that case was correct and the same procedure should have been followed in the present case.

[7] This view receives support also from such a high authority as Sir John Beaumont in a decision reported in *Emperor* v. *Jaffar Kassum*, 35 Cr. L. J. 1035 : (A. I. R. (21) 1934 Bom. 212). In that case in which it was said that want of personal examination of an accused allowed to be represented by a lawyer vitiated the trial, the High Court of Bombay held that S. 205 was not controlled by S. 342, Criminal P. C. and the trial was not vitiated in any way. This is also the view of a Divisional Bench of this Court as we have already pointed out.

[8] We, therefore, hold that S. 342 does not govern S. 205, Criminal P. C., as it also does not govern S. 540A and in a case in which the accused is represented by a pleader in accordance with the permission granted by the Court,

it is not necessary to call upon the accused to be personally present to be examined under S. 342, Criminal P. C. The Magistrate, therefore, in the present case acted rightly in refusing the application of the complainant opposite party and in dispensing with the presence of the accused petitioner even at the time of the examination under S. 342, Criminal P. C.

[9] The result, therefore, is that the rule is made absolute and the order passed in Cr. Revn. No. 590 of 1949 set aside.

M.K. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 163 *[C. N. 52.]*

DAS GUPTA AND GUHA JJ.

National Investment Co. Ltd., Calcutta — Petitioner **v.** *Mohendra Nath Kundu and others, — Opposite Party.*

Civil Rule No. 574 of 1949, Decided on 20th September 1949, from order of Dist. Judge, Alipur, D/- 9th Febuary 1949.

Tenancy Laws—Bengal Tenancy Act (VIII [8] of 1885), S. 26F—Co-sharer tenant transferring his interest — Landlord exercising his right of pre-emption under old section—Interest of cosharer tenant transferred to landlord — Other cosharer tenant transferring his interest subsequently — Landlord having no right of pre-emption as landlord under new section — Landlord held was entitled to pre-empt as co-sharer under new section.

Once a tenancy has come into existence, it must in law be held to be continuing, unless shown to have been extinguished, or split under the provisions of S. 88, Bengal Tenancy Act; and the burden of proving that it does not exist in the same form is on the person who says this. Thus, when a landlord acquires part of a tenancy, no partial extinction of the tenancy results; the tenancy continues with only this change that the landlord and the co-sharer tenant, whose share has not been acquired, are now the tenants of the holding: A. I. R. (29) 1942 Cal. 68 and 46 C. W. N. 853, *Ref.*

[Paras 9 and 10]

When a co-sharer tenant transferred his interest in the holding, the landlord exercised his right of pre-emption under the old S. 26F and obtained an order by which the interest of the co-sharer tenant stood transferred to him. Subsequently the other cosharer tenant also transferred his interest. The landlord had no longer any right of pre-emption as a landlord in view of the new S. 26F. He claimed however to have become co-sharer of the tenancy as a result of the transfer to him of a co-sharer's interest under the old section, and so, to be entitled to exercise the right of pre-emption which the new section gives to co-sharer tenants:

Held that the landlord was entitled as a co-sharer to exercise a right of pre-emption under the new section.

[Para 14]

Atul Ch. Gupta and N. C. Chakaravarty — for Petitioner.

Hiralal Chakravarty and Shyamadas Bhattacharjee—for Opposite Party.

Das Gupta J. — Section 26 (F), Bengal Tenancy Act, as enacted by the amending Act of 1928, gave the immediate landlord of a holding a right of pre-emption, in the case of a transfer of the holding by the tenant, with a few exceptions. When the Act was further amended the right of the pre-emption was taken away from landlords and given to cosharer tenants. In the present case, the facts are that when a cosharer tenant transferred his interest, in (*sic*) the opposite parties as landlords exercised their right of pre-emption, and obtained an order by which the interest of the cosharer tenants stood transferred to them. The other cosharer tenant has since transferred his interest to the petitioner, but the opposite parties have no longer any right of pre-emption as "landlords," since the law has changed. They claim, however, to have become cosharers of the tenancy as a result of the transfer to them of a cosharer's interest under the old S. 26F, and so, to be entitled to exercise the right of pre-emption which the new section gives to cosharer tenants.

[2] The Court below accepted this contention of the opposite parties and allowed the application for pre-emption.

[3] On behalf of the petitioners, Mr. Atul Chandra Gupta has contended before us that the landlord cannot in law become his own tenant; and so, even after the transfer to themselves of the interest of a cosharer tenant the opposite parties did not become cosharer tenants of the holding, but continued to be 'landlords' only.

[4] Section 2 (17), Bengal Tenancy Act, defines 'tenant' as "the person who holds land under *another* person and is . . . . ." Obviously, when a tenancy originates, the landlord and the tenant cannot be one and the same person. After a tenancy has come into existence, with say, A as the landlord, and B, as the tenant, is it right to say that if A acquires B's interest, or B acquires A's interest—the tenancy ceases to exist? It has been held that this will depend on how far the law of merger will be applicable, and that whether the two interests—landlord's interest and tenant's interest—will merge or not, will depend on the intention of the person. Thus, under the ordinary law of merger, where say A was the landlord of a tenure, and B the tenant, and A purchases B's interest A may keep the tenure-holder's interest separate from the landlord's interest, and then there will be no merger. In such a case, A the landlord, and B the tenure-holder will be considered to be *different persons*, within the meaning of S. 2 (17), Bengal Tenancy Act.

[5] Section 22 (1), Bengal Tenancy Act, introduces a special rule of merger, in providing that where the landlord of an occupancy holding is a proprietor *(sic)* a tenure-holder, and the entire landlord's interest and tenant's is united in the same person, the tenant's interest merges in the landlord. Section 22 (2) provides

when the occupancy *raiyat's* interest and a co-sharer landlord's interest is combined in the same person, there will be no merger; but where a co-sharer landlord acquires the *raiyati* holding by purchase at a rent sale or certificate sale under the Act, the *raiyati* interest will merge in his landlord's interest, but he will have to pay a fair and equitable sum to the other co-sharer landlords.

[6] It is important notice *(sic)* that S. 22 makes no provision for the case of the landlord's interest and a co-sharer tenant's interest being combined in the same person.

[7] Turning now to the old S. 26 (F), Bengal Tenancy Act, we find that as soon as the landlord's application for pre-emption is granted, the right, title and interest in the holding accruing to the transferee, shall be deemed to have vested in the landlord whose application has been granted subject to the provision of S. 22. As S. 22 has no provisions applicable to a case where a landlord acquires part of the tenancy interest, the consequence of the above provision of sub-s. (5) of the old S. 26 (F) is that the opposite parties hold apart from the landlord's interest a share of the tenant's interest.

[8] Mr. Gupta argues that the automatic result of this is that the tenant's interest is wiped out, and the tenancy continues only for the untransferred portion and the landlord is the landlord for this altered tenancy. According to this argument, suppose there was a holding with a rent of Rs. 50, and an area of 10 bighas, and on eight annas share of the tenant's interest being sold, landlord in exercise of his right of pre-emption acquires this eight annas interest, the tenancy will at once become one with a rent of Rs. 25 held by the owner of the unsold eight annas share under the landlord who has exercised the right of pre-emption. If this argument is not accepted, Mr. Gupta points out, the landlord will be able to sue the co-sharer who has not sold, for the entire Rs. 50, even though he is himself liable for Rs. 25. This is certainly a curious position. But another curious thing will result, if Mr. Gupta's argument of the automatic birth of a new tenancy is accepted. The area, in our illustration, was 10 bighas. Which portion of these 10 bighas will form the holding for the tenancy of Rs. 25? Obviously without a partition, this cannot be ascertained. The new tenancy with a rent of Rs. 25, will be, therefore, for an unascertained portion of the former holding. This is perhaps even more unsatisfactory than what results from the joint and several liability of each co-sharer tenant for the entire rent of the holding.

[9] I am, therefore, unable to accept Mr. Gupta's argument that an automatic alteration of the tenancy by a process of reduction, takes place, when the landlord acquires part of the tenancy interest. Once a tenancy has come into existence, it must in law be held to be continuing, unless shown to have been extinguished, or split under the provisions of S. 88, Bengal Tenancy Act, and the burden of proving that it does not exist in the same form is on the person who says this. There is no case here of extinction of the entire tenancy, or a splitting of the old tenancy into two or more new tenancies. Mr. Gupta's argument is that part of the old tenancy has been extinguished by the mere fact of the landlord having acquired it. As I have stated above, the position according to the argument will be that a tenancy comes into being, but it is not known what lands it includes. This is a contradiction in terms.

[10] In my judgment, when a landlord acquires part of a tenancy, no partial extinction of the tenancy results; the tenancy continues with only this change that the landlord, and the co-sharer tenant whose share has not been acquired, are now the tenants of the holding.

[11] A somewhat similar question was considered by Derbyshire C. J. and Sen J. in *B. A. Basil* v. *Charu Chandra Chatterjee*, 46 C.W.N. 853.

[12] When they had to decide whether when a co-sharer tenant acquires the entire landlord's interest, the tenancy continues the same, their Lordships held that the tenancy continues, so that even after acquisition of the landlord's interest, a co-sharer tenant remains co-sharer tenant.

[13] In *Amjat Talukdar* v. *Rohini Kanta Bhattacharjee*, 45 C. W. N. 901 : (A. I. R. (29) 1942 Cal. 68), Henderson J. sitting singly, had to consider exactly the question as is now before us, and decided that the landlord on acquiring share of a tenancy becomes a co-sharer tenant.

[14] My conclusion is that the Courts below rightly held that the opposite parties were entitled as "co-sharer" to exercise a right of pre-emption under the new S. 26 (F), Bengal Tenancy Act.

[15] I would, therefore, discharge the Rule with costs. Hearing fee 3 gold mohurs.

Guha J. — I agree.

V.R B. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 164 *[C. N. 53.]*

HARRIES C. J. AND S. N. BANERJEE J.

Messrs. Tobacco Manufactures (India) Ltd. —*Appellant* v. *Mrs. Marian Stewart* — *Respondent.*

A. F. O. O. No. 29 of 1949, Decided on 2nd December 1949, against order of Commissioner for Workmen's Compensation, Bengal, D/- 7th February 1949.

Workmen's Compensation Act (1923), S. 3 (1) — Compensation — Right to — Workman should be acting in course of employment — "Employment" includes things belonging to or arising out of it.

A workman in order to be entitled to the compensation, should be acting in the course of his employment, that is to say, when he is doing something in discharge of a duty to his employer directly or indirectly imposed upon him by his contract of service. The word "employment" covers and includes things belonging to or arising out of it: 1924 A. C. 59, *Rel. on.* [Para 3]

Annotation : ('46-Man) Workmen's Compensation Act, S. 3 N. 2.

(b) Evidence Act (1872), S. 32 —Scope — Workman on way to factory on bicycle — Accident and subsequent death of workman — His widow stating cycle given by employer to avoid late attendance — Statement made on what she heard from husband —Statement is not admissible.

A statement made by the widow in her evidence before the Commissioner for Workmen's Compensation that she had heard from her husband, who was then dead as a result of injuries received in an accident while proceeding to the factory, that the bicycle on which he met with the accident had been given to him by his employer, because otherwise he might be late in attending the factory, is hearsay, as it does not fall within any of the sub-sections of S. 32 and, therefore, inadmissible. [Para 6]

Annotation : ('46-Man.) Evidence Act, S. 32 N. 1.

Bhabes Narain Bose—for Appellant.

Noni Coomar Chakraborti and Sukrity Ganguly — for Respondent.

Banerjee J. — This is an appeal by the employer from an order made by the Commissioner for Workmen's Compensation, West Bengal, awarding compensation against the employer to the widow of the deceased workman in the following circumstances.

[2] One Lionel Henry Stewart was a mechanic employed by Messrs. Tobacco Manufactures (India) Ltd., (who is the employer,) in its Kidderpore Factory. Stewart lived in Howrah and had to attend the Factory at 8 in the morning, On 10th April 1947, he was going to work riding a bicycle. He was knocked down by a lorry belonging to the Civil Supplies, Government of West Bengal, near Princep's Memorial and received injuries. Stewart died on 13th April 1947 from the injuries. His widow claimed compensation from the employer on the ground that the accident arose in course of and out of the employment.

[3] The law is well established that the workman in order to be entitled to the compensation, should be acting in the course of his employment, that is to say, when he is doing something in discharge of a duty to his employer directly or indirectly imposed upon him by his contract of service. The word "employment" covers and includes things belonging to or arising out of it: *St. Helens Colliery Ltd.* v. *Hewitson*, 1924 A.C. 59.

[4] The learned Commissioner found that the employer gave the bicycle to Stewart to secure his punctual attendance at the factory, and the workman was bound to use the bicycle. And the route by which the deceased went was a recognised and permissible route. According to him, therefore, the accident arose in the course of the employment and out of it.

[5] The learned Commissioner reached his conclusion relying on a statement made by the widow in her evidence before the Commissioner that she had heard from her husband that the bicycle had been given to him by his employer, because otherwise he might be late in attending the factory.

[6] In our opinion, this evidence is hearsay. It does not come within any of the sub-sections of S. 32, Evidence Act. Therefore, it is inadmissible. There is no other evidence to support the finding of the Commissioner that the bicycle was supplied by the employer to the deceased for doing his duty. Therefore. the Commissioner's finding is wrong in law. We, therefore, allow this appeal and set aside the order.

[7] The employer's counsel did not ask for costs of this appeal against the widow. So, there will be no order as to costs.

Harries C. J.—I agree.

M.K. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 165 *[C. N. 54.]*

SEN J.

Abdul Majid — Accused — Petitioner v. *The King.*

Criminal Revn. No. 684 of 1949, Decided on 12th September 1949.

(a) Criminal P. C. (1898), S. 162—Grant of copies of statements to accused — Court cannot refuse merely because statements are signed.

Section 162 of the Code nowhere says that if the statements made to the police by witnesses are signed by them, the accused will not be entitled to get copies of such statements. It merely contains a provision that the statements should not be signed. The police or the prosecution cannot render the section nugatory by disobeying its provisions and making the witnesses sign their statements.

Hence the Court is not justified in refusing copies of statements of witnesses merely because they are signed by the witnesses. [Para 2]

Annotation : ('49-Com.) Criminal P. C., S. 162, N. 9 and 14.

(b) Criminal P. C. (1898), S. 162 — 'In the course of investigation under this chapter' — Statement made to police during investigation under S. 174 falls within S. 162. [Para 2]

Annotation : ('49-Com.) Criminal P. C., S. 162, N. 7, Pt. 4.

(c) Evidence Act (1872), S. 145 — Statements recorded under R 254 (b), Police Regulation, Bengal are not privileged and accused is entitled to get copies of such statements for cross examination of witnesses under S. 145—Criminal P. C. (1898), S. 162: A. I. R. (16) 1929 Cal. 257, *Ref.* [Para 2]

Annotation : ('46-Man.) Evidence Act, S. 145, N. 6.

S. S. Mukherjee — for Petitioner.

Order.— This Rule has been obtained by the accused whose application to be given copies of the witnesses' statement to the police during the investigation of this case has been refused by the learned trying Magistrate. Against the order of refusal the Sessions Judge was moved to refer the matter to this Court. The learned Sessions Judge stated that the order was bad but he said that the Magistrate may reconsider the order and allow the defence to get copies of the statements made by the witnesses before the police or he may acquit the accused. For these reasons he thought that he should not delay the proceedings by making a reference to this Court.

[2] The learned Magistrate's order is in my opinion entirely wrong. An accused person is entitled under the provisions of S. 162, Criminal P. C., to get copies of the statements made by persons to the police during an investigation under Ch. 14 of the said Code provided that such persons are examined as witnesses by the prosecution. The accused when he gets such statements is entitled to use them for the purposes of contradiction in the manner provided by S. 145, Evidence Act. Now, S. 162 of the Code states that persons examined by the police shall not sign their statements. These statements were signed by the witnesses and the Magistrate says that this is a good ground for holding that S. 162 of the Code does not apply and therefore the defence are not entitled to get copies of the statements of the witnesses. This view, I must say, with respect exhibits both a misappreciation of the law and also a wrong sense of justice and fair play. Section 162 of the Code nowhere says that if the statements made to the police by witnesses are signed by them, the accused will not be entitled to get copies of such statements. It merely contains a provision that the statements should not be signed. The police or the prosecution cannot render the section nugatory by disobeying its provisions and making the witnesses sign their statements. I should have thought that an elementary sense of justice would have prevented any one from coming to such a conclusion as the learned Magistrate has done. Next, the learned Magistrate holds that as the statements were recorded under the provisions of R. 254 (b), Police Regulation, Bengal, therefore those statements do not come within the purview of S. 162, Criminal P. C. The answer to this point is obvious. If these statements be treated as statements recorded under the Police Regulation, Bengal, then there is nothing to prevent the accused getting copies of such statements for cross examination of the witnesses under S. 145, Evidence Act. Such statements are not privileged. In this connection I would refer to a decision of this Court in the case of *Panchanan Mukherjee* v. *Emperor*, 33 C. W. N. 203 : (A. I. R. (16) 1929 Cal. 257 : 30 Cr. L. J. 577). Further, the investigating officer himself says that he carried out the investigation in accordance with the provisions of S. 174, Criminal P. C If that be correct, then S. 162, Criminal P. C., applies because it refers to statements made by persons to a police officer in the course of investigation under Ch. 14 and S. 174 is in Chapter 14, Criminal P. C. I do not know why the learned Magistrate says that this was not an investigation under S. 174, Criminal P. C. That section deals *inter alia* with the investigation of a case where a person had died under circumstances raising a reasonable suspicion that some other person has committed an offence. Here, the case related to the death of a girl being caused by the rash driving of a motor vehicle. This clearly comes under the provisions of S. 174 (1) (c), Criminal P. C. I wish it to be clearly understood that I am not for a moment suggesting that the case against the accused is in any way established, nor am I giving any opinion whatsoever regarding the merits of the case. All I wish to say is that the case is one which falls under S. 174 (1) (c), Criminal P. C., if the allegations are proved to be true. It may also fall under the provisions of S. 174 (1) (b) of the Code.

[3] For the reasons stated above, I set aside the order of the learned Magistrate and direct that copies of the statements made by persons to the police who are called as witnesses in this case be supplied to the accused whether they are signed or unsigned or whether they are recorded under the provisions of Chapter 14, Criminal P. C., or under any other provision of the law in order to enable the accused to use the statements for the purpose of contradiction.

[4] The Rule is made absolute.

K S. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 166 *[C. N. 55.]*

R. P. MOOKERJEE J.

Sailendra Nath Sen —Auction-Purchaser — Petitioner v. *Sudhanya Charan Das Naiya and others — Opposite Party.*

Civil Rule No. 595 of 1949, Decided on 23rd November 1949, to revise order of Sub-Judge, 4th Court, Alipore, D/- 20th January 1949.

(a) Tenancy Laws — Bengal Tenancy Act (VIII [8] of 1885) Ss. 173 and 174 (3) —Application under both sections —Rejection by trial Court —Appeal — Appeal lies against order so far as it is under S. 174 (3).

Where an application to set aside an auction sale is made jointly under Ss. 173 and 174 (3) and the trial Court refuses to set aside the sale under either of the two sections, an appeal lies against the order so far as it

is directed against the order passed under S. 174 (3): A. I. R. (14) 1927 Cal. 833, *Disting.* [Para 3]

(b) Tenancy Laws — Bengal Tenancy Act (VIII [8] of 1885), S. 174 (3) — Application under, to set aside sale on ground of fraud — Benefit of S. 18, Limitation Act —Fraud on part of auction purchaser need not be proved—Limitation Act (1908), S. 18.

In a case coming under S. 174 (3), Bengal Tenancy Act where an application is filed long after the statutory period and the provisions of S. 18, Limitation Act, are attracted, it is not necessary to come to a definite finding that the auction purchaser was a party to the fraud which had kept the applicants out of knowledge during the period in question. Section 18, Limitation Act, may be availed of to extend the period of limitation of an application for setting aside a sale where fraud is proved to have been committed by the decree-holder though the auction purchaser who was a stranger was not a party or accessory to the fraud. The fraud that can be alleged or proved against an auction purchaser would ordinarily be a fraud subsequent to the sale but for invoking the benefit of S. 18, Limitation Act, it is not necessary to prove fraud subsequent to the sale: A. I. R. (36) 1949 Cal. 212, *Rel. on*; 46 C. W. N. 403, *Disting.* [Paras 4 and 5]

C. S. Sen and Amal Kumar Mukherji —for Petitioner.

Chandra Sekhar Bhowmik —for Opposite Party.

Order. — This is an application in revision on behalf of the auction-purchaser against an order passed by the lower appellate Court setting aside a sale. The sale in question was held on 5th May 1941, and a jama of Rs. 74-8-16 gandas covering an area of about 79 bighas was sold for Rs. 203-9-0. About a quarter of this area was khas land and the remaining portion was tenanted. The sale was confirmed on 7th June 1941 and the auction purchaser thereafter obtained possession through Court. About four years later, on 24th July 1945, an application purporting to be under Ss. 173 and 174 (3), Bengal Tenancy Act was filed by the judgment-debtors. It was alleged that the auction-purchaser was the benamdar of some of the judgment-debtors and this was made the foundation of the application under S. 173. Various allegations about suppression of service of notices and other irregularities and of fraud were made in support of the prayer made under S. 174 (3), Bengal Tenancy Act. This joint application was dismissed by the learned Munsif and all the allegations by the judgment-debtors were rejected.

[2] An appeal was taken before the learned Subordinate Judge against this decision. It was held that although the judgment-debtors seemed to have some understanding with the auction-purchaser prior to the confirmation of the sale and though the case was not free from a strong suspicion that some of the judgment-debtors were in league with the auction-purchaser, it had not been conclusively proved that he was the benamdar of some of the judgment-debtors. It was accordingly held that the application under S. 173 had been rightly dismissed by the learned Munsif. In connection with the appeal preferred under S. 174 (3), Bengal Tenancy Act, the learned Judge came to the conclusion that there had been not only material irregularities and fraud in publishing and conducting the sale, to the detriment of the applicants, but that the judgment-debtors had been kept out of their knowledge of the sale by the fraudulent action of the decree-holder. In this view, the sale was set aside.

[3] It is against this order that the present application has been moved in this Court. It is contended in the first instance that no appeal lay to the lower appellate Court against the decision of the learned Munsif. Reliance is placed on the case of *Durga Charan* v. *Bishnupada*, 46 C. L. J. 172: (A. I. R. (14) 1927 Cal. 833), for the proposition that if there be a joint application under ss. 173 and 174 (3), Bengal Tenancy Act, no appeal would lie even against that portion of the order which deals with the prayer under S. 174 (3), Bengal Tenancy Act. On a reference to the decision itself it is apparent that this proposition finds no support. If there is a joint application under the two sections mentioned above and the trial Court sets aside the sale under S. 173, Bengal Tenancy Act, the Court considered that an appeal against that part of the decision which dealt with the prayer under S. 174 (3), Bengal Tenancy Act would not entitle the aggrived party to any relief in the appeal. This is due to the fact that the sale having been set aside under S. 173, it becomes infructuous for the appellate Court to go again and further into the question whether the sale can or ought to be set aside for the reasons assigned which come under S. 174 (3), Bengal Tenancy Act. In the case now before me, the trial Court had refused to set aside the sale under either of the two sections. If the Court of appeal sets aside the sale on appeal on grounds falling under S. 174 (3), Bengal Tenancy Act, there would be no decision by the appellate Court which would be contradictory to the decision arrived at by the trial Court under S. 173 of the Act. The jurisdiction of the Court to entertain an appeal against an order passed under S. 174 (3), Bengal Tenancy Act, cannot be taken away by reasons which were attempted to be placed before me. The appeal was competent so far as the same was directed against the order passed under S. 174 (3), Bengal Tenancy Act.

[4] It is next contended on behalf of the petitioner by Mr. Sen that in a case coming under S. 174 (3), Bengal Tenancy Act, where the application is filed long after the statutory period and the provisions of S. 18, Limitation Act have to be attracted, the Court must come to a definite

finding that the auction purchaser was a party to the fraud which had kept the applicants out of knowledge during the period in question. Reliance is placed on *Jagiswar Das* v. *Deb Narain Roy*, 46 C. W. N. 403. It may be pointed out that the observations which appear in that judgment are all obiter as it had been held that there had been a previous application by the petitioner some years ago. On that finding alone there could be no doubt that the application was, apart from any other consideration, barred by limitation. Certain observations there are no doubt but they are not a decision on the point which actually arose. Reference was also made to the case of *Atul Jamil* v. *Ambia Khatun*, 43 C. W. N. 862: (A. I. R. (26) 1939 Cal. 663). The actual decision in this case also was that the initial onus of proving that by reason of fraudulent concealment on the part of the person against whom the applicant had made the petition that he had been kept from the knowledge of his right to file the same, lies very heavily on the applicant. The manner in which such fraud is to be proved by the applicant was also indicated.

[5] Section 18, Limitation Act, provides :

"Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application:

(a) against the person guilty of the fraud or accessory thereto or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby. . . . . ."

This section was recently considered by B. K. Mukherjea J. in the case of *Mahipati Haldar* v. *Atul Krishna*, 53 C. W. N. 587: (A. I. R. (36) 1949 Cal. 212). It was held there that S. 18, Limitation Act may be availed of to extend the period of limitation of an application for setting aside a sale where fraud is proved to have been committed by the decree-holder though the auction-purchaser who was a stranger was not a party or accessory to the fraud. I respectfully agree with the view above. The fraud that can be alleged or proved against an auction purchaser would ordinarily be a fraud subsequent to the sale but as has been held repeatedly that for invoking the benefit of S. 18, Limitation Act, it is not necessary to prove fraud subsequent to the sale. The provisions of S. 18 cannot be interpreted so as to make it incumbent on the petitioner to prove that in respect of the items of fraud proved against the decree-holder, the auction purchaser was also an accessory thereto. In this view, the findings arrived at by the Court of appeal below were sufficient for setting aside the sale.

[6] The Rule is accordingly discharged with costs.

D.R R. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 168 *[C. N. 56.]*

SEN J.

Tetri—Petitioner v. *Ram Newaj—Opposite Party.*

Criminal Revn. No. 814 of 1949, Dicided on 23rd November 1949.

Criminal P. C. (1898), Ss. 488, 561A — Order for maintenance — Cancellation of — Subsequent compromise between parties —Both husband and wife filing joint application for cancellation of order— Magistrate has jurisdiction to cancel it — High Court also may cancel it under S. 561A.

An order passed under S. 488, Criminal P. C. ,is a continuing order and it is based upon the fact that the husband and wife are at variance and that the husband has refused to maintain his wife. In these circumstances the husband is compelled to maintain his wife by an order passed under S. 488 of the Code. It is clear from the provisions of the various sub-sections to Ss. 488 and 489, that this order of maintenance is dependent upon certain circumstances continuing to exist. In altered circumstances the order may be set aside or varied. The two sections lay down certain conditions under which an order for maintenance may be set aside. It is true that the sections have not mentioned the particular circumstances of a compromise between the parties, but it would be reasonable to hold that where parties have come together and have asked the Court to cancel an order for maintenance the Court has jurisdiction to cancel such order. In any event High Court by virtue of the provisions of S. 561A of the Code has certain inherent powers and under those powers it can cancel the order of maintenance in such circumstances: A. I. R. (10) 1923 Cal. 456 ; A. I. R. (14) 1927 Mad. 376 and A. I. R. (18) 1931 Rang. 89, *Disting.* [Para 4]

Annotation: ('49-Com.) Criminal P. C., S. 488 N. 16, 24.

Amaresh Chandra Roy and Bireswar Chatterji —for Petitioner.

Debabrata Mukherjee—for Opposite Party.

Order.—The petitioner has obtained this Rule and it relates to certain proceedings under S. 488, Criminal P. C.

[2] The material facts which need be stated briefly are as follows: The petitioner applied for an order of maintenance under S. 488, Criminal P. C. against her husband. The order granting maintenance was made on 23rd June 1947. There were certain proceedings thereafter which need not be considered. On 3rd November 1947, the husband made an application under S. 488, subs. (5), Criminal P. C., for cancellation of the order for maintenance on the ground that his wife was living in adultery. When that application came to be heard a compromise petition

was put in on 2nd December 1948 which is in the following terms:

"The humble petition of the parties in this case, most respectfully sheweth: That the above matter has been compromised between the parties and the husband and wife have agreed to live together and none of the parties desires to proceed with any case against the other either civil or criminal.

That your petitioner Ram Nawaj will maintain his wife honourably and there will be no further cause of dissatisfaction for the wife.

That your petitioner Tetri has agreed to live with her husband as a faithful wife.

In the circumstances your petitioners pray that your Honour would be pleased to treat this case as compromised and the order of maintenance may be treated as ineffective. And your petitioner, as in duty bound, shall ever pray."

Thereafter the learned Magistrate passed an order on that very date in the following terms :

"Petition filed that the matter is amicably settled. Proceedings dropped. The order of maintenance already passed becomes ineffective. Both sides present."

On 4th December 1948 the wife came again before the Court and filed a petition stating that in pursuance of the compromise petition she went to her husband's house, that husband assaulted her and kept her under lock and key and threatened to cut off her hands and legs. It is futher stated that she managed to come out of the room with some difficulty and she asked the Court to set aside the order of 2nd December 1948 and review the case and issue notice on the second party to appear before the Magistrate. The learned Magistrate held that the parties having already compromised the matter and he having passed an order upon the compromise he could not revive the order for maintenance after the compromise had been effected and that the remedy of the wife lay in making a fresh application. In this view he refused the application. Against this order, there was a motion preferred to the Sessions Judge which was heard by the Additional Sessions Judge and he refused to refer the case to this Court. The petitioner then applied for and obtained the present rule.

[3] It is argued on behalf of the petitioner that the learned Magistrate had no jurisdiction to pass the order which he did upon the compromise petition. It is said that once an order for maintenance is made it can only be cancelled or reviewed upon the conditions mentioned in Ss. 488 and 489, Criminal P. C. If the conditions specified in those sections were not present the Court had no jurisdiction to cancel the order for maintenance. It is argued that the order of 2nd December 1948 being without jurisdiction, the order for maintenance still subsists. Learned advocate on behalf of the husband frankly admits that there is no specific provision in the Code which empowers a Magistrate to cancel an order for maintenance upon a compromise petition filed by the parties after the order has been made; but he contends that in the circumstances which have occurred the basis of the order for maintenance no longer exists, and that as it is an order dependent on certain continuing circumstances it has become infructuous and that this Court should not interfere with the order of the learned Magistrate refusing to accede to the prayer made in the petition of the wife. I have been taken through both Ss. 488 and 489, Criminal P. C; it is clear that there is no express provision in these sections which permits a Magistrate to cancel an order for maintenance which he has already made on the ground that the parties have made up their differences and wished to have the order cancelled. On the other hand, there is no prohibition in the Code against a Magistrate acting upon a petition of compromise in proceedings under S. 488, Criminal P. C. In my opinion, if both the parties approached the Magistrate after the Magistrate made an order of maintenance and said that they did not wish this order to continue there could be no obstacle in the way of the Magistrate passing an order in terms of the compromise. On behalf of the petitioner, I was referred to two decisions, namely, *Parul Bala Debi* v. *Satis Chandra*, 37 C. L. J. 180: (A. I. R. (10) 1923 Cal. 456: 24 Cr. L. J. 945) and *Kanangammal* v. *Pandara Nadar*, 50 Mad. 663: (A. I. R. (14) 1927 Mad. 376 : 28 Cr. L. J. 271). The facts in these cases are quite different. In those cases the wife after an order for maintenance had been made went to live with her husband for some time. Thereafter she left her husband and applied for recovery of maintenance in accordance with the order passed by the Magistrate. The Courts held that the mere fact that she had gone to stay with her husband did not have the effect of cancelling or nullifying the order for maintenance and that until such order of maintenance is cancelled or nullified the wife is entitled to claim maintenance in accordance with the terms of the order.

[4] Learned advocate for the husband referred to a decision of the Rangoon High Court, namely, the case of *U Po Shein* v. *Ma Sein Mya*, 32 Cr. L. J. 114: (A. I. R. (18) 1931 Rang. 89). In that case the wife had obtained an order of maintenance against her husband. The husband brought a suit for restitution of conjugal rights and got a decree. The wife after the decree applied for payment of her maintenance. It was held that after the decree for restitution of conjugal rights had been made the very basis of the order under S. 488, Criminal P. C. had disappeared and therefore the wife was not entitled to get maintenance in accord-

ance with the order passed under S. 488, Criminal P. C. The facts of the case also are not the same as the facts in the present one. I must, therefore, decide this point on the wording of the section and upon general principles. In my opinion an order passed under S. 488, Criminal P C., is a continuing order and it is based upon the fact that the husband and wife are at variance and that the husband has refused to maintain his wife. In these circumstances the husband is compelled to maintain his wife by an order passed under S. 488, Criminal P. C. It is clear from the provisions of the various sub-sections to Ss. 488 and 489, Criminal P. C. that this order of maintenance is dependent upon certain circumstances continuing to exist. In altered circumstances the order may be set aside or varied. The two sections lay down certain conditions under which an order for maintenance may be set aside. It is true that the sections have not mentioned the particular circumstances of this case. I think it would be reasonable to hold that where parties have come together and have asked the Court to cancel an order for maintenance the Court has jurisdiction to cancel such order. In any event this Court by virtue of the provisions of S. 561A, Criminal P. C., has certain inherent powers and under those powers this Court can cancel the order of maintenance in certain circumstances. In my opinion the circumstances which have occurred would justify this Court in cancelling the order of maintenance and for greater safety and I cancel that order. It is open to the wife, however, to file a fresh application for maintenance on fresh grounds.

[5] The Rule is discharged.

D.R.R. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 170 *[C. N. 57.]*

R. P. MOOKERJEE J.

Indra Chand Dutt Choudhury and others—*Appellants* v. *Tinkari Ghose and another*—*Respondents.*

A. F. A. D. No. 1214 of 1945, Decided on 9th September 1949, against decree of Sub-Judge, 1st Addl. Court, Alipore, D/- 9th March 1945.

(a) Tenancy Laws—Bengal Tenancy Act (VIII [8] of 1885), S. 182 — Right given by section is personal right—It continues to be available only so long as conditions in S. 182 are satisfied.

The word 'holds' in S. 182, indicates the point of time when the necessary ingredients are to be satisfied and that is when the dispute about the incidence of the tenancy of the homestead arises: A. I. R. (36) 1949 Cal. 259 and A. I. R. (23) 1936 Cal. 565, *Rel. on.*

[Para 16]

It is not correct to state that the raiyat or an underraiyat acquires a right of occupancy in the homestead on his proving that he is a settled raiyat or the holder of a raiyati in the same village or in a contiguous one. It is not that the homestead itself becomes a raiyati holding. The effect of the provisions is not to create a transferable occupancy right in that homestead. The right is a personal one dependent on the proof of the existence of certain facts. Such personal rights continue to be available only so long as the conditions are satisfied.

[Para 19]

(b) Tenancy Laws—Bengal Tenancy Act (VIII [8] of 1885), S. 182, (as amended in 1928)—Word 'contiguous' must be construed in its strict sense—Person holding homestead in one village and agricultural holding in another adjoining village—Subsequent division of latter into three villages with result that contiguity was lost—Person loses his right to claim benefit of S. 182.

The word 'contiguous' in S. 182, must be interpreted in its strict sense as 'touching in actual contact, next in space, meeting at a common boundary' and not in its loose sense as 'neighbouring, situate in close proximity'.

[Para 20]

Where a person holds his homestead land in one village and his agricultural holding in another adjoining village but the latter is subsequently divided into three villages with the result that the agricutural holding becomes situate in a village which has no common boundary or even a point of contact with the village in which the homestead is situate the person loses his right to claim the benefit of S. 182, in the homestead.

[Para 22]

Atul Chandra Gupta, Manindra Nath Ghose and Hemanta Krishana Mitra—for Appellants.

Dr. N. C. Sen Gupta and Provash Chandra Chatterjee — for Respondents.

Judgment.—This appeal is on behalf of the plaintiffs against the decision by the Courts below dismissing the plaintiffs' suit against the defendants for ejectment.

[2] The principal question in issue in this appeal depends on an interpretation of S. 182, Bengal Tenancy Act and is one of first impression.

[3] The plaintiffs are admittedly the owners of premises No. 47/1 now re-numbered 46/1 Barrackpore Trunk Road, covering an area of about 1½ bighas, which had been included upto March 1924, within the municipal limits of Cossipore Chitpore; but from after the passing of the Calcutta Municipal Act, 1923, which came into force on 1st April 1924, it is within the ambit of the Calcutta Corporation. As after service of notice under S. 106, T. P. Act, the defendants had not given up possession, the plaintiff filed the present suit for ejectment. There is a further claim for arrears of rent for a certain period upto the date of notice and for damages for use and occupation thereafter. The defence is that the alleged notice had not been served or at any rate it was not sufficient in law. The tenancy is claimed to be governed by the provisions of the Bengal Tenancy Act and in any view the defendants being settled rayats of the adjoining village Nainan they have acquired an occupancy right in the suit land and cannot be ejected.

[4] The learned Munsif held that the notice to quit had been duly served and the holding having

been leased out for residential use it was not a holding held for agricultural purposes but the defendants being settled rayats of the adjoining village the provisions under S. 182, Bengal Tenancy Act would be attracted. Plaintiffs' prayer for ejectment was accordingly dismissed.

[5] On appeal by the plaintiffs the learned Subordinate Judge agreed with the trial Court that the suit land had been leased out for residential purposes and the notice had been duly served. He, however, remitted the suit to the trial Court for further investigation as to the applicability of S. 182, Bengal Tenancy Act. The High Court was moved against this order of remand. The direction given by this Court is in the following terms:

"The learned Subordinate Judge will himself take such evidence as the parties think fit to adduce on the question whether the village Nainan is contiguous to the village where the suit land is situate. He will also take such evidence as the plaintiffs seem fit to adduce in rebuttal of the Dakhilas Ex. F series. He will then dispose of the appeal in accordance with law."

[6] Upto this stage the parties were proceeding on the footing that S. 182, Bengal Tenancy Act as amended in 1928, was the one applicable in the present case. When, however, the matter was heard by the learned Subordinate Judge after remand from this Court, it was argued that S. 182, as it stood before the amending Act of 1928, was attracted. This contention was upheld. The defendant tenant was found to have acquired an occupancy right in the suit land as their homestead from before the amended section had come into force. It was also held in the alternative that even if the amended section was applicable the defendants were equally protected. Hence this appeal on behalf of the plaintiffs.

[7] The first point urged on behalf of the appellants is that even if the line of reasoning adopted by the learned Subordinate Judge be accepted he was wrong in stating that the defendants had acquired an occupancy right before the amended section had come into effect on 21st February 1929. The dakhilas marked as Ex. F series show that the defendants were tenants in respect of the holding from 1324 B. S. 1st of Baisakh 1324 B. S. corresponds to 14th April 1917. Twelve years from this date would not be completed when the amended section took effect on 21st February 1929. The reasoning adopted by the Subordinate Judge for attracting the old section cannot be supported.

[8] Before I deal with the question whether the new point about the applicability of the old section can be urged, I shall first consider whether on the facts found S. 182 as it now stands can be attracted.

[9] There can be no question that the land in suit, although now under the jurisdiction of Calcutta Corporation is within the added area and under cl. (ii) of sub-s. (3) of S. 1, Bengal Tenancy Act, the provisions of the Bengal Tenancy Act would be attracted unless a notification, withdrawing the operation of the Act is issued. As there has been no such notification, the Bengal Tenancy Act is attracted over the area in question.

[10] Section 182, Bengal Tenancy Act, as after amendment in 1928 is in the following terms:

"When a raiyat or an under-raiyat holds his homestead otherwise than as part of his holding within the same village or any village contiguous to that village, his status in respect of his homestead shall be that of a raiyat or an under-raiyat according to the status of the landlord of the homestead, and the incidents of his tenancy of such homestead shall be governed by the provisions of this Act applicable to raiyats or under-raiyats, as the case may be."

[11] If the raiyat has his homestead in the same village in which he has his agricultural holding or in

"any village contiguous to that village the tenant will thereby acquire a status dependant on the status of the landlord of the homestead."

[12] The first question for consideration in this connection is whether the village Chasadhopapara, wherein the land in suit is situate and is used as the homestead, is contiguous to the village which is now known as Nainan Purba. The admitted fact is that to the east of the village Chasadhopapara was situate a village known as Nainan which extended further to the east beyond the limits of the northern boundary of Chasadhopapara. It is common case of both the parties that there was one village Nainan until 21th June 1931, when the old village Nainan was divided into three villages — the western portion which is just to the north of village Chasadhopapara remains as Nainan and is noted as sub-division (1) of Division 1 of Dehi Panchannagram. To the east of this sub-division is sub-division (13) which is known as Nainan Nij. To the further east of sub-division (13) is Nainan Purba, bearing the sub-division No. (12). From Billon's map marked Ex. J. it would appear that Nainan Purba had no separate existence as an independent village before 1931.

[13] On these facts it is contended on behalf of the landlord plaintiffs that Nainan Purba having now been declared as a separate village under S. 3 (19), Bengal Tenancy Act which has no common boundary with Chasadhopapara, the agricultural holding which is in Nainan Purba cannot be considered to be in a contiguous village and accordingly the provision of S. 182 will not be attracted.

[14] On behalf of the tenant defendants it is argued on the other hand that contiguity under S. 182 is not to be strictly interpreted but when two villages are near about, that should be taken

as sufficient compliance of the requirements of that section. As admittedly the tenant in respect of the agricultural land had acquired occupancy right before Nainan-Purba was declared to be a separate village, the right of occupancy which the defendants had so acquired in the homestead in Chasadhopapara could not be destroyed or affected by a subsequent declaration, creating Nainan-Purba as a separate village.

[15] It is now settled that the tenant need not take settlement of the agricultural holding and of the homestead at the same time. A person owning a homestead may become a raiyat subsequent to his taking the residential tenancy and he is entitled to the protection provided in S. 182. *Pulin Chandra* v. *Abu Bakhar Naskar*, 40 C. W. N. 599 : 67 C. L. J. 59 : (A. I. R. (23) 1936 Cal. 565). Similarly, a raiyat becoming a settled raiyat by lapse of time is entitled to invoke the provisions of this section in respect of the residential holding which he had been occupying from before.

[16] The word 'holds' in this section indicates the point of time when the necessary ingredients are to be satisfied and that is when the dispute about the incidence of the tenancy of the homestead arises. *Naihati Jute Mills* v. *Kali Prosad Saha*, 53 C. W. N. 82 at pages 90 and 91: (A. I. R. (36) 1949 Cal. 259), see also *Pulin Chandra* v. *Abu Bakhar Naskar* (40 C. W. N. 599 : 67 C. L. J. 59 : A. I. R. (23) 1936 Cal. 565): *supra*.

[17] It is also to be noticed that the rights which are declared in favour of the tenant over a homestead under S. 182 are dependent on his holding another agricultural tenancy in respect of which he has a right of occupancy. If such a tenant disposes of his agricultural holding and ceases to be a settled raiyat or an occupancy raiyat he will not continue to have the rights over his homestead which he previously had. *Naihati Jute Mills* v. *Kali Prosad Saha* (53 C. W. N. 82 : A. I. R. (36) 1949 Cal. 259) *supra* dissenting from the single Judge decision *Haru Charan Manna* v. *Sourendranath*, 40 C. W. N. 182.

[18] If, on the other hand, such a tenant transfers his residential holding to another person who holds no agricultural holding either in the same village or in any contiguous village, the transferee will not be entitled to rely or fall back upon the rights which could have been claimed by his transferor because of his being the holder of another agricultural raiyati holding.

[19] It is further not correct to state that the raiyat or an under raiyat acquires a right of occupancy in the homestead on his proving that he is a settled raiyat or the holder of a raiyat in the same village or in a contiguous one. It is not that the homestead itself becomes a raiyati holding. The effect of the provisions is not to create a transferable occupancy right in that homestead. The right is a personal one dependent on the proof of the existence of certain facts. Such personal rights continue to be available only so long as the conditions are satisfied.

[20] The Bench decision in *Naihati Jute Mills* v. *Kali Prasad Saha*, 53 C. W. N. 82 at p. 88 : (A. I. R. (36) 1949 Cal. 259) is a clear authority to the effect that the same person must, when the dispute arises about the ejectibility of the tenant from the homestead land be still holding there as agricultural plot. Contiguity of the villages must be proved as at that relevant time. The word 'village' as used in the Bengal Tenancy Act has got a special meaning in this Act as clearly defined in S. 3 (19) of the Act. On the declaration made in June 1931, Nainan-Purba has become a separate village. It is admitted that not only there is no common boundary between the village Chasadhopapara and the village Nainan-Purba, there is even no point of contact between the two. The word 'contiguous' in Murray's Oxford Dictionary is explained as "touching, in actual contact, next in space, meeting at a common boundary, bordering, adjoining." Reliance, however, is placed by the defendant respondent on what is stated by Murray as being the loose use of the word contiguous: "Neighbouring, situate in close proximity". In the first place such loose use is not in use in modern times. Further, such a loose use will introduce uncertainties and various complexities into the working of the provisions of S. 182. Anomalies will arise if it has to be decided in each particular case as to what is to be conceded to be close proximity. It will introduce an uncertainty which is wholly undesirable.

[21] Even if the test of close proximity were to be applied, the existence of another village Nainan Nij intervening between the two will not justify describing Chasadhopapara and Nainan-Purba as contiguous villages.

[22] I would, therefore, hold, that the two villages were not contiguous ones at the relevant time and the defendant is not entitled to rely upon S. 182, Bengal Tenancy Act as it now stands after amendment in 1928.

[23] As indicated already the defendant made a new case after remand that the old S. 182 was attracted though the grounds mentioned by the Subordinate Judge for attracting the old section cannot be supported. Dr. Sen Gupta contends that it may be possible for the defendants to prove that they had acquired occupancy rights in respect of the agricultural plot long before

1929, and that such right cannot be affected by the subsequent notifications declaring Purba Nainan as a separate village which cannot affect the defendants' right of occupancy which had so been already acquired.

[24] Reliance is placed on certain observations appearing in the *Naihati Jute Mills Co. Ltd.* v. *Kali Prasad Saha*, 53 C. W. N. 82 : (A. I. R. (36) 1949 Cal. 259) as to the effect of the amended section on rights already acquired by the operation of the old S. 182 before 1st January 1929. As the facts necessary for giving a final decision on this point have not been ascertained I would not express any opinion on this question.

[25] The question of attracting the provisions of S. 182 as it stood before the amendment had not been raised up to the High Court on the previous occasion and if such a point is allowed to be taken the parties will have to be given an opportunity of adducing evidence on question of facts which must be enquired into. Ordinarily, such an enquiry ought not to be allowed at a late stage. In view, however, a further enquiry has to be directed to determine the applicability or otherwise of the provisions contained in the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, which came into force during the pendency of appeal in this Court, I think the parties may have a further opportunity of agitating the applicability or otherwise of S. 182, Bengal Tenancy Act, as it stood before 1929.

[26] It may be noted that even if it had been held that the residential and occupancy holdings were in two contiguous villages the defendants would not have been able to rely upon S. 182 as it now stands as there is a further lacuna. On the authority of the *Naihati Jute Mills Co. Ltd.* v. *Kali Prasad Saha*, 53 C. W. N. 82:(A. I. R. (36) 1949 Cal. 259), the status of the tenant in respect of the homestead is to be determined "according to the status of the landlord of the homestead." It is for the tenant to prove what the status of the landlord is. This aspect of the case was neither raised by the parties nor considered by the Courts until the hearing of this appeal now. Had I not been of the view that the amended S. 182 was not attracted I would have been bound to send the case back for enquiry and decision as to the status of the landlord of the homestead i. e. the plaintiff. This point, however, now becomes immaterial on the decision arrived at as above.

[27] Even if it be found that the defendants are not entitled to rely upon or invoke the provisions contained in the old S. 182, Bengal Tenancy Act, a further question will arise for consideration. During the pendency of the appeal in this Court, the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, came into force on 1st December, 1948. Whether the defendants are "tenants" as defined in S. 2 (11) of this Act will have to be examined. Whether the defendants can in that case fall back upon Ss. 11, 12 or any other provisions of that Act will also require consideration.

[28] This suit cannot be finally disposed of until these questions are ascertained and considered.

[29] The judgment and decree passed by the Subordinate Judge are set aside and the case is remitted to the lower appellate Court for rehearing according to the directions indicated above. The learned Subordinate Judge will frame proper issues for determining whether old S. 182, Bengal Tenancy Act and or the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, are attracted in the present case. Such issues will be sent down to the Court of the Munsif for trial after allowing the parties to adduce evidence on those issues. The findings of the trial Court so arrived at will be considered along with evidence already on the record and the learned Subordinate Judge will proceed to hear the appeal on those issues only according to law. The appeal is accordingly allowed. Each party will bear his own costs in this Court. Future costs will be in the discretion of the Court below.

K.S. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 173 *[C. N. 58.]*

HARRIES C. J. AND SARKAR J.

Sris Chandra Nandy — Defendant— Petitioner v. *Sm. Annapurna Ray — Plaintiff— Opposite Party*

Civil Rule No. 819 of 1949, Decided on 4th November 1949, to revise order of Sub-Judge, Murshidabad at Berhampur, D/- 4th and 31st May 1949.

Civil P. C. (1908), O. 26, R. 1 — Application for examination of ailing witness on commission — Medical certificate in support of application is inadmissible —Evidence Act (1872), S. 60.

Medical certificate tendered in support of an application for the issue of a commission for the examination of a witness on the ground of illness is inadmissible in evidence being the worst form of hearsay evidence. The doctor himself should be called in evidence.

[Paras 5 and 6]

Annotation : ('44-Com.) C. P. C., O. 26, R. 1, N. 4; ('46-Man.) Evidence Act, S. 60, N. 4.

Sitaram Banerjee and Amarendra Narain Bagchi —for Petitioner.

Chandra Sekhar Sen and Lala Hemanta Kumar —for Opposite Party.

Harries C. J. — This is a petitton for revision of an order of a learned Subordinate Judge of Murshidabad directing that the evidence of the plaintiff's husband be taken on commission.

[2] The plaintiff who is a lady had already given evidence on commission in the suit and it is suggested that her husband was her legal adviser and a most important witness in the case. The defence were naturally anxious to cross examine this witness in open Court. But an application was made for the issue of a commission on the ground that the witness was unfit to give evidence.

[3] An affidavit of the plaintiff was filed in support of the application and a medical certificate of some medical practitioner was also tendered.

[4] There can be no doubt that the learned Judge in coming to the conclusion that a commission should issue was influenced by this medical certificate. In his order he states :

"Heard the learned lawyers of both parties and perused the petition of the plaintiff of date supported by a medical certificate. Plaintiff's prayers for examination of her ailing husband on commission will be allowed."

[5] Mr. Banerji on behalf of the petitioner has contended that this medical certificate was inadmissible. The medical man who gave the certificate did not swear an affidavit and a medical certificate tendered in this manner is the worst form of hearsay evidence. By tendering the certificate the plaintiff informs the Court what the doctor says in the matter with her husband. She certainly could not give evidence that a doctor had told her verbally what was in the certificate. Neither can she produce the certificate and make it evidence because it is merely what the doctor had told her in writing. The certificate is wholly inadmissible in evidence. That being so, the very basis of the Judge's order disappears and the order must consequently be set aside.

[6] It will be of course open to the plaintiff, if her husband is now unfit to give evidence, to make a fresh application. But before the Court makes an order for the examination of this witness on commission it must have before it admissible evidence. The doctor should be called so that the defence would have an opportunity of cross examining to test his evidence.

[7] The result, therefore, is that this petition is allowed and the order of the learned Subordinate Judge is set aside. The rule is made absolute with costs.

[8] Let the counter affidavit filed in Court to day be kept on the record.

Sarkar J.—I agree.

D.H. *Petition allowed.*

A. I. R. (37) 1950 Calcutta 174 *[C. N. 59.]*

G. N. DAS AND GUHA JJ.

Province of West Bengal and another — *Defendants* — *Appellants* v. *Bholanath Sen and another* — *Plaintiffs* — *Respondents.*

A. F. O. O. No. 6 of 1947, D/- 20-9-1949, from order of Sub-Judge, 2nd Addl. Court, Alipore, D/- 23-9-1946.

(a) Civil P. C. (1908), S. 47—Objection to attachment by judgment-debtor — Case comes under S. 47 and not under Civil P. C. (1908), O. 21, R. 58.

Where the objection to attachment is at the instance of the judgment-debtor and not of a third party, the case comes within S. 47 and not under O. 21, R. 58. [Para 8]

Annotation : ('44-Com.) Civil P. C., S. 47, N. 4; O. 21, R. 58, N. 14 and 17.

(b) Indian Independence (Right, Property and Liabilities) Order (1947), Ss. 3, 7 and 12—Decree in favour of Province of Bengal in respect of court-fee before appointed day—Appeal pending on appointed day—Decree vests in East and West Bengal unless there is agreement — Appeal should be by both Provinces.

The decree which related to court-fees payable in respect of a suit in Alipore, Bengal and which was held for the purpose of the Province of Bengal, automatically vested, by virtue of S. 7 (2) of the Order, as from the appointed date, (15th August 1947) in His Majesty for the Provinces of East and West Bengal and the Provinces of East and West Bengal would be automatically substituted for the Province of Bengal in the appeal from the decree which was pending on the appointed day and the appeal would continue as such. But this result is, by reason of S. 3 of the Order, subject to any agreement between the two Dominions or Provinces or any award of the Arbitral Tribunal. In the absence of any agreement both the Provinces are to be deemed to be appellant. [Paras 14 and 18]

(c) Civil P. C. (1908), S. 60 — Appellant to Privy Council depositing amount with Court as security for costs of respondent — Security amount can be attached in execution of decree against depositor.

Under S. 60, subject to the proviso, any saleable property, over which judgment-debtor has disposing power, is liable to be attached. Where the appellant to the Privy Council deposits an amount in Court as security for the costs of the respondents, the appellant still retains some disposing power over the amount deposited, which he may exercise for his benefit. The extent of the power is dependent on certain contingencies. The fact that the G. P. Notes deposited are endorsed in the name of an officer of the Court does not affect the question. The word property in S. 60 is used in a wide sense and does not mean only proprietorship but includes any right or power in respect of the same. The security deposit is made for the purpose of enabling the respondents to England to realise the cost which may be awarded to the latter in case the appeal fails. Even if the appeal fails, the costs decreed may or may not exhaust the deposit. In the latter case, the surplus is available for the appellant (depositor). If the appeal succeeds, the whole of the deposit remains at the disposal of the depositor. [Paras 20, 21 and 24]

This security deposit can, therefore, be attached in execution of a decree against the depositor : A. I. R. (17) 1930 All. 225 and A.I.R. (16) 1929 Pat. 97, *Rel. on;* A. I. R (6) 1919 Mad. 607 ; A. I. R. (20) 1933 Cal. 625 and 53 C. W. N. 832, *Disting.* [Para 26]

Annotation : ('44-Com.) Civil P. C., S. 60, N. 6.

(d) Debt Laws— Bengal Money-lenders Act (X [10] of 1940), S. 36—Privy Council appeal dismissed and decree maintained — Decree reopened under Act and new decree passed—Security deposited by appellant (judgment-debtor) before Privy Council for costs of respondent (decree-holder) is not extinguished. [Para 29]

Chandra Sekhar Sen and Jagneswar Majumdar — for Appellants.

Md. Asir—for Province of East Bengal.

Siti Kanta Lahiri — for Respondents.

G. N. Das J.—This is an appeal by the Province of Bengal against an order dated 23rd September 1946, passed by Mr. J. P. Mukherjee, learned Subordinate Judge, 2nd Additional Court, District 24-Parganas, dismissing an execution case started by appellant.

[2] The facts are as follows : Bholanath Sen, predecessor-in-interest of the respondents and Tulsimanjuri Dasi filed a suit in *forma pauperis*, being Title Suit No. 69 of 1939 against Rajlakshmi Dasi and Nabani Gopal Banerjee. On 31st June 1941, the suit was dismissed and under the provisions of O. 33, R. 11, Civil P. C., a decree for payment of Rs. 2484-12-0 being the court-fees which would have been payable to the Government, had the plaintiff not been permitted to sue as paupers, was passed against the plaintiffs in favour of the Government.

[3] In 1900 the said Bholanath Sen had borrowed a sum of Rs. 3000 from Jogendranath Das on a mortgage. In 1911, Jogendra sued to enforce the mortgage. The Court, however, passed a money decree in favour of Jogendra. Jogendra preferred an appeal to this Court. On 5th June 1917, this Court allowed the appeal and passed a preliminary mortgage decree. Bholanath Sen preferred an appeal to His Majesty in Council, which was numbered P. C. Appeal No. 126 of 1917. Bholanath Sen deposited 3½ p. c. G. P. Notes of the face value of Rs. 4000 as security for cost of the said Jogendranath Das, in the said P. C. Appeal. The P. C. Appeal was dismissed with costs. On 23rd November 1918, a final mortgage decree for Rs. 43,000 odd was passed in favour of Jogendra. The decree was executed and the mortgaged properties were sold on 6th October 1936 and purchased by the decree-holder Jogendra for Rs. 79,000 the dues of the mortgagee being about Rs. 85,000 on that date. The sale was confirmed on 29th May 1939. The decree-holder auction purchaser took possession through Court on 20th February 1940. The Bengal Money-lenders Act having come into force, the judgment-debtor Bholanath Sen instituted proceedings under the said Act for reopening of the said mortgage decree and for incidental reliefs. On 26th February 1944 the learned Subordinate Judge directed the decree to be reopened and a new preliminary decree for Rs. 43,000 was passed, but no instalments were granted. Both Jogendra and Bholanath appealed to this Court. The appeals were disposed of on 26th April 1944 and this Court directed a preliminary decree to be passed for Rs. 28,826 which was made payable in 10 annual instalments commencing with 3rd January 1945.

[4] Meanwhile on 25th August 1942 the Province of Bengal executed the decree for Rs. 2484-12-0 passed in T. S. No. 69 of 1939 against Bholanath Sen and Tulsi Manjuri Dasi and prayed for realisation of the same by the attachment of 3½ p. c. G. P. Notes for Rs. 4000 deposited by Bholanath Sen as security for costs of the respondent Jogendranath Das in P. C. Appeal No. 126 of 1917. This was registered as Title Execution Case No. 39 of 1942. On 15th March 1944, Ajit Nath Das one of the respondents in P. C. Appeal No. 126 of 1927 filed an application under O. 21, Rr. 52 and 58 Civil P. C., for releasing the said G. P. Notes from attachment by the Province of Bengal. This gave rise to Miscellaneous Case No. 11 of 1944. The miscellaneous case was dismissed on 2nd August 1944. On the ground that as the first instalment had not fallen due, the claimant had no lien on the said 3½ p. c. G. P. Notes and the latter could not be released from attachment. No suit has been filed by the claimant under O. 21, R 63, Civil P. C.

[5] On 6th March 1946, the judgment-debtor Bholanath Sen filed a petition of objection under S. 47 and prayed that the G. P. Notes be released from attachment and the execution case be dismissed. This was registered as Miscellaneous Case No. 12 of 1946. The learned Subordinate Judge by his order dated 23rd September 1946 allowed the miscellaneous case on the following grounds : (1) The mortgagee respondents in the said P. C. Appeal have a lien on the said G. P. Notes. (2) The said G. P. Notes were earmarked for a certain purpose viz., the payment of the cost of the said P. C. Appeal and cannot be utilised for any other purpose unless the said costs are paid. (3) The order in the claim case was made on the footing that the first instalment had not then become due and is not conclusive. On 2nd January 1947, the decree-holder Province of Bengal preferred this appeal against the said order.

[6] Mr. Sen, the learned Senior Government Pleader appearing for the appellant pressed the following points: (1) Even assuming that the lien of the respondents in the said P. C. Appeal subsisted, there was no bar to an attachment of the said G. P. Notes. (2) The lien in fact does not subsist, because the P. C. costs are now incorporated in the reopened decree which created a charge only on the mortgage properties. (3) The order passed in the claim case is binding on the judgment-debtor.

[7] Mr. Siti Kanta Lahiri for the respondents raised three preliminary objections : (1) The petitition filed by the respondent judgment-debtor really came under O. 21, R. 58, Civil P. C. and no appeal lay against the order allowing the same. (2) The appeal cannot proceed in the absence of Tulsimanjuri, the co-judgment debtor. (3) The decree under execution cannot be now executed by the Province of Bengal which has ceased to exist since the appointed day (15th August 1947).

[8] The first objection must be overruled as the objection to attachment is at the instance of the judgment-debtor and not of a third party. The case comes within S. 47 *vide* Mulla's Civil Procedure Code, Edn. 11, p. 188.

[9] The second objection is also without any substance. The G. P. Notes sought to be attached were deposited by Bholanath Sen alone. The relief is claimed against him and on his death his successors-in-interest who are parties to the appeal as respondents.

[10] The third objection requires careful consideration. Section 3 (1), Indian Independence Act, 1947 provides that as from the appointed day. (a) the Province of Bengal, as constituted under the Government of India Act, 1935, shall cease to exist, and (b) there shall be constituted in lieu thereof two new Provinces to be known respectively as East Bengal and West Bengal.

[11] Section 3 of the Indian Independence (Right, Property and Liabilities) Order, 1947 provides that the initial distribution of rights, property and liabilities would be governed by the provisions of the order subject to any agreement between the two Dominions of India and Pakistan, or the provinces concerned, and to any award of the Arbitral Tribunal.

[12] Sections 4, 5 and 6 relate to the distribution of land, goods, coins, banknotes and currency notes.

[13] Section 7 deals with distribution of all property other than land, goods, coins, banknotes and currency notes.

[14] The effect of S. 7 (2) is to vest in His Majesty for the joint purposes of the two Dominions of East Bengal and West Bengal all such property which was held for the purpose of the Province of Bengal. It is admitted on both sides that the decree which related to court fees payable in respect of a suit in Alipur, Bengal was held for the purpose of the Province of Bengal; as such, the decree automatically vested, as from the appointed date, in His Majesty for the Province of East and West Bengal.

[15] By S. 12 (2) of the Order, therefore, the Provinces of East and West Bengal would be automatically substituted for the Province of Bengal in this appeal which was pending on the appointed day and the appeal shall continue as such.

[16] The above result is, by reason of S. 3 of the Order, subject to any agreement between the two Dominions or Provinces or any award of the Arbitral Tribunal.

[17] No such agreement has been placed before us and we are not aware of the terms of such an agreement, if any.

[18] As the interest in the decree has been automatically transferred to the Provinces of East Bengal and West Bengal, both the Provinces are to be deemed to be appellant. The learned Senior Government Pleader, for the Province of West Bengal represents one of the appellants viz., the Province of West Bengal. We gave time to the Province of East Bengal to appear. Mr. Asir has appeared for the Province of East Bengal and represents the latter. Mr. Asir has accepted the position taken by the Province of West Bengal.

[19] We shall now proceed to deal with the contentions raised on behalf of the appellants.

[20] The security deposit was made for the purpose of enabling the respondents to England to realise the cost which may be awarded to the latter in case the appeal fails. Even if the appeal fails, the costs decreed may or may not exhaust the deposit. In the latter case, the surplus is available for the appellant (depositor).

[21] If the appeal succeeds, the whole of the deposit remains at the disposal of the depositor.

[22] Section 60, Civil P. C., enumerates the properties liable to attachment, namely lands . . . . . ; all other saleable property, moveable or immoveable, of the judgment-debtor, over which or the profits of which, he has a disposing power which he may exercise for his benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf.

[23] The enumeration is subject to certain proviso which are not applicable in the present case.

[24] The effect of the security deposit as stated already, is not to take away entirely the disposing power of the depositor. In spite of the fact that the deposit is ear-marked for a specific power, the depositor still retains a disposing power which he may exercise for his benefit. The extent of the power is dependent on certain contingencies. The fact that the G. P. Notes deposited are endorsed in the name of an officer of the Court did not affect the question. The word property is used in a wide sense and does not mean only proprietorship but includes any right or power in respect of the same. The effect of the attachment is merely to prevent private

alienation and to subject the attached property to claims enforceable under the attachment.

[25] In my opinion, the security deposit is liable to attachment in execution of a decree.

[26] This view is supported by the decision in *Shantanand* v. *Basudevanand*, A.I.R. (17) 1930 ALL. 225 at pp. 244-245 : (52 ALL. 619 F. B.).

[27] The view is also supported by the decision in *Jagadish Narain* v. *Mt. Ramsakal Koer*, 8 Pat. 478 : (A. I. R. (16) 1929 Pat 97). In that case, money was deposited by an insolvent as security for costs of an appeal to His Majesty in Council. The deposit was attached by a creditor. It was held that the attachment was valid, the only effect is that it is subject to the result of the appeal.

[28] Mr. Lahiri relied on the case of *Ramiah* v. *Gopala Aiyar*, 41 Mad. 1053 : (A.I.R. (6) 1919 Mad. 607). In that case a debtor in order to prevent his arrest by the creditor, deposited the claim of the plaintiff. The money so deposited was attached by another person who had obtained a decree against the depositor. The latter was adjudicated an insolvent. It was held that the money deposited was charged with the dues of the plaintiff but the attachment effected was good, the rights of the attaching creditor and the official receiver were however subject to the said charge. Mr. Lahiri also relied on the case of *Gauranga Behari* v. *Manindra Nath*, 58 C. L. J 222 : (A. I. R. (20) 1933 Cal. 625). This case turned on the question of priority between a mere attaching judgment-creditor, the official receiver and a person in whose favour an order had been made by a Court to bring the money into Court. The cases cited by Mr. Lahiri do not therefore militate against the view taken by me. The decision in *Chitrambani Ltd.* v. *Kisava Achan*, 53 C. W. N. 832, did not decide the point before us. The first contention raised on behalf of the appellant therefore succeeds.

[29] It is not necessary to express an opinion on the second contention as we are not in a position to ascertain, on the materials before us, how far the judgment-debtor has fulfilled the terms of the reopened decree. We may observe, however, that the mere passing of the reopened decree had not the effect of extinguishing the security for costs of the Privy Council.

[30] The third contention is not of substance, the claim was filed by one of the decree-holders and the order made was not a final one.

[31] The result therefore, is that this appeal succeeds, the decision of the Court below is set aside and the execution case will proceed. In the circumstances of the case, the parties will bear their own costs.

Guha J.—I agree.

R.G.D. *Appeal allowed.*

1950 C/23 & 24

A. I. R. (37) 1950 Calcutta 177 *[C. N. 60.]*

HARRIES C. J. AND DAS GUPTA J.

Sk. Ohid and others—*Accused*—*Petitioners* v. *The Crown.*

Criminal Revn. No. 501 of 1949, D/- 18th November 1949.

(a) Criminal P. C. (1898), S. 117 (4)—Evidence of general repute should be considered very carefully—Magistrate or Judge must consider how far general repute is justified by good grounds—Circumstances under which accused acquired general repute must be examined.

Section 117 (4) provides a very extraordinary rule of evidence and because of the special nature of this provision of law, it is necessary that Judges and Magistrates should consider very carefully the evidence of general repute that is adduced to decide whether in a particular case the evidence of general repute is sufficient to establish the truth of the prosecution allegation that a person is a habitual thief or a robber. Mere enumeration of the number of persons who have given evidence does not amount to a sufficient consideration of the points that are at issue. When the prosecution relies mainly on the evidence of general repute to establish the case that a person is a habitual thief or robber, it is absolutely necessary for the Magistrate and the Judge to consider how far the general repute is justified by good grounds as also to examine the circumstances under which the accused acquired the general repute.

[Paras 5 and 6]

Annotation : ('49-Com.) Criminal P. C., S. 117 N. 7.

(b) Criminal P. C. (1898), S. 117 (4)— General repute— Evidence as to — Witness and accused belonging to same caste and walk of life — Fact is in favour of his opinion and not against his credibility.

Though the fact that a certain person is a relation is a circumstance which may be taken into consideration against his evidence, the fact that he belongs to the same caste and walk of life is, far from being a circumstance against the credibility of the witness in a matter of general repute, a circumstance in favour of his opinion; because it is only people who belong to the same circle as the accused who can really give evidence of any value as to what he is reputed to be. [Para 5]

Annotation : ('49-Com.) Criminal P. C., S. 117 N. 7.

(c) Criminal P. C. (1898), Ss. 110 and 117 (2) and (5)—Joint enquiry—Enquiry under S. 110 — There should be accusation justifying joint enquiry.

A joint enquiry against a number of persons would be fully justified in law if and when these persons have jointly taken part as habitual robbers and thieves. In enquiries under S. 110, no less than in trials for offences under the Code, it is necessary before there can be a joint trial of certain persons that there should be an accusation which would justify a joint trial. Where there is no such accusation, a joint enquiry is not in accordance with the provisions of law: A.I.R. (25) 1938 P. C. 130, *Foll.* [Paras 9 and 11]

Annotation: ('49-Com.) Criminal P. C., S. 117, N. 13 Pts. 22 and 23.

Sudhansu Sekhar Mukherji — for Petitioners.

J. M. Banerji — for the Crown.

Das Gupta J. — This application is against an order of the Additional Sessions Judge of Midnapur under S. 123, Criminal P. C., directing the petitioners to execute bonds for good behaviour for a period of three years, and in default

to undergo rigorous imprisonment for the same period.

[2] Proceedings under S. 110, Criminal P. C., were drawn up against these petitioners and other persons, the allegations being that they were habitual thieves, robbers, house breakers and were so dangerous and desperate that their being at large without security was hazardous to the community. A large number of witnesses were examined on behalf of the prosecution and quite a fair number for the defence. The learned Magistrate came to the conclusion, on a consideration of the evidence, that the allegations that these persons were habitual thieves, robbers and house breakers had been established and it was necessary for the maintenance of good behaviour that they should be ordered to execute bonds for being of good behaviour for a period of three years. Accordingly, he sent the papers to the learned Sessions Judge of Midnapore. The learned Magistrate discharged two of the persons against whom proceedings were drawn up, being of the view that the charge had not been established as against them.

[3] The learned Sessions Judge has come to the conclusion that the learned Magistrate was right in his opinion that the evidence established the prosecution allegation that these persons were habitual thieves, robbers and house-breakers. He accordingly confirmed the order of the learned Magistrate. In fact he went a little further than the learned Magistrate inasmuch as he even passed an order as regards the two persons whom the Magistrate had discharged holding that the evidence showed that they also were habitual thieves and robbers and accordingly passed an order against them also directing them to execute bonds for good behaviour.

[4] It appears that later on the learned Judge passed an order in order, as it is said, to rectify this wrong direction of him so that the present position as regards these two persons, namely, Abinash and Dhananjoy is that there is no order against them.

[5] We are not concerned at present as to how the learned Judge could make such a mistake, nor how he himself having made such a wrong order had the jurisdiction to pass what is called the rectifying order. The mistake however shows this that the learned Judge was either thoroughly confused by the mass of evidence on the record or that he did not give the matter the attention it deserved. There can be no other explanation of a learned Judge wrongly thinking, as regards persons who had been discharged, that the Magistrate had passed an order and then proceeding to confirm that order. When we turn to the judgment delivered by the learned Judge I am confirmed in my opinion that the learned Judge did not give the matter the attention it deserved. His judgment hardly contains any discussion of the evidence. It is true that S. 117 (4), Criminal P. C. provides that the fact that a person is a habitual offender may be proved by evidence of general repute. This is a very extraordinary rule of evidence and because of the special nature of this provision in law, it is necessary that Judges and Magistrates should consider very carefully the evidence of general repute that is adduced to decide whether in a particular case the evidence of general repute is sufficient to establish the truth of the prosecution allegation that a person is a habitual thief or a robber. Mere enumeration of the number of persons who have given evidence does not amount in my opinion to a sufficient consideration of the points that are at issue. The learned Judge, when considering the case of each accused, has merely given the number of persons who deposed to the general repute and then pointed out as regards the persons who spoke in favour of the general repute of the person that they should not be believed, because apart from being relations they did not belong to different castes and walks of life. While I am inclined to agree that the fact that a certain person is a relation is a circumstance which may be taken into consideration against his evidence, the fact that he belongs to the same caste and walk of life is, far from being a circumstance against the credibility of the witness in a matter of general repute, in my opinion, a circumstance in favour of his opinion; because it is only people who belong to the same circle as the accused who can really give evidence of any value as to what he is reputed to be.

[6] When the prosecution relies mainly on the evidence of general repute to establish the case that a person is a habitual thief or robber, it seems to me absolutely necessary for the Magistrate and the Judge to consider how far the general repute is justified by good grounds. It may very well happen that a man is arrested several times, put on trial and acquitted. The fact that he has been arrested several times would itself create a general repute against him. The mere fact that the house of a person has been searched several times would also be sufficient to create a general repute against him even though there may not be good ground for such a search and the search may be the result of some party faction or a quarrel with the police. For these reasons it is necessary, when assessing the value of the evidence of general repute, for the Judge and the Magistrate to examine the circumstances under which the accused acquired the general repute.

[7] In the present case the learned Judge has not cared to consider the evidence from that light at all. To my mind, the judgment delivered by the learned Additional Sessions Judge quite apart from the circumstance mentioned above that he has wrongly passed an order against two persons who had been discharged by the Magistrate is an entirely unsatisfactory one and does not show that he applied his judicial mind to the consideration of the matter at issue.

[8] If that were all, I should be inclined to set aside the order passed by the learned Judge and send the matter for further enquiry by him. But there is a very much more fatal defect in this case. Eleven persons were dealt with together in the enquiry under S. 110, Criminal P. C. Sub-s. (2) of S. 117 provides that an enquiry in proceedings under S. 110 shall be made as nearly as may be practicable in the manner prescribed for conducting trials and recording evidence in summons cases. There is a special provision in sub-s. (5) that where two or more persons have been associated together in the matter under enquiry, they may be dealt with in the same or separate enquiries as the Magistrate shall think just.

[9] There can be no doubt that in view of these provisions a joint enquiry against a number of persons would be fully justified in law if and when these persons have jointly taken part as habitual robbers and thieves. It is settled law now that it is on the basis of the accusation made and not on the facts finally proved on the evidence that the legality or the illegality of a joint trial depends. This has been held by the Privy Council in the case of *Babulal Choukhani* v. *Emperor*, 42 C. W. N. 621 : (A. I. R. (25) 1938 P. C. 130 : 39 Cr. L. J. 452).

[10] It is contended by Mr. Banerji on behalf of the Crown that the decision of the Privy Council covers only cases of joint trials and does not cover cases of enquiry under S. 110, Criminal P. C. In my opinion, there is no substance in this contention. Sub-section (5) of S. 117, Criminal P. C., which has been already mentioned runs thus :

"Where two or more persons have been associated together in the matter under enquiry, they may be dealt with in the same or separate enquiries as the Magistrate shall think just."

[11] When is the Magistrate to decide whether the same or separate enquiries are to be held? Obviously before he starts the enquiries. Necessarily therefore he cannot decide whether to hold the same or separate enquiries before allegations are made before him that several persons have been associated together as habitual thieves and robbers. Curious consequences will follow, if the contention of Mr. Banerji that it is not necessary that an accusation that the persons have been associated together as habitual thieves and robbers should be made at the very outset before the enquiry commences be accepted. It may very well happen that after a large number of witnesses have been examined the Magistrate is satisfied on the evidence that the accused persons have not been associated together in the matter under enquiry. According to Mr. Banerji, he is then to scrap all the proceedings and start afresh. That clearly in my opinion is not the intention of the Legislature. The very language used in sub-s. (5) does in my judgment make it very clear that the Magistrate has to decide before the enquiry commences whether certain persons should be dealt with in the same or separate enquiries. My conclusion therefore is that in enquiries under S. 110, Criminal P. C., no less than in trials for offences under the Code, it is necessary before there can be a joint trial of certain persons that there should be an accusation which would justify a joint trial. It is quite clear that in the present case there was no such accusation. The necessary consequence that follows is that the enquiry which has been held has not been held in accordance with the provisions of law.

[12] In this view I do not think that it is possible to send the matter for any enquiry by the learned Judge, for as there is no accusation of joint activity he cannot even now hold a joint enquiry.

[13] I would therefore make this rule absolute and set aside the orders passed by the learned Judge and the Magistrate directing these persons to furnish security for good behaviour. They are discharged from their bail bonds.

[14] Panchu, Jnan Giri and Purna Sahu against whom also orders were passed by the learned Magistrate and the learned Judge, have not moved this Court in revision. In view of my conclusion however that the whole enquiry has been illegal, I would set aside the orders passed by the learned Magistrate and the learned Judge against them as well. If they are in custody they should be set at liberty at once.

Harries C. J.—I agree.

V.R.B. *Rule made absolute.*

** A.I.R. (37) 1950 Calcutta 179 *[C. N. 61.]*

DAS GUPTA AND GUHA JJ.

Sadananda Pyne — Appellant v. *Harinam Sha and another—Respondents.*

A. F. O. D. No. 170 of 1948, Decided on 16th September 1949, against decree of D. J., Hooghly, at Chinsurah, D/- 13th August 1948.

(a) Succession Act (1925), Ss. 263, 283 (1) (c) — Revocation of probate — Application for — Tres-

passer in possession of deceased's property has no interest in it—He cannot apply for revocation.

In order to have the *locus standi* to apply for revocation of probate, a person must have an interest in the estate of the deceased, supposing he had died intestate. Thus, the creditor of a son who would have been heir on intestacy has *locus standi* to apply for revocation of probate. But a person who has merely the possession of a trespasser has no interest *in* the estate of the deceased. He has an interest *against* the estate of the deceased. He has, therefore, no *locus standi* to file such an application. [Para 2]

Annotation : ('46-Man.) Succession Act, S. 263 N. 2; S. 283 N 11 Pt. 18.

✠✠(b) Hindu law — Succession — Dayabhaga School — Acharyya — On failure of blood relations Acharyya inherits—Diksha guru is not Acharyya.

The rule that an Acharyya of a Hindu governed by the Dayabhag system will inherit on the failure of the blood relations who are heirs is not obsolete in present-day India; in these days, the person who gives the Upanayan will inherit as Acharyya, and a Dikshaguru not being the person who gives Upanayan, or any other preceptor whether spiritual preceptor or not, will not inherit: 12 M. I. A. 448 (P. C.) and A. I. R. (1) 1914 P. C. 1, *Disting.*; *Texts and Case law discussed.* [Para 42]

(c) Interpretation of Statutes — Duty of Courts—Courts cannot make new laws or repeal existing ones.

It is the legislature alone who can make new laws. Courts must resist the temptation to change the law under cover of interpretation of law. If as Judges, the Courts use their power to interpret law, to alter laws which they may not like, and to make new laws which they think should be made, that would be a corrupt use of their power. The Courts have to observe constant vigilance against such corrupt use of power by them. Similarly, if and when the ground on which a law is enacted ceases to exist, it is the province of the proper legislative authority to consider the matter of repealing the same The Courts cannot arrogate to themselves the functions of the legislature. The Courts have no right to repeal alaw, because what appears to them to be the reasons for which the law was enacted no longer exist. [Paras 24 & 29]

Hiralal Chakravarty and Shyamadas Bhattacharjya — for Appellant.

Apurba Dhan Mukherji and Chandra Narayan Laik — for Respondents.

Das Gupta J. — The principal question for decision in this appeal is whether the Dikshaguru of a Hindu not being the person who invested him with the sacred thread is his heir, on failure of other heirs. The appeal is against the decision of a Probate Court, allowing an application for revocation of a probate that had been granted of a will of one Manmatha Nath Mandal, who will be later referred to simply as Manmatha. Manmatha died in July 1933, leaving his widow Manada Bala Dassi hereinafter referred to as Manada. Manada died in 1945. Disputes arose over properties left by Manmatha, after the death of Manada, between purchasers from Pachkari Bhuian who sold as a guardian of Gokul said to have been adopted by Manmatha and the purchaser from Janaki Nath Chakravarti who claimed to be Manmatha's heir on the death of Manada, on the ground that he was Manmatha's "Dikshaguru". On 23rd August 1945, Panchkari Bhuian applied for Probate of a will said to have been left by Manmatha. He stated therein that there was no other heir of the deceased except Gokul Chandra Mandal, who had been taken in adoption by Manmatha. No special citation was, therefore, issued, and Probate was granted in November 1945. On the last May 1946, Harinam Sha filed an application for revocation of Probate. He stated therein that the will was a forged document, that the story of adoption of Gokul was false, that Manmatha had died leaving Manada as his heir, and on Manada's death, as no blood relations who would be heirs according to Hindu law existed, Manmatha's Dikshaguru Janaki Nath Chakravarty (who will be hereinafter referred to as Janaki) succeeded to Manmatha's estate as his heir, but this fact was fraudulently concealed in the application for probate, and probate was obtained without any citation being issued on Janaki. It was stated that Harinam had purchased the properties of Manmatha from Janaki by registered Kobala on 21st June 1945. The main contentions of Panchkari Bhuian, in reply to this application were that the will was genuine, that Gokul was really the adopted son of Manmatha, and that Janaki was not Dikshaguru of Manmatha. These contentions were adopted by Sadananda Pyne, who was added as a party. At the trial, the dispute centred round the question of law, whether a Dikshaguru is the heir of a Hindu, on failure of nearer heirs. The first question that was raised was whether Harinam Sha, as purchaser from Janaki, had *locus standi* to apply for revocation of probate, the other question was whether non-mention of Janaki as an heir was a "just cause for revocation of the Probate." The decision of both these questions turned on the question whether Janaki would be Manmatha's heir, on failure of nearer heirs. The learned trial Court held that Janaki was an heir; under the Hindu law, and allowed the application for revocation.

[2] Before entering into the question whether Janaki, as Dikshaguru, is an heir under the Hindu law, it is necessary to consider the contention of Mr. Apurbadhan Mukherji the learned advocate for the respondent that Harinam Sha, has *locus standi* to apply for revocation for probate, even if Janaki is not an heir, and so Harinam has not acquired any interest in the property by his purchase from Janaki. Mr. Mukherji contends that the mere fact that Harinam was in actual possession of the property gives him an interest in the property, which gives him a *locus standi*. If Janaki was not

Manmatha's heir, Harinam has acquired no interest by his purchase from Janaki and Harinam's possession is merely a trespasser's possession. Does possession as a trespasser amount to an interest which gives the *locus standi* to apply for revocation of probate? Clearly not. In order to have the *locus standi* to apply for revocation of probate, a person must have an interest in the estate of the deceased, supposing he had died intestate. Thus, the creditor of a son who would have been heir on intestacy, has *locus standi* to apply for revocation of probate. But a person who has merely the possession of a trespasser, has no interest *in* the estate of the deceased. He has an interest *against*—the estate of the deceased. Whether the estate descends to the heir on intestacy, or the legatee on the will, can have no legal effect on the trespasser's possession. If he remains in possession for the statutory period of twelve years, he will acquire a lawful title—which will be good against the legatee no less than against the heir on—intestacy. It is clear to me that a trespasser has no interest in the estate of the deceased. He has therefore no *locus standi* to file an application for (revocation of?) probate.

[3] Mr. Mukherji relied for his proposition that a trespasser has *locus standi* to file an application for probate on the dictum in Mortimer's Probate and Practice, which was accepted by Mukherjee J. in *Haripada Saha* v. *Ghanesyam Saha*, 49 C. W. N. 713, that any interest is sufficient to gives *locus standi*. There can be no doubt whatsoever that both Mortimer and Mukherji J. are thinking of some interest in law—some legal title, however remote or however slight—when they say "any interest is sufficient . . . ." A trespasser has no interest in law; if he may be said to have a "possessing interest" it has to be remembered that the possession being without title, this interest is against 'law'.

[4] I have not the least hesitation in rejecting Mr. Mukherji's proposition that a trespasser's possession gives him *locus standi* to file an application for revocation for probate.

[5] In order to succeed in the application for revocation, Harinam Sha bas therefore to establish that Janaki would be Manmatha's heir, on failure of other heirs. That Janaki was Manmatha's 'Dikshaguru' is not disputed now, nor that this Diksha was Tantrik Diksha. It is also not disputed that according to Dayabhag, the 'Acharyya' is a Hindu's heir, on failure of blood relations who are heirs. Jagnabalkya does not mention "Acharyya" as an heir; but Manu does. Jimutbahan accepts Manu's text, and includes Acharyya in his list of heirs. In fact, he combines Manu's dictum "Acharyya Sishya eb ba" and Jagnabalkya's "Sishyah Sabrahmacharinan" and states as the law that on failure of Sapindas, Sakulya and Samanodakas, an Acharyya inherits—on failure of Acharyya a Sishya inherits—and on failure of Sishya, a Sabrahmachari inherits.

[6] Jimutbahana himself does not say whom he means by the word "Acharyya". He is content to quote Manu's text as the authority of his statement of the law that an Acharyya inherits. Srikrishna Tarkalankar, who flourished more than two hundred years ago, does however in his commentary on the Dayabhag, offer an explanation of the word "Acharyya" as used by Jimutbahan here. He explains the word as "the teacher of the Vedas". In his synopsis on the Dayabhag which he calls Daykram Sangraha, Srikrishna when mentioning Acharyya as the heir, takes pains to cite a verse (from Jagnabalkya) to explain who Acharyya is and says "Upaniya Dedadvedamsa Acharyya Udahratatha". It is abundantly clear therefore that Srikrishna had no doubt in his own mind as to what "Acharyya" meant in Dayabhag. He was clearly of opinion that Jimutbahan, was using this word to mean the Brahmin who gives the sacred thread, and then teaches the Vedas. To him clearly Acharyya did not include Dikshaguru ; or "religious preceptors" in general.

[7] It is well to remember in this connection that tantrism was not less prevalent in Srikrishna's time than now; and there can be no doubt that "Dikshagurus" were well known to Srikrishna's time. His interpretation of "Acharyya" to mean only the Brahmin who gives the sacred thread, and then teaches the Vedas, must therefore be taken to exclude "Dikshaguru" from the list of a Hindu's heirs.

[8] Mr. Mukherji has drawn our attention to Sir William Jone's translation and Colebrooke's translation of "Acharyya" as used in Dayabhag, as "Religious preceptor", and has asked us to accept the view of these learned translators in preference to Srikrishna's. I have the highest regard for the scholarship and erudition of Sir William Jones, and Colebrooke ; but if it is a question of preference between those English scholars and Srikrishna, I have no hesitation in saying that I would prefer Srikrishna's authority. It is important to mention that neither Sir William Jones, nor Colebrooke has given any reasons for interpreting Acharyya as a generic term, meaning all kinds of religious preceptors, in preference to Srikrishna's interpretation of it as meaning a specific class of religious preceptors viz., the preceptor, who gives the sacred thread, and then teaches the Vedas.

[9] In *The Collector of Madura* v. *Moottoo Ramalinga*, 12 M. I. A. 397 : (1 Beng. L. R. 1

P. C.), the Privy Council observed that the duty of a Judge administering Hindu law is not so much to inquire whether the doctrine is fairly deducible from the earliest authorities, as to ascertain whether it is one that has been received by the particular school of Hindu law, which prevails in the district in which the case arises, with which he has to deal and whether such doctrine has been sanctioned by usage; as by the Hindu system of law, clear proof of usage will outweigh the written opinion of text writers. In the present case, there is no evidence of any dispute between usage and the opinion of the text writers. It is reasonable to think that Srikrishna's interpretation is based on his own experience of usage ; but whether or not that is so, it is I think proper, to examine Manu's own writings for finding what kind of religious preceptor, he had in his mind, when he laid down that an Acharyya would be an heir.

[10] In Sloka 140, Chap. II of his Sambita, Manu gives the following definition of an Acharyya:

Upaniya tu yah Sishyam Vedamadhyapayod-dvijah

Sakalpam Sarakshyacha tamacharyyam prachakshate

It has been argued by Mr. Mukherji that Manu is not giving his own definition of Acharyya ; but is stating what others think the Acharyya to be. There can be no doubt however that Manu is quoting with approval this definition of Acharyya even if we agree that this is not a definition starting with Manu. Quite apart from this Sloka, however, a study of the second chapter of Manu, (which deals with Brahmacharyasram) brings before the mind's eye a clear picture of the "Acharyya" as Manu saw him. The ceremony of Upanayan was indeed the most important event in a Hindu's life ; for it was this, which gave him his second birth. In the Upanayan ceremony itself, certain verses of the Vedas were taught by the Brahmins who invested the young Hindu with the sacred thread ; it was with this ceremony that he entered upon the Brahmacharyasram. Immediately after the Upanayan, the Hindu had to take up his residence in the house of this very Brahmin, and receive education in Vedas as well as other matters from him. Manu has sometimes used the words Guru and sometimes the word Acharyya in dealing with the Upanayan ceremony, and the system of studies thereafter ; but he has used either of these words to mean that one Brahmin who invested the Hindu with sacred thread, and then became his teacher. There was no vagueness in Manu's mind as to who this person was. He was not thinking of a number of functionaries, any of whom could be an Acharyya; he was thinking of one and one person only.

[11] Mention may be made only of the following verses :

145. Upadhyayan Dasacharyya Acharyyanam Satam Pita. [The "Acharyya" is ten times more venerable than an Upadhay; the father a hundred times more than the Acharyya.]

148. Acharyyastasya Yajatim Bidhibadvedaparagah Utpadayati Sabitrya Sasatya sajaramara. [But that birth which the Acharyya acquainted with the whole Veda, in accordance with the law procures for him through the Savitri is real, exempt from age and death.]

170. Tara Yadbrahmajanmasya Maunjibandhanachihritam Tatrasya Mata Sabitri Pita tvacharyya uchyyate. [Among those three, the birth which is symbolized by the investiture with the girdle of munja grass is his birth for the sake of the Vedas, they declare that in that birth Savitri (verse) in his mother and the Acharyya his father.]

171. Vedapradanadacharyam Pitaram parichakshate Nahyasmin Yujyate karma Kinchidamamamjibandhanat. [They call the Acharyya father because he gives the Veda; for nobody can perform a sacred rite before the investiture with the girdle of Munja grass.]

226. Acharyyo Brahmano Murtih Pita Murtih Prajapateh. [The Acharyya is the image of Brahmin, the father the image of Prajapati.]

The verses 148, 170 and 171 are specially helpful in understanding whom Manu had in mind, when he used the word Acharyya.

[12] The text on which Jimutbahana's rule that an Acharyya is an heir on the failure of blood relations, is Sloka 187 in Ch. IX Manu. The commentators of Manu do not try to explain "Acharyya" as occurring in this Sloka. The reason of this may very well be, that in an earlier part of Manu Ch. V. 80, where the word occurs, they have already given their explanations. The Sloka runs thus:

Triratramachurshaucham Acharyye samsthite sati Tasya putre cha patincha Dibaratramiti sthitih. [They declare that when the Acharyya has died, the impurity lasts three days; if the Acharyya's son or wife is dead, it lasts a day and a night; that is a settled rule.]

[13] In Medhatithi's commentary on this Sloka, we find "Acharyya Upaneta tashmin samsthite": Sarvaganarayan, another commentator, says "Acharyya Upaniyadhyapake" Raghabananda says "Acharyya upanetan".

[14] We find thus that in this very important Sloka as regards Asaucha, where it is of very great practical importance to know which person is meant by Acharyya the commentators agree in saying that it means the person who gives the upanayan. When later on, Acharyya is enumerated as an heir, and the commentators do not trouble to explain the word, it is reasonable to conclude that according to them the word had the same connotation as in Ch. V, where they had explained it.

[15] My conclusion on a study of Manu and his commentators therefore is that Acharyya in Sl. 187, Ch. IX means the person who gives upanayan and nobody else.

[16] It is useful to turn at this stage to the Jagnavalkya-Samhita and the Mitakshara, to discover what meaning Jagnavalka and Vignaneswara attached to this word. Verse 34 Acharadhyaya contains Jagnavalkya's definition of the Acharyya.

"Sa gururjah Kriyahkritra Vedamatmai prajachhati Upaniya dadadvedam Acharyyah Sa udahrtah" [He is called the Guru who after performing the ceremonies on the child from before his birth gives him the Vedas; and he is called the Acharyya, who having performed upanayan gives him the Vedas.]

[17] Vijnaneswara's commentary on this runs thus:

"He who performing all the rites according to rule beginning with the Garbhadhana ceremony, and ending with the upanayan teaches the Vedas to him the Brahmachari is called a Guru; He again who only performing upanayan teaches the Vedas is an Acharyya.

[18] When Jimutvahana (who according to the generally accepted view flourished after Vijnaswar) wrote the Dayabhaga, he was aware of these definitions of the word 'Acharyya' by Jagnavalka and Vijnaneswara's commentary on the same.

[19] If Jimutvahana had thought fit to extend the connotation of this word, we would have been bound to accept that extended connotation. But Jimutbahana does not do so; he simply quotes Manu's text and accepts it adding to the list of heirs—"Sabrahmachari." The only possible conclusion is that Jimutbahana was not prepared to extend the connotation of the word Acharyya, and he meant this word to connote the same person as Manu had meant the person who gives upanayan.

[20] In Manu's time, the task of the person who gave Upanayan did not cease there. It was rather merely the beginning of his task, for it was he who taught him the Vedas, and other subjects as well. In present-day India, the person who gives the upanayan ends his task there. The Upanayan ceremony itself requires him to teach a few verses of the Vedas; but, that is all. In fact, the system of learning Vedas as a part of one's education no longer exists, and even if any person wants to study the Vedas, he does not ordinarily study it with the Brahmin who gave him the Upanayan.

[21] Two opposite theories have been sought to be built on this undisputed fact that in modern India, the person who gives the Upanayan does not thereafter take the boy as his 'student' for teaching Vedas and other subjects.

[22] Mr. Hiralal Chakravarti, arguing for the appellant, propounded the theory that the law that an Acharyya would be an heir, was an integral part of the system of education under which the student used to live in the house of the teacher, and as this system has disappeared, the law that an Acharyya would be an heir should no longer be considered good law. He drew our attention to the observation of their Lordships of the Privy Council in *Ramchandra* v. *Vinayak*, (41 I. A. 290 : A. I. R. (1) 1914 P. C. 1) :

"It was urged that it is hardly likely Vijnaneswara would give a right of inheritance to a spiritual preceptor or Guru before Kinsman, however remotely connected. This argument appears to ignore the peculiar and intimate relationship which their Lordships understand exists in the Hindu system between the pupil and the Guru who has to initiate him into the mysteries of the Vedic laws and rites, and under whose roof he has to pass many years of his life. It is easy to suppose that in such circumstances the mystical relationship between a spiritual preceptor and a pupil should be regarded as creating a far closer tie than remote relationship of blood."

[23] These observations, intended as they were to meet the argument that a religious preceptor could not possibly have been included as an heir, if certain blood relations were excluded from heirship, may at most be said to express their Lordships' view as regards some of the reasons which made the author of the Mitakshara include a religious preceptor as an heir. They do not in my opinion justify a conclusion that their Lordships considered the rule of inheritance in favour of a religious preceptor *dependant* in any way on the institution of the student, living at the house of his teacher, to be initiated into Vedic laws and rites.

[24] Assuming, however, that at the time, the law was made, the ground for the same was this intimate relation which the teacher in those days had with the student, it by no means follows that once the ground had disappeared, the law also disappears. If and when the ground on which a law is enacted, ceases to exist, it is the province of the proper legislative authority to consider the matter of repealing the same; but the Courts cannot arrogate to themselves the functions of the legislature. We have no right to repeal a law, because what appears to us to be the reasons for which the law was enacted no longer exist. Even assuming, therefore, though not accepting, the theory that the rule that an Acharyya would be heir, first became law, because he had certain, intimate relations with the pupil. I am of opinion that this rule of inheritance continues to be good law, even though such relations no longer exist.

[25] Mr. Apurbadhan Mukherji has on the other hand put forward the theory that while

the Acharyya continues to be an heir under the Hindu law, this word now connotes the Diksha-guru. His argument is that the person who, in these days, gives the sacred thread, does not answer the description of an Acharyya, because he does not teach the Vedas, and that the person who gives Tantrik Diksha, has really taken the place of the person who in Manu's time gave Upanayan and taught the Vedas.

[26] Mr. Mukherji has in a very learned discourse, tried to convince us that the Tantrik system is really based on the Vedas, so that the Guru who initiates a man into the Tantrik system by giving Diksha, is really giving him Vedic education. I do not think it necessary for the purpose of this case to reach a conclusion on Mr. Mukherji's proposition that the Tantrik system is based on the Vedas, for I do not see that the truth of this proposition can justify the further conclusion that the person who initiates a man into the Tantrik system by giving him a Diksha, becomes this man's heir. In the first place, I am clearly of opinion that though the person who gives the Upanayan in modern times may not possess all the characteristics of an 'Acharyya' — inasmuch as he no longer teaches the Vedas — he retains still the principal characteristics and is the Acharyya, who inherits on failure of blood relations. Mr. Mukherji drew our attention to Medhatithi's commentary on Manu's definition on Acharyya in Sl. 140, Ch. II, where Medhatithi says that if one person gives the sacred thread, and another teaches the Vedas, neither can be called the Acharyya. It is to be noticed however, that Medhatithi himself does not stick to this strict and literal interpretation of the word Acharyya. For, commenting on Sl. 80 of Ch. V, Medhatithi himself uses the word *Upaneta*, i. e., the person who gives the sacred thread, to explain the word Acharyya. It is remembered also that the Sabitri, the communication of which is the essential part of the Upanayan ceremony has had been said to be the essence of the Vedas.

[27] Even in present-day India, therefore, the person who gives the Upanayan, does teach at least some important part of the Veda. It would be against all known canons of justice, to treat him, as not entitled to inherit as *Acharyya*, because he does not teach all the Vedas.

[28] In the second place, supposing that the person who gives the sacred thread is not entitled to inherit in present-day India, I can see no reason why another person who does not give the sacred thread, but initiates into the Tantrik system by giving Diksha, can be held to be the 'Acharyya,' in the list of heirs. Supposing Mr. Mukherji is correct in saying that the Tantras are based on the Vedas, it still remains true that the Tantras are not the Vedas, — just as Buddhism which, is based on Hinduism, is certainly not the same as Hinduism. It is absolutely clear that the Dikshaguru who initiates a person into the Tantrik system of worship by giving Diksha does not as such, teach any of the Vedas. He does not, therefore, possess either of the two characteristics of the Acharyya that Manu knew the giving of the sacred thread, and the giving of the Vedas.

[29] Mr. Mukherji also argued that the Diksha-guru in present day India has taken the place of the Acharyya of the days of yore, — for it is the Dikshaguru who gives religious education now as the Acharyya did in the days of Manu, and should be allowed to inherit as the Acharyya. The fact that the Dikshaguru is the person who gives *serious* religious education may be a very good reason, for which he *should be* an heir. But it is the legislature alone, who can make new law making an heir. We must resist the temptation to change the law, under cover of interpretation of law. If as judges, we use our power to interpret law, to alter laws which we may not like, and to make new laws which we think, should be made, that would be a corrupt use of our power. We have to observe constant vigilance against such corrupt use of power by ourselves. I refuse, therefore, to consider the question whether the Dikshaguru ought to be made an heir.

[30] Mr. Mukherji's next argument is that as the word Acharyya has been used in old treatises in a wider sense than to mean the person who gave the Upanayan and thus taught the Vedas, it would be wrong to put this limited interpretation on the word as used, by Jimutbahana, in the Dayabhaga. Mr. Mukherji referred first to two passages in the Vishnupuran which show that Vasistha was being called 'Acharyya' and also as 'Kulaguru.' This, in my judgment, does not show the use of Acharyya to mean anybody than the person who gave the sacred thread. We find in fact Valmiki himself using the word Acharyya as well as the word Guru for—Vasistha, in more than one part of the Ramayan. Thus, in 111 Canto of the Ayodhyakanda, Vasistha describes himself as an Acharyya :

"Purushasya hi jatasya bhavanti gurubastriyah
Acharyyaschib Kakutstha pita mata cha raghab Pita
hyeenam janayati purusham purushasharva Pragnam
dadati acharyyastashmat sa gururuchayate Sa bi te
pituracharyyastab ebaib parantap."

The Ramayana itself shows however, that Vasistha, as the Purohit of the family, gave Rama and his brothers Upanayan and taught them the Vedas.

[31] That the word Acharyya was used in old times to include persons other than the person who gave Upanayan is, however, clear from the fact that in the Mahabharat both Kripa and Drona are called Acharyya of the Kaurava and the Pandavas. Sayana, the great commentator of the Vedas, is generally referred to as Sayanacharyya.

[32] As regards more modern times Mr. Mukherji has drawn our attention to a passage in Raghunandan's Dikshatattwa where Raghunandan in quoting from another treatise called Mantratantra Samhita a verse in which Acharyya is clearly used to denote a Dikshaguru.

[33] Mention may be made in this connection of the Savdakalpadrum—a lexicon compiled by Sanskrit Scholars in Bengal in the last century —according to which "Acharyya" means the teacher of Vedas and also the commentator on Vedic Mantras; and Wilson's "Glossary of Judicial and Revenue laws", where we find the following interpretation of the word Acharyya :

"A religious teacher; properly the Brahman who instructs the religious student of the two next castes the Kshatriya and the Vaisya—as well as the Brahman, in the Veda. In modern use, it is applied to any religious instructor, and to any Brahman and religious mendicant professing to be qualified to give spiritual instruction. In the south of India it specially denotes the head of a religious society—the Mahant of Hindusthan and the Panda and head priest of a temple. Among the Marathas, it was given to Brahmans employed by respectable families as cooks. In the Tamil provinces, it is assumed by carpenters and other artisans."

[34] Quite clearly, therefore, uses of the word "Acharyya" in other senses than the Brahmin who gives the sacred thread and teaches Veda were not unknown in ancient India, and are common in modern India. Our task in this case is not however to investigate the many meanings the word Acharyya may have had, but to ascertain what sense it has in the list of heirs, as propounded by Manu, and accepted by Jimutbahan. For this, we have to turn to other passages of Manu's Samhita, and the notes of his commentators. These I have already mentioned, and they show in my opinion that to Manu, an Acharyya was the person who gave the Upanayan and taught the Veda, and as I have already stated Jimutvahana should be considered to have used the word in the same sense as Manu.

[35] Mr. Mukherji drew our attention to the fact that the Privy Council in *Giridhari Lal* v. *The Bengal Government*, 12 M. I. A. 448 : (1 Beng. L.R. 44 P. C.), while making a reference to the text in Mitakshara, renders the word Acharyya by 'preceptor'.

[36] I find no justification for reading into this an expression of their Lordship's opinion that 'Acharyya' in the list of heirs, means 'spiritual preceptors' in general. Not only were their Lordships not considering in that case, the question with which we are now concerned; they were not even remotely concerned with the meaning of the word Acharyya in Jimutbahan's list of heirs. If it were justifiable, to make from the mere fact that the judgment contains a translation of the text in which Acharyya has been translated by the word 'preceptor', the deduction that in their Lordships' considered view, Acharyya in the list of heirs means 'spiritual preceptor', in general, it would be even more justifiable to deduce from the passage in *Ramchandra* v. *Vinayak*, 41 I. A. 290 : (A.I.R. (1) 1914 P. C. 1) quoted above, that the Privy Council held there that the 'spiritual preceptor' in the list of heirs is that person in whose house the man lives as a pupil and who initiates him into the mysteries of the Vedas.

[37] In my judgment, neither of these Privy Council decisions, can reasonably be used for any light on the question which is now for consideration.

[38] Nor can I find any assistance from the decision in *Sambasiva* v. *Secy. of State*, 44 Mad. 704 : (A. I. R. (8) 1921 Mad. 537), on which reliance was placed by the learned trial Court. That was a case where the Crown claimed the property of a Sudra ascetic, as escheated, on failure of heirs, and the defendant claimed to be an heir, as a "Sishya". The main contention on behalf of the Crown was that the rule of law making Sishya an heir, had become obsolete. The High Court rejected this contention, and held that the defendant was entitled to inherit as a Sishya. It was not disputed there that the defendant was the Sishya of the deceased. This decision can clearly be of no assistance for our present purpose.

[39] Nor can I derive any assistance from this Court's decision in *Jugdanund* v. *Kesubnund*, 1864 W. R. 146.

[40] It was held that the priest may, in certain circumstances, inherit. It is well-known that the family priest is very often the person who gives Upanayan. On my interpretation of the word 'Acharyya' as the Brahmin who gives Upanayan, the priest will be an heir, when he gives Upanayan. As this decision does not say in what circumstances a priest may inherit, it is of no assistance to us.

[41] One consequence of interpretation of Acharyya as the Brahmin who gives the Upanayan is that a Sudra who cannot have Upanayan cannot have an Acharyya in his list of heirs. As the rules of inheritance in the Dayabhaga are for all the four castes—Brahman, Kshatriya, Vaisya and Sudra—we should cer-

tainly try to interpret the rules in such a manner as to make them operative in the case of all the castes. But, for this, we have no right to put a meaning on a word, where it is clear that Jimutbahana did not use in that sense.

[42] My conclusion is that the rule that an Acharyya of a Hindu governed by the Dayabhag system will inherit on the failure of the blood relations who are heirs is not obsolete in present-day India; that in these days, the person who gives the Upanayan will inherit as Acharyya, and a Dikshaguru not being the person who gives Upanayan, or any other preceptor—whether spiritual preceptor or not—will not inherit.

[43] Consequently, I hold that Janaki was not Manmatha's heir, and thus, no interest was acquired by Harinam Sha by his purchase from Janaki. Harinam Sha had, therefore, no locus standi, to apply for revocation of probate.

[44] I would therefore allow this appeal, with costs, set aside the judgment and decree of the trial Court, and dismiss the application for revocation of probate. The hearing fee is assessed at three gold mohurs.

Guha J.—I agree.

D.R.R. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 186 *[C. N. 62.]*

G. N. DAS AND DAS GUPTA JJ.

Rameswar Das Bhiwaniwalla and another — Defendants — Appellants **v.** *Byomkesh Samanta — Plaintiff — Respondent.*

A. F. A. D. Nos. 1773 and 1827 of 1943, Decided on 11-11-1949, against decrees of D. J., Zillah Burdwan, D/- 30-4-1943.

Bengal Land Revenue Sales Act (XI [11] of 1859), Ss. 13, 14 —Section 14 does not provide for closing of separate accounts—Contemplated sale not taking place—Order of Collector closing separate account ceases to be effective.

Section 14 does not expressly provide for the closing of separate accounts. It merely directs that the Collector will declare that the entire estate will be brought to sale if the cosharers do not pay up the arrears in respect of the defaulting shares. The closure of all separate accounts is done in the Collectorate for the purposes of convenience, with a view to find out whether the estate as a whole is in default or not. If, in point of fact, the contemplated sale does not take place or is set aside in a competent proceeding, the effect of the declaration made by the Collector loses all its force and the parties are restored to the position which they occupied before the declaration was made by the Collector. The order of the Collector closing the separate accounts ceases to be effective if the contemplated sale never took place. Separate account therefore survives the order of the Collector : A. I. R (2) 1915 P. C. 177, *Disting.*; A. I. R. (27) 1940 Cal. 115, *Rel. on.*

[Para 6]

Amarendra Nath Bose (in No. 1773), Hariprasanna Mukherji and Bankim Chandra Roy (in No. 1827) —for Appellants.

Baidya Nath Banerjee (in No. 1827) and Dr. Naresh Chandra Sen Gupta (in No. 1773) —for Respondents.

G. N. Das J.—These two appeals arise out of Title Suit No. 95 of 1941 of the Court of the 1st Munsif at Burdwan. Second Appeal No. 1773 of 1943 is at the instance of the plaintiff. Second Appeal No. 1827 of 1943 is at the instance of the defendant. The suit was for declaration of the plaintiff's exclusive title and possession in respect of Cadastral Survey Dags Nos. 31 and 33 of khatian No. 253 of mouza Ichlabad. The plaintiff's allegation is that the plaintiff purchased the residuary share in touzi No. 147 of the Burdwan Collectorate in January 1936, the residuary share being 13 as. 6 gds. 3 karas and 2 tils, that the plaintiff obtained symbolical possession on 24th May 1936, that there was a separate account No. 16 comprising 2 gds. 2 karas 2 krantis and 2 tils share in the aforesaid touzi, the disputed lands being the lands of the said separate account, that the defendant's predecessor held the said separate account which was closed and later on the previous owners of separate accounts Nos. 1 and 2 had their own separate account reopened, the result being that the residuary share including separate account No. 16 was brought to sale and was purchased by the plaintiff, the plaintiff's purchase taking effect under S. 28 of the Revenue Sale Law on 29th September 1935, that the defendant had failed to restore possession of the disputed lands and the plaintiff accordingly prayed for declaration of his title to the said dags and for possession of the same.

[2] The defence to the suit was that there was no closure of separate account No. 16 as alleged in the plaint either in fact or in law, that consequently by this revenue sale at which the plaintiff purchased separate account No. 16 which had never been amalgamated with the residuary share did not pass by the sale.

[3] The trial Court was of the opinion that the effect of the order of the Collector dated 31st March 1932 viz., Ex. 9 was to close all the separate accounts including separate account No. 16 and although there was no sale as contemplated by S. 14 of the Revenue Sale Law, as there was no attempt to supersede the order of the Collector closing the separate accounts, in proper proceedings, separate account No. 16 ceased to exist and was amalgamated with the residuary share. The sale at which the plaintiff purchased therefore passed separate account No. 16 and the plaintiff had a good title to the disputed lands. In the result the trial Court passed a decree declaring the plaintiff's title to the disputed land with the exception of the superstructures standing thereon and directed delivery of possession of the suit lands, the defendant being directed to remove the buildings standing on the disputed land. Against the decision of the trial Court, the defendant preferred an appeal.

[4] The learned District Judge who heard the appeal concurred with the view of the trial Court as regards the effect of the revenue sale with this modification that the defendant was to remain in occupation of the buildings on payment of fair and equitable rent. As stated already two appeals have been taken against the decision of the learned District Judge. The defendant in appeal raises the question whether by the revenue sale the plaintiff acquired a good title to separate account No. 16, that is, to the lands in suit. The plaintiff's appeal concerns that part of the order of the learned District Judge which maintains the defendant in possession of the superstructures on payment of fair rent.

[5] We shall first deal with the defendant's appeal, viz., Appeal No. 1827 of 1943. Dr. Sen Gupta appearing on behalf of the defendant has contended that as there was no sale of the entire estate after the collector had directed separate accounts to be closed in March 1932 the rights of the holders of separate account were not in any way affected by the order of the collector dated 31st March 1932 directing the separate accounts to be closed. As such in the absence of any thing to show that there was any other valid basis for the alleged closing of the separate accounts, the effect of the order of the collector dated 31st March 1932 was to maintain the existence of separate account No. 16 and as such the revenue sale at which the plaintiff purchased did not pass that share.

[6] The question as to the effect of an order made by a Collector under S. 14, Revenue Sale Law (Act XI [11] of 1859) depends on the view to be taken of Ss. 13 and 14 of the said Act. Section 13 of Act XI [11] of 1859 states that after separate accounts have been opened in respect of an estate, if the estate is in default because of non-payment of revenue in respect of any share the Collector shall declare the share or shares of estate which are in default to be put up to sale, and if at the sale the bid offered is not sufficient to liquidate the arrears the Collector will under S. 14, Revenue Sale Law, stop the sale and declare that the entire estate shall be brought to sale at a future date unless the other recorded sharer or sharers purchase the share in arrears within 10 days by paying the arrears due from the said shares. Section 14 does not expressly provide for the closing of separate accounts. It merely directs that the Collector will declare that the entire estate will be brought to sale if the co-sharers do not pay up the arrears in respect of the defaulting shares. The practice of closing separate accounts is to be traced to the decision in the case of *Haji Mutsaddi Mian* v. *Mahomed Idris*, 19 C. W. N. 764 : (A. I. R. (2) 1915 P. C. 177) to which our attention was drawn by Mr. Bose appearing for the respondent. The passage which occurs at p. 767 of the judgment of the High Court runs as follows:

> "It is admitted that the Collector was bound to close all the separate accounts before he could sell the entire estate under S. 14."

The judgment of this Court was merely affirmed on appeal by the Judicial Committee. The practice, therefore, rested on a concession made by the parties before the Hon'ble High Court. As already indicated there is no express provision in the Act itself for the closure of all separate accounts. This is done in the Collectorate for the purposes of convenience, with a view to find out whether the estate as a whole is in default or not. This view is in accord with a decision of this Court in the case of *Narendra Nath Roy* v. *Midnapore Zemindary Co. Ltd.*, 44 C. W. N. 38 : (A. I. R. (27) 1940 Cal. 115). At p. 49 Mitter J. observed thus:

> "The Act does not contain any provision for closing separate accounts. Section 14 speaks only of a declaration by the Collector; makes the same a necessary preliminary step for putting at a future date the entire estate to sale."

If in point of fact, the contemplated sale does not take place or is set aside in a competent proceeding, the effect of the declaration made by the Collector loses all its force and the parties are restored to the position which they occupied before the declaration was made by the Collector. Assuming that there was a statutory justification for the closing of the separate accounts, for which as we have already said there was none, the order of the Collector dated 31st March 1932 closing the separate accounts ceased to be effective as the contemplated sale never took place. Separate account No. 16, therefore, survived the aforesaid order of the Collector. It was not necessary for the recorded proprietors of that account to take any proceeding to have the order of the Collector vacated, as was erroneously thought by the Courts below. The argument in so far as it proceeded on the order of the Collector dated 31st March 1932 *vide*, Ex. 9, does not support the plaintiff's alleged title to separate account No. 16. In the Courts below the plaintiff relied also on the entry in the D Register, Ex. 8 and it was urged on his behalf that the entry in the D Register must be taken to be *prima facie* correct. A reference to Ex. D shows that serial No. 77 refers to separate account No. 16. There is an entry 'closed' against the serial number. That entry is undated and no reference is made to any order of any officer justifying the entry. No order of any competent officer has also been produced. Serial No. 17 and a few other serial numbers against which there is a similar entry 'closed' are struck out and a

note is made vide serial No. 83. Serial No. 83 states that the plaintiff is the proprietor of 13 as. 6 gds. 3 karas 0 krant 2 $\frac{36315}{39969}$ tils in the touzi. Reference is made then to Mutation Cases Nos. 561 and 563 of 1936-1937. This is followed by a remark "in lieu of Ali Mohammad and others by purchase at revenue sale." A fair inference to draw from these entries is that serial No. 77 was closed at the time when serial No. 83 was placed on the D Register as a result of the mutation cases in 1936-1937 after the plaintiff's purchase at the revenue sale now in question. This does not support the view that the closure of separate account No. 17 proceeded on any order of the Collector either under S. 14 of Act XI [11] of 1859 as mentioned in the plaint or on any order under S. 72 or 74A, Land Registration Act (Act VII [7] BC 1876). In fact there is nothing on the record to show that any order was passed under S. 72 or 74A, Land Registration Act which is the only procedure for the closure of separate accounts. Mr. Bose appearing for the respondent wanted to contend that as the D Register shows the existence of a residuary share in respect of 13 as. 6 gds. 3 karas 0 krant 2 $\frac{36315}{39969}$ tils share the legal basis for that entry must be presumed and the Court is to surmise that at some other intermediate date between the abortive revenue sale of 1932 and the present revenue sale, there had been proceedings legally undertaken to close separate account No. 16. This is a contention which is opposed to the case made in the plaint and as stated by the plaintiff himself in cross examination. In the plaint it was generally stated that the separate accounts were closed and thereafter two of the separate accounts Nos. 1 and 2 were reopened. The date when this was done was not specifically mentioned. The plaintiff in his cross examination stated that 'the amalgamation of separate account No. 16 took place in 1932' obviously referring to the order of the Collector dated 31st March 1932, Ex. 9. It is not open to the plaintiff respondent to make out this case in this Court. As the existence of separate account No. 16 at an earlier date is admitted, it was for the plaintiff respondent to prove by evidence how the separate account ceased to exist. The result, therefore, is that by the revenue sale at which the plaintiff purchased, separate account No. 16 did not pass.

[7] Mr. Bose at the close of his argument, prayed that even if the above view be taken, as there was nothing to show that separate accounts were opened under S. 10 of Act XI [11] of 1859 the plaintiff has admittedly an undivided share in the disputed land which forms a part of the lands comprising the touji and as such a declaration may be made in respect of his undivided residuary share in respect of the disputed land. This contention cannot be given effect to in view of the specific case made in the plaint that the disputed lands are the specific lands of separate account No. 16 and the prayer by the plaintiff for declaration of his exclusive title to and possession of the said lands. A further difficulty stands in the plaintiff's way, viz. that the other recorded co-sharers in the touzi are not before the Court. Mr. Bose prayed for leave to amend the plaint to raise this case and to add the co-sharers as parties. In our opinion such a prayer cannot be acceded at this late stage and in view of the course of the trial in the Courts below.

[8] The result, therefore, is that Second Appeal No. 1827 of 1943 succeeds. The judgments and decrees of the Courts below are set aside and the plaintiff's suit must stand dismissed with costs in all Courts.

[9] *Second Appeal No. 1173 of 1943.*— As the plaintiff has been found to have no title to the disputed lands this appeal must also fail. This appeal is therefore dismissed but there will be no order for costs.

Das Gupta J.—I agree.

D.H. *Order accordingly.*

I. R. (37) 1950 Calcutta 188 *[C. N. 63.]*

SEN J.

Budhu Mohan and another—*Petitioners* v. *Corporation of Calcutta and another*—*Opposite Party.*

Criminal Revn. No. 889 of 1949, D/- 28-11-1949.

Municipalities—Calcutta Municipal Act (III [3] of 1923), S. 488—Trial for disobeying notice under Rule 4 (2) of Sch. XVIII—Question of dangerous condition of building and necessity to vacate cannot be agitated before Magistrate.

It is quite clear from the words of Rule 4 that the Corporation is the authority to decide whether the building is in a dangerous condition and whether it is necessary to require the inmates of the building to vacate it. The statute gives the Corporation alone the power to decide this matter. Further, the statute has provided by S. 511 the tribunal to decide this question, that tribunal being the Corporation itself. In these circumstances, the question cannot be re-agitated before the Municipal Magistrate who is trying persons for disobeying a notice under Rule 4 (2) asking a tenant to vacate the premises: 11 C. W. N. 671; 26 Cal 811 and A. I. R. (29) 1942 Cal 142, *Ref.* [Para 4]

Debi Prosad De—for Petitioners.

Debabrata Mukherjee for Bireswar Chatterjee and Kamal Krishna Palit—for Opposite Party Nos. 1 and 2, respectively.

Order. —This Rule has been obtained by the petitioners who have been convicted by the Municipal Magistrate and fined. The case against

them is that they did not comply with a notice to vacate certain premises which were in a dangerous condition and that thereby they had committed an offence which was punishable under S. 488, Calcutta Municipal Act.

[2] The facts briefly are these : The petitioners are tenants of certain premises. It came to the notice of the Municipality that the premises were in a dangerous condition and after inspection a notice was served both upon the landlord and the tenants under Rule 4, sub-rule (2) of Sch. XVIII, Calcutta Municipal Act requiring the inmates of the building to vacate it The tenants admitted that they received this notice. They applied under S. 511, Calcutta Municipal Act for a withdrawal of the notice. The matter was considered by the Administrative Officer and he was satisfied that the notice was necessary. In spite of this decision the tenants did not vacate the premises and they were prosecuted, and sentenced as stated above.

[3] The only contention raised before this Court is that the Magistrate was wrong in refusing the petitioners an opportunity to adduce evidence to prove that the notice was not necessary inasmuch as the premises were not in a dangerous condition. It was pointed out that the learned Magistrate refused to allow the petitioners to adduce evidence on this point holding that the question was concluded by the decision of the Corporation and that he had no jurisdiction to consider whether or not the building was in a dangerous condition.

[4] I am of opinion that the learned Magistrate was right in his view. Apart from the case law on the subject, I think the wording of the sections and general principles of law indicate unmistakably that this question cannot be investigated by a Municipal Magistrate trying a person for disobedience of a notice issued under Rule 4, sub-rule (2) of Sch. XVIII, Calcutta Municipal Act directing them to vacate the premises on the ground that it was in a ruinous or dangerous condition. The relevant words of Rule 4 which need be quoted are these :

"Rule 4, sub-rule (1) : If any wall or building, or anything affixed thereto, be deemed by the Corporation to be in a ruinous state, or likely to fall, or to be in any way dangerous, they shall forthwith cause a written notice to be served . . . ."

"Rule 4, sub-rule (2) : The Corporation may also, if it appears to them to be necessary to do so, cause a proper hoarding or fence or other means of protection to be put up . . . and may also, after giving them such notice as the Corporation may think necessery require the inmates of the building to vacate it."

It is quite clear from the words of this rule that the Corporation is the authority to decide whether the building is in a dangerous condition and whether it is necessary to require the inmates of the building to vacate it. The statute gives the Corporation alone the power to decide this matter. Further I would point out that S. 511, Calcutta Municipal Act makes it additionally clear, that this question is one which is to be decided exclusively by the Corporation. Section 511 of the aforesaid Act provides that if any person is dissatisfied or objects to the issue of such notice, his remedy lies in making an application to the Corporation within a certain period. The section also provides that the Corporation shall consider and decide the objection. It is thus clear that the statute has provided the tribunal to decide this question, that tribunal being the Corporation itself. In the circumstances I do not see how it can be argued that the question can be re-agitated before the Municipal Magistrate who is trying persons for disobeying a notice. In this connection I would refer to the following cases : *Shamul Dhone Dutt* v. *Corporation of Calcutta*, 11 C. W. N. 671, *F. W. Duke* v. *Rameswar Malia*, 3 C. W. N 508 : (26 Cal. 811) and *Atul Chandra* v. *Corporation of Calcutta*, I. L R. (1941) 2 Cal 308 : (A. I. R. (29) 1942 Cal. 142 : 43 Cr. L. J. 513). The first case deals with the Bengal Municipal Act and the second with the Calcutta Municipal Act as it was in 1899. The last case deals with the present Act. Although the sections dealt with are different, I am of opinion that the principal enunciated in these cases entirely supports the view that I have taken.

[5] In my opinion, the learned Magistrate's order cannot be interfered with and this Rule is discharged.

D.R.R. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 189 *[C. N. 64.]*

G. N. DAS J.

Sree Sree Iswar Gopinath Deb Thakur and another — Defendants — Appellants v. *Kameswar Nath and another—Plaintiffs—Respondents.*

A F. A. D. No. 176 of 1946, Decided on 17th November 1949, against decree of D. J. Murshidabad, D/-7th August 1945

(a) Bengal Primary Education Act (7 (VII) of 1930), S. 29 (1) —*Niskar* lands lying within zemindari – Zemindari assessed to payment of road and public works cess—*Niskardar* not liable to pay road cess—Still education cess is recoverable.

Where the disputed lands are *Niskar* lands lying within the ambit of a zemindari which itself is assessed to the payment of road and public works cess, it cannot be said that the disputed lands are such immovable property on which road and public works cess was not assessed. Section 29 (1) declares the liability of all immovable property on which road and public works cesses have been assessed, to be further assessed to the education cess. The fact that the *Niskardar* was not liable to pay road cess to the zemindar does not lead to the conclusion that the property itself was not assess-

ed to road and public works cesses. Hence even though road cess is not payable education cess is recoverable from the *Niskardar*. [Para 5]

(b) Bengal Primary Education Act (7 (VII) of 1930), S. 32—Road cess not leviable be cause of non-service of notice under S. 54, Cess Act—Still education cess is recoverable—Bengal Cess Act (9 (IX) of 1880), S. 54.

In order to entitle the holder of an estate to recover primary education cess no special notice under S. 54 of the Cess Act is required to be served. Hence, even though the levy of road cess is not possible because of the non-service of the requisite notification, under S. 54 of the Cess Act, still primary education cess is recoverable. [Para 6]

(c) Bengal Cess Act (9 [IX] of 1880), S. 58—Education cess not paid though leviable—Zemindar can recover penalty under section.

Where the primary education cess is properly leviable but has not been paid according to the instalments fixed by the Act, the zemindar is entitled to recover penalty as stated in S. 58. [Para 7]

Purushottam Chatterji—for Appellants.

Judgment.— This appeal is on behalf of the defendants and arises out of a suit for recovery of arrears of road cess for the years 1343 to 1350 B. S. and education cess for the last half year of 1347 B. S. together with the penalty provided for in S. 58 of the Cess Act.

[2] The defence of the defendants was that neither the road cess nor the education cess is recoverable because notice under S. 54 of the Cess Act was not served according to law.

[3] The trial Court dismissed the plaintiff's suit in so far as it concerned the claim for recovery of road cess inasmuch as the service of notice under S. 54 of the Cess Act was not proved. The claim for recovery of education cess was however decreed. The judgment does not give us any indication of the reasons which led the trial Court to decree this part of the claim. Against the decision of the trial Court, the plaintiff preferred an appeal in so far as the trial Court dismissed the claim for recovery of road cess. The defendants preferred a cross appeal. The appeal and the cross appeal were both dismissed by the lower appellate Court. The appeal was dismissed on the ground that notice under S. 54 of the Cess Act was not proved to have been served. The cross appeal was dismissed by the lower appellate Court on the ground that the liability to pay education cess was determined under S 30 of the Bengal Primary Education Act (Act, VII (7) of 1930). The plaintiff has not preferred any appeal. The defendants have preferred this appeal challenging their liability to pay education cess as claimed in the plaint.

[4] Mr. Chatterji appearing for the defendants appellants has conteded in the first place that as no road cess is payable in the present case education cess is not recoverable in view of the provisions of S. 29 (1), Bengal Primary Education Act of 1930. In the second place it is contended that S. 32 of the said Act makes the provisions of the Cess Act applicable in the matter of assessment, levy, payment and recovery of education cess. As road cess is not recoverable in the present case education cess is also irrecoverable. In the third place it is contended that the decrees of the Courts below imposing a penalty under S. 58, Cess Act are not in accordance with law on the grounds already mentioned.

[5] The first contention depends on an interpretation of S. 29 (1) of the said Act. The sub-section runs as follows:

"In any district or part of a district in which the provisions of this Chapter are in force all immovable property on which the road and public works cesses are assessed according to the provisions of the Cess Act, 1880, shall be liable to the payment of a primary education cess."

The disputed lands are *niskar* lands lying within the ambit of a zemindari belonging to the plaintiff. The Zemindari itself is assessed to the payment of road and public works cess. It cannot therefore be said that the disputed lands are such immovable property on which road and public works cess was not assessed. Section 29 (1) of the Act declares the liability of all immovable property, on which road and public works cesses have been assessed, to be further assessed to the education cess. The fact that the *niskardar* was not liable to pay road cess to the Zemindar does not lead to the conclusion that the property itself was not assessed to road and public works cesses. The first contention raised on behalf of the appellants must therefore be overruled.

[6] The second contention has to be answered by a reference to the different sections of the Bengal Primary Education Act 1930 as also of the Cess Act, 1880. I have already referred to S. 29 (1), Bengal Primary Education Act, 1930 which makes all immovable property on which road and public works cesses have been assessed to be further subject to a liability to pay the primary education cess. Section 29 (2) of the Act prescribes the rate of levy of education cess which in the case of land is fixed at 5 per cente per rupee on each rupee on annual value of the land. Section 30 of the Act provides for the mode of payment of education cess by the holders of different grades of interests in land and for apportionment of the same between the holder of an estate or a tenure or a cultivating *raiyat*. Section 31 of the Act provides that when primary education cess is levied for the first time a notification and proclamation in the manner provided for by S. 41 of the Cess Act and a notice on the holder of an estate showing the amount of cess payable in respect of the estate and specifying the date from which such primary education cess will take effect, shall be served subject to

the proviso that defect in the service of notice shall not effect the liability of any person or proprietor to the payment of cess. Section 32 of the Act then states :

"Subject to the provisions of this chapter the provisions of the Cess Act, 1880, shall apply so far as possible to the assessment, levy, payment and recovery of the primary education cess."

It is contended that as the levy of education (road?) cess in the present case is not possible because of the non-service of the requisite notification under S. 54 of the Cess Act primary education cess is also irrecoverable. In order to deal with this contention we have to refer to S. 54 of the Cess Act. Section 54 provides that in cases where a new valuation or re-valuation takes effect in a district or where the rate of cess is changed or where the dates fixed by the Board of Revenue for payment of cesses under S. 57 of the Cess Act are altered, the holder of the estate will cause a notice in the prescribed form to be published in the places mentioned in S. 54. Section 56 then provides that if such a notice under S. 54 is not published cesses cannot be recovered. In the present case, there is no question of a new valuation or re-valuation of the estate or a change in the rate on which cesses are payable or any change in the dates fixed by the Board of Revenue for payment of an instalment under S. 57 of the Cess Act. The education cess, as I have already stated, is payable at certain rates on the annual value of land. The annual value of the land is defined in the Cess Act. As such, in order to entitle the holder of an estate to recover primary education cess no special notice under S. 54 of the Cess Act was required to be served. It has been found that notice under S. 52 of the Cess Act was properly served. In this view, the defendants *niskardars* cannot escape liability from the payment of education cess as claimed in the plaint. The second contention on behalf of the appellants must therefore fail.

[7] The third contention raised on behalf of the appellants relates to the imposition of a penalty under S. 58 of the Cess Act. As I have already held that the primary education cess was properly leviable and as the same has not been paid according to the instalments fixed by the Act the plaintiff was entitled to recover penalty as stated in S. 58 of the Cess Act. This contention must also be overruled.

[8] The result therefore is that this appeal fails and must be dismissed but as there is no appearance on behalf of the respondent there will be no order for costs.

V.B.B. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 191 *[C. N. 65.]*

R. P. MOOKERJEE J.

Harendra Nath—Creditor—Petitioner v. *Sm. Dakhyamoni Dassi — Debtor—Opposite Party.*

Civil Rule No. 829 of 1949, D/- 30-11-1949.

(a) Interpretation of Statutes—Technical legislation—Language plain — Words to be construed according to ordinary and natural meaning in absence of indication to contrary.

The elementary rule of construction is that it is to be assumed that the words and phrases of a technical legislation are used in the ordinary meaning. If there is nothing appearing in the section itself either to modify or to alter or if there be nothing to qualify the language which the statute contains, it is to be construed in the ordinary and natural meaning of the words and sentences. If the language is not only plain, but admits of only one meaning, the task of interpretation can hardly be said to arise. It is not allowable to interpret what has no need of interpretation: A. I. R. (8) 1921 P. C. 240 and (1886) 12 A. C. 1, *Rel. on.* [Para 5]

Annotation:—('44-Com.) C. P. C., Pre. Note 7.

(b) Debt laws — Bengal Agricultural Debtors Act (7 [VII] of 1936), S. 44 — Words 'decision' or 'order' in S. 44 include award — Even if not included, Board's jurisdiction to review its decision is not taken away merely because decision has culminated in award.

Review as allowed under S. 44 is against any order or decision passed by the Board. The words 'order' and 'decision' are quite clear and make no differentiation between certain classes of orders and others. Looking at it from the practical point of view, there must be certain orders or decisions by the Board before an award can be drawn up and if there be any defect or any ground on which review will be allowed, such previous order or decision being modified on review, the award also falls to the ground as a corollary. Even if it were taken that the term 'award' was not specifically included that would not take away the right of the Board to review its own decision which had ultimately culminated in the award. [Para 6]

(c) Debt laws—Bengal Agricultural Debtors Act (7 [VII] of 1936), Ss. 44 and 55—Rules under S. 55, R. 91 (b)—R. 91 (b) does not require previous filing of review application to Board before obtaining permission from Collector — Board exercising powers of review suo motu after receipt of order from Collector granting permission—Subsequent formal application to Board—Board cannot refuse it on ground of delay.

Under R. 91 (b), if a review application is to be made beyond 60 days such an application cannot be dealt with by the Board unless permission of the Collector has been obtained. But there is nothing in R. 91 (b) which requires the previous filing of an application for review in the Board and then approaching the Collector for permission. [Para 9]

On an application by a debtor, the Collector allowed permission under R. 91 (b) for review of an award passed by the Board two years back. On receipt of the order from the Collector, the Board proceeded to deal with the matter though there had been no application filed for review before the Board itself and passed various orders from time to time. Subsequently, the debtor filed a formal application for review on the direction of the Board. The Board, however, dismissed the appli-

cation on the ground of inordinate delay in filing the application:

Held, that in the circumstances the Board was exercising its powers of review suo motu and as it had already taken cognizance of the proceedings, it was not open to it to refuse the prayer for review on the ground of delay on the part of the debtor. [Para 10]

Ajoy Kumar Basu—for Petitioner.

Syama Charan Mitter—for Opposite Party.

Order.—This application in revision is on behalf of the creditor. On an application by the creditor, an award was made by Fatepur Debt Settlement Board on 25th January 1942. In 1944, an application was filed by the debtor before the Collector of 24 Parganas for permission under R. 91 (b) read with S. 44, Bengal Agricultural Debtors Act for review of the award which had been made in January 1942 inasmuch as more than 60 days had expired from the making of the award. On 21st July 1944, the order passed by the Collector permitting review of the previous award was received by the Debt Settlement Board. From the order sheet maintained by the Board, it appears that after the receipt of that intimation various orders were passed from time to time, sometimes directing service of notice on the creditor and sometimes on the debtor concerned. On 12th April 1946 up to which the proceedings were continuing before the Board, the latter directed the debtor to file a formal application for review under S. 44, Bengal Agricultural Debtors Act accompanied by the requisite court-fees. An application was accordingly filed on 14th June 1946. The Board however held on 8th August 1946 that there had been inordinate delay in filing the application and accordingly dismissed the prayer for review.

[2] On an appeal being taken to the Appellate Officer, the order was set aside directing the Debt Conciliation Officer concerned to deal with the application according to law and on the merits. This order was affirmed by the District Judge under S. 40A, Bengal Agricultural Debtors Act.

[3] On behalf of the creditor, it is contended that it is not competent for the Board to entertain the application for review after an award has been signed. Section 44 of the Act is in the following terms :

"Subject to any rules made under this Act—(a) a Board may, on an application made by any person interested, or of its own motion review any decision or order passed by it and pass such order in reference thereto as it thinks fit."

Clause (b) authorises the Appellate Officer in similar terms. There is a proviso that no order shall be varied or reversed unless an opportunity has been given to a person interested to appear and be heard in support of such order.

[4] It is contended on behalf of the petitioner that the expression 'decision' or 'order' used in cls. (a) and (b) of S. 44 does not include an award. Reference is, in this connection, made to the provisions contained in S. 40 of the Act where while dealing with the right of appeal in addition to the reference made to a decision or order of a Board, an award is referred to in the next clause. It is urged that had the expression 'decision' or 'order' the general significance, there would not have been any necessity of making separate reference to the word 'award'.

[5] Before I refer to the effect of the use of the relevant words in S. 40 we have, in the first instance, to consider the effect of the words as appearing in S. 44. The elementary rule of construction is that it is to be assumed that the words and phrases of a technical legislation are used in their ordinary meaning *(Corporation of the City of Victoria* v. *Bishop of Vancouver Island*, (1921) 2 A. C. 384 : (A. I. R. (8) 1921 P. C. 240). If there is nothing appearing in the section itself either to modify or to alter or if there be nothing to qualify the language which the statute contains, it is to be construed in the ordinary and natural meaning of the words and sentences. *(Vestry of St. John Hampstead* v. *Cotton* (1886) 12 A. C. 1, 6.) If the language is not only plain, but admits of only one meaning, it has repeatedly been held that the task of interpretation can hardly be said to arise. It is not allowable to interpret what has no need of interpretation.

[6] The words 'order' and 'decision' are quite clear and make no differentiation between certain classes of orders and others. Looking at it from the practical point of view, there must be certain orders or decision by the Board before an award can be drawn up and if there be any defect or any ground on which review will be allowed, such previous order or decision being modified on review, the award also falls to the ground as a corollary. Even if it were taken that the *term* 'award' was not specifically included that would not take away the right of the Board to review its own decision which had ultimately culminated in the award.

[7] The difference in the language used between Ss. 40 and 44 may also be explained. By a technical and very strict interpretation; it may be stated that the word 'award' is not a decision by the Board, but it is a formal paper, which records the effect of the decision or order. An appeal under S. 40 is allowed not only against the earlier order passed, but against the award as it stands. Review as allowed under S. 44 is against *any* order or decision passed by the Board and if a review is limited to the award itself without questioning any earlier or previous orders passed by the Board, it may be contended that review is not allowed under such circumstances. But on the other hand, if any

earlier order or decision passed by the Board is questioned any review and a modification of such earlier order or decision, if affecting the award itself, will be permissible.

[8] Merely because there has been an award will not take away the jurisdiction of the Board to review its own order or decision. This objection, therefore, must be overruled.

[9] It is next contended that as there had been no application for review filed before the permission of the Collector was sought, the proceedings now pending before the Board are without jurisdiction. This contention also cannot be supported. If an application is made within 60 days under R. 91 (b), that application has to be filed before the Board immediately. If the Board exercises its right to review its own order *suo moto* within 60 days that also can be done without any reference to the Collector. If review, however, of the earlier order or decision is to be made beyond the period of 60 days such an application cannot be dealt with by the Board unless the permission of the Collector has been obtained. Reliance is placed upon the proviso to R. 91 (b) wherein it is laid down " that no action shall be taken by a Board " and it is argued that it is only taking some action on the application which is barred and not the filing of the application before the Board. It is further pointed out that there is no definite provision barring out the entertaining of an application before the Collector's permission is obtained. There is no substance in this contention. If the application itself cannot be dealt with by the Board before the permission of the Collector is obtained, there is nothing in the rule which requires the previous filing of the application in the Board and then approaching the Collector for permission. As there is no direct provision in the rule requiring such previous filing of the application before the Board, I would not accept such a far fetched interpretation.

[10] In the present case, it appears that after the order from the Collector was received by the Board, the Board proceeded to deal with the matter although there had been no application filed for review before the Board itself. It might have been taken on the special facts of this particular case that the Board was exercising its powers to review its own order of its own accord. But on the subsequent filing of the application as required by the Board two years later, it cannot be thrown out, because there had been no such application at an earlier stage. My attention has not been drawn to any provision under which the application must be filed within a definite period. As the Board had already taken cognisance of the proceedings and had been dealing with the same from July 1944, till April 1946, it was not open to the Board to take an objection, thereafter about any supposed delay an the part of the debtor.

[11] The decision by the Additional District Judge cannot be assailed. This Rule is accordingly discharged.

[12] There will be no order for costs.

K.S. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 193 *[C. N. 66.]*

K. C. CHUNDER AND GUHA JJ.

Mubarak Hossain and another—*Petitioners* v. *The King.*

Criminal Revn. No. 810 of 1949, D/- 8th December 1949.

Influx from Western Pakistan (Control) Ordinance (XVII [17] of 1948), S. 3 — Permit System Rules, 1948, Rr. 12 and 16A — Applicability—Persons going to Lahore under temporary business permit and 'returning back to Calcutta' under permit valid for two months 'pending verification' — R. 16A applies — Conviction under R. 12 held invalid.

The case of a person who wants to return to India claiming that he is domiciled here and was only staying on a temporary visit to Pakistan is provided for in R. 16A which provides for the High Commissioner or the Deputy High Commissioner to grant him the necessary permit to return permanently here, but in case the authority is not satisfied, he may grant a temporary permit which is to be for a period long enough for the authority to receive a report from India as to the desirability or otherwise of the person being allowed to return permanently here. If the enquiry has not been completed by the High Commissioner or the Deputy High Commissioner he may automatically extend the period under R. 16A (4). This has got nothing to do with the permit-holder, as under cl. (5) of the Rule it is the duty of the High Commissioner or the Deputy High Commissioner to send an intimation to the Superintendent of Police of the district where the applicant is for the time being staying that his application has been refused and that the applicant should return to Pakistan on the expiry of the period of the temporary permit held by him : [Para 4]

Where, therefore, certain persons proceeded from Calcutta to Delhi and from there to Lahore under a temporary business permit and returned to India under a permit which was valid for 2 months in which their object of return was stated to be 'returning back to Calcutta, pending verification' and they were convicted under R. 12 for over-staying in India :

Held, that as their object was to return permanently to India, they were entitled to claim that their case was governed by R. 16A. (The conviction was set aside as this point was not gone into by the lower Court.) [Paras 4 and 5]

Nirmal Chandra Sen — for Petitioners.

Ajit Kumar Dutt and N. K. Sen—for the Crown.

Order. — This Rule was issued at the instance of two persons who have been convicted by a Presidency Magistrate of Calcutta under S. 4, Influx from Western Pakistan (Control) Ordinance, 1948, and R. 12, Permit System Rules, 1948, framed thereunder, each being sentenced

to pay a fine of Rs. 200, in default to suffer rigorous imprisonment for three months.

[2] As far as the facts are concerned, on 18th October 1948, the petitioners went from Calcutta to Delhi and then on 23rd October 1948, they went to Lahore from Delhi under Temporary Business Permits Nos. 210 and 211 granted by the High Commissioner for Pakistan, in India at New Delhi. They wanted to return and on 2nd November 1948 they were granted two Temporary Permits being Nos. M. B. 28650 and 28651 by the Deputy High Commissioner for India in Pakistan at Lahore in which the object of the visit was stated to be "returning back to Calcutta: pending verification," and these permits were made valid for two months. It is not disputed that the petitioners did not return to Western Pakistan after two months.

[3] Various questions have been raised by Mr. Sen appearing on behalf of the petitioners relating to the powers of the Governor-General to pass the Ordinance and also the different Ordinance subsequently passed and the retrospective operation of the different clauses, but in view of our decision in the present case, we do not intend to express any opinion whatever either on this point or on the actual question of facts. It appears that the petitioners are convicted for violation of the Rules framed under the Ordinance then in force or even as subsequently modified so far as it relates to the case of the petitioners. The Rules then in force were the Rules published in the Gazette of India (Extraordinary), first on 14th September 1948 and then amended on 4th October 1948. Of the Rules published in the Gazette on 14th September 1948, R. 3 speaks of three kinds of permits of which No. 1 is permit for temporary visits and under R. 12 it was laid down that no person holding a temporary permit shall stay in India after the date of expiry of such permit. Then on 4th October 1948 (published in the Gazette of India on 7th October 1948) Rr. 12A and 16A were added. Rule 12A enables a permit-holder to apply to the Superintendent of Police of the district to extend the period of the permit by such number of days not exceeding 20 days as may be necessary on account of circumstances over which the permit-holder has no control. This obviously refers to such temporary permit holders who are in India from Western Pakistan for a temporary purpose and not permanently to India after a temporary sojourn in Pakistan. In such a case, it would appear he may, if circumstances are such that he had no control over them, get an extension only for a period of 20 days from the Superintendent of Police.

[4] The case of a person who wants to return to India claiming that he is domiciled here and was only staying on a temporary visit to Pakistan was provided for in R. 16A. That Rule provided for the High Commissioner or the Deputy High Commissioner to grant him the necessary permit to return permanently here, but in case the authority was not satisfied, he may grant a temporary permit which is to be for a period long enough for the authority to receive a report from India as to the desirability or otherwise of the person being allowed to return permanently here. It is provided in R. 16A (4) that if necessary the period of such temporary permit can be extended from time to time. This obviously means that if the enquiry has not been completed by the High Commissioner or the Deputy High Commissioner he may automatically extend the period. This has got nothing to do with the permit-holder, as under the next clause, Cl. 5 of R. 16A, it is the duty of the High Commissioner or the Deputy High Commissioner to send an intimation to the Superintendent of Police of the district where the applicant is for the time being staying that his application has been refused and that the applicant should return to Pakistan on the expiry of the period of the temporary permit held by him. It has to be connected, as we have said, with the previous clause, cl. 4, which shows that the High Commissioner or the Deputy High Commissioner must finish the enquiry before the expiry of the period of the temporary visit and should communicate the result and ask the person to return and in case this cannot be done there is this provision for extension as we have said, i. e., for automatically extending the period of the temporary permit and in such a case when permission permanently to return to India is refused, the High Commissioner or the Deputy High Commissioner will intimate such refusal to the applicant through the District Superintendent of Police as also the extended date by which he is required to return to Pakistan. There is no provision for intimation or granting of the application. In the present case as the object of the visit is to return to Calcutta and no other temporary object of visit is shown, it is written there that this is pending verification, the petitioners are entitled to claim that their case was under R. 16A and this point had not been gone into in the Court below. This is a matter which cannot be decided without evidence and the evidence must be given by the prosecution before the Chief Presidency Magistrate as to whether the application was made to the High Commissioner or the Deputy High Commissioner for India in Pakistan only under cl. (12) for a temporary visit or under cls. (16) or (16A) for the purpose of return to India permanently of a person who claims to be domiciled in India and had been only on a tem-

porary visit to Pakisthan. The Court will then consider on the evidence how the law is to be applied.

[5] The conviction and sentence are, therefore, set aside and the Rule is made absolute and the case remanded to the Presidency Magistrate for further enquiry in the light of this judgment. The fine, if paid, will be refunded.

D.R.R. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 195 *[C. N. 67.]*

K. C. CHUNDER AND DAS GUPTA JJ.

Hooghly Bank Ltd., Calcutta—Appellant v. *Mahendra Nath Mukhopadhyaya and others —Respondents.*

A. F. A. D. No. 1187 of 1944, D/- 2-12-1949, against decree of D. J., Hooghly, D/- 24-2-1944.

Landlord and Tenant—Putni lease—Covenant by putnidar to submit collection papers yearly affects value of land and therefore is covenant running with land—Covenant binds assignees from parties —Transfer of Property Act (1882), S. 40.

Though a covenant in a putni lease that the putnidar shall submit duly, year after year in the landlord's office, the 'Jamawasil baki' and 'lowazima papers' does not affect the nature or quality of the land, it will certainly affect the value of the land from the very moment it is entered into, inasmuch as the collection papers will supply requisite materials and facilitate collection and show the real state of affairs of the putni and the dues etc. from the tenants and this factor will weigh with the purchaser of such interest in estimating the money that may reasonably be paid for such purchase. Such a covenant runs with the land and therefore binds the assignees from the parties. [Paras 2 & 4]

Annotation : (45-Com.) T. P. Act, S. 40, N. 1 and 25.

Atul Chandra Gupta, Shambhu Nath Banerji (Sr.) and Satya Prasad Banerjee—for Appellants.

Hiralal Chakravarty and Rabindra Nath Bhattacharjee—for Respondents.

Judgment.— This is an appeal against an appellate decree of the District Judge of Hooghly affirming the decree of the Subordinate Judge, 2nd Court of the same place.

[2] The facts are very simple. The appellant is a successor-in-interest of one Prannath Choudhury of Satkhira. The defendants are the successors-in-interest of one Raj Krishna Mukherjee. Both parties are assignees. Prannath Choudhury gave a putni lease of his share of touzi No. 37 of the Hooghly Collectorate to Raj Krishna Mukherjee, one of the terms of which was 'You shall submit duly year after year in my office the Jamawasil baki papers etc., and the Lowazima papers." On 1st May 1942, the plaintiff, the Hooghly Bank Ltd., purchased also the putni interest and took delivery of possession on 30th June 1942. They found an utter absence of papers and as the assignees of the original creators of the putni they have now called upon the defendants, the assignees of the putni holder, for the lowazima and collection papers not submitted prior to the purchase by the plaintiff and within the period of limitation. Both Courts have held that the covenant is not which runs with the land but is only a personal covenant. The learned District Judge's judgment is not very satisfactory as it deals with questions as to restraint on alienation etc., which really do not arise. The only question which has been urged is whether the covenant, we have mentioned before, is one which runs with the land and is therefore binding on the assignees of the original contracting parties. The case stood over for a long time as no decision actually covering the point could be shown, except an observation in a case by this Court in which the Divisional Bench assumed that such a covenant may run with the land. It did not decide the point. Some decisions were cited regarding covenants to pay *chout* or 1/4th share of the purchase money on sale of occupancy tenancies. Those are clearly distinguishable as they are creating a new right which as tenants the occupancy tenants did not possess and so conditions on the exercise of the right could be imposed.

[3] It is clear that in order to be a covenant running with the land the covenant must touch and concern the land, that is, it must affect the nature, quality or the value of it. If it runs with the land then the covenant will bind not merely the original contracting parties, but even assignees provided privity is proved. In the present case, there is no question that there was privity between the assignees of the landlord's interest and the assignees of the tenant's interest. Land also means interests in land.

[4] It is also clear that the covenant in question does not affect the nature or quality of the land. The only question, therefore, is : Does it affect the value of it ? It is again clear from the decided cases that the covenant, to run with the land, must affect the value from the very time when it is entered into. In other words, would a purchaser take the existence of such a covenant into consideration in deciding upon the money he would spend for the purchase of the lands or the interest in lands ? It is clear that a purchaser at an *astam* sale i. e. compulsory sale of putni under the Regulation or the landlord, if he becomes the successor of the putnidar by surrender of the putni, would be in great difficulties as to collection unless he got proper collection papers of the tenant putnidar. In the two instances we have mentioned, he would not be likely to get any such help from the previous putnidars. Therefore, whether a person is a purchaser of the putni interest or of the landlord's interest, both will know that a duplicate set of collection papers submitted by the putnidar and kept in

the landlord's sherista will supply requisite materials and facilitate collection and show the real state of affairs of the putni and the dues etc., from the tenants. This factor will weigh with a purchaser of the interest in estimating the money that may reasonably be paid in the purchase of such property or interest. Under the circumstances, it cannot but be said that a covenant like this will affect the value of the land and that from the very moment it is entered into. As it does so, it is a covenant running with the land and therefore binds the assignees. The defendants were therefore liable as assignees of the original putnidar to submit collection papers to the assignees of the original landlord. Both the Courts were therefore wrong in dismissing their claim. The case cannot be fully disposed of here as the question of damages will have to be fully gone into now in the trial Court.

[5] The order therefore is that the appeal succeeds and is allowed and the decrees of the Courts below are set aside and the case is remanded for further action by the Subordinate Judge in the light of this judgment. The plaintiff appellant will have all the costs incurred by him so far further costs being at the discretion of the Subordinate Judge.

K.S. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 196 *[C. N. 68.]*

G. N. DAS J.

Nrisinha Kumar Sinha — Plaintiff — Appellant v. *Shyam Sundar Debanshi and another—Defendants—Respondents.*

A. F. A. D. Nos. 214 and 215 of 1946, D/- 18th November 1949, against decree of D. J., Birbhum, D/- 11th August 1945.

(a) Bengal Village Choukidari Act (6 [VI] of 1870), S 54; Sch D, Form D—Requisition in Form D in Sch. D does not require specification of area of land.

Requisition under Form D, under S. 54 in respect of choukidari chakran lands requires that the amount in arrears and the name of the person liable to pay the same and the village in which the lands are situate should be stated. The requisition does not require to specify the details of the lands in respect of which arrears are claimed. It cannot therefore be said that the requisition which does not correctly specify the area of lands is not in the proper form. [Para 7]

(b) Bengal Land Revenue Sales Act (X1 [11] of 1859), Ss. 6, 33—Misdescription of land is not per se ground for setting aside sale—Misdescription when ground for setting aside sale, under S. 33, stated.

Incorrect specification of some of the details in the notification under S. 6 is not per se such a misdescription as would entitle the Civil Court to set aside a sale under S. 33. The object of a notification under S. 6 is obviously to apprise likely purchasers of exactly what is going to be sold and to ensure thereby reasonable competition amongst bidders in order that the defaulter may have a fair value for the property which is sought to be sold. Rules and forms which have been prescribed by the Board of Revenue in this behalf have no statutory force but are in the nature of administrative behests and mere non compliance with them is not sufficient to vitiate the sale. Whether the misdescription is such as would render the sale liable to be set aside depends on the particular facts of each case, the test being whether the specification of the property put up for sale is sufficiently definite for the purposes already mentioned. The Court has to see if the particulars given are sufficient to identify the property and give prospective bidders information as to what they was going to bid for : A. I. R. (2) 1915 P. C. 24 and A. I. R. (29) 1942 Cal. 173, *Rel. on.* [Para 7]

Where it was merely stated who the defaulters were and the serial number which the choukidari chakran lands bore in the assessment list had been correctly stated and there were no other choukidari chakran lands in the villages in question, the identity of lands was beyond question and the description of the property sold in the notification under S. 6 was not such as to vitiate the sale. [Para 7]

(c) Bengal Village Choukidari Act (VI [6] of 1870), Ss. 55, 6 — Sale of choukidari chakran land by Collectors for non-payment of arrears of assessment—Notification under S. 5, Bengal Land Revenue Sales Act (XI [11] of 1859) is not necessary.

Sections 50, 52, 53 to 55 of the Choukidari Act read with S. 30 of the Act, have the effect of empowering the Collector to sell choukidari chakran lands in respect of which a requisition has been made under S. 54, under the provisions of the Bengal Land Revenue Sales Act, 1859, after the service of a notification under S. 6, Bengal Land Revenue Sales Act, 1859. [Para 18]

In regard to sales of choukidari chakran lands under the provisions of S. 55, Village Choukidari Act, the service of a notification under S. 5, Bengal Land Revenue Sales Act, 1859, is not necessary. [Paras 23 & 25]

Purushottam Chatterjee—for Appellant.
Hari Prasanna Mukherjee—for Respondents.

Judgment.—This appeal is by the plaintiff. The plaintiff's case is that the disputed lands are the choukidari chakran lands situate in mouja Jamuni and Kanaipur appertaining to touji NO. 1401 of the Birbhum Collectorate. The previous number of the touji was NO. 139 of the Murshidabad Collectorate. On 29th June 1939 a requisition for payment of dues under the Village Choukidari Act was issued under S. 59 of the said Act. Thereafter without serving a notice under S. 5, Bengal Land Revenue Sales Act, 1859, the said choukidari chakran lands were advertised for sale after the issue of a notice under S. 6, Bengal Land Revenue Sales Act 1859. The sale took place on 19th September 1939 and the disputed lands were purchased by defendant 1, at the highest bid. The plaintiff who owned 4 as. 8p. share in the disputed lands instituted this suit for setting aside the sale and for recovery of possession. There was an alternative prayer for reconveyance if the prayer for setting aside the sale could not be entertained. In view of the findings arrived at by the Courts below the alternative prayer has not been pressed in this Court and no reference need be made to the allegations on

which the alternative prayer was founded. The validity of the sale was attacked on two grounds: (1) That the notice under the provisions of S. 5, Bengal Land Revenue Sales Act, 1859, was neither issued nor published and (2) that in the requisition under S. 54 of the said Act the disputed lands were not properly described. The same misdescription attached to the notification under S. 6, Bengal Land Revenue Sales Act, 1859 and that in consequence of misdescription the disputed lands were sold at an under valuation.

[2] The defence of the contesting defendant was (1) that the suit was bound to fail on account of non-joinder of the other co-sharers of the plaintiff; (2) that the service of a notice under S. 5, Bengal Land Revenue Sales Act, 1859 was not necessary in order to bring to sale choukidari chakran lands under the special provisions of the Village Choukidari Act, 1870; (3) that there was no misdescription of the lands sold and even if there was any the misdescription was not such as to justify a reversal of the sale.

[3] The trial Court dismissed the plaintiff's suit and the judgment of the trial Court was affirmed on appeal. The findings of the lower appellate Court are (1) that there was no defect in the frame of the suit because of the non-joinder of the other co-sharers of the plaintiff ; (2) that the misdescription was not sufficient to justify a setting aside of the sale and (3) that notice under S. 5, Bengal Land Revenue Sales Act, 1859, was not necessary.

[4] As I have already stated, this appeal is at the instance of the plaintiff. Mr. Purushottam Chatterjee appearing on behalf of the plaintiff appellant has contended in the first place that there was misdescription both in the requisition under S. 54, Village Choukidari Act 1870 and in the notification under S. 6, Bengal Land Revenue Sales Act, 1859, and the misdescription was such as to justify the plaintiffs' prayer for a reversal of the sale. In the second place, it is contended that the service of a notice under S. 5, Bengal Land Revenue Sales Act, 1859, was an essential prerequisite to a sale of the choukidari chakran lands under the provisions of S. 55, Village Choukidari Act.

[5] The first contention turns on the provisions of S. 54, Village Choukidari Act, 1870, and Ss. 6 and 13, Bengal Land Revenue Sales Act.

[6] Section 54, Village Choukidari Act, 1870, states that whenever an assessment has been made in respect of a choukidari chakran land and if the assessment is in arrears for a space of 15 days after it has become payable, the collecting member of the Panchayet shall forward to the Collector of the district in which the lands are situate:

"a notice of the amount of such arrears and the name of the person liable to pay such assessment in the Form in Schedule D annexed to the Act."

[7] Turning to Form D the form requires that the amount in arrears and the name of the person liable to pay the same and the village in which the lands are situate should be stated. The requisition does not require to specify the details of the lands in respect of which arrears are claimed. It cannot therefore be said that the requisition which did not correctly specify the area of lands, was not in proper form. The defects in the notification under S. 6, Bengal Land Revenue Sales Act, 1859, are stated to be that the areas of the choukidari chakran lands in the two moujas have been grossly misstated and the names of the transferees of the original holders of these lands have not been specified. It is merely stated that the defaulters are Rajendra Chandra Pal and others. It is, however, to be noted that the serial number which the choukidari chakran lands bear in the assessment list has been correctly stated and that there are no other choukidari chakran lands in the two villages in question. Both the Courts below have found that the identity of the disputed lands was beyond question. Incorrect specification of some of the details in the notification under S. 6, Bengal Land Revenue Sales Act is not per se such a misdescription as would entitle the civil Court to set aside a sale under S. 33, Bengal Land Revenue Sales Act, 1859. The object of a notification under S. 6, Bengal Land Revenue Sales Act is obviously to apprise likely purchasers of exactly what is going to be sold and to ensure thereby reasonable competition amongst bidders in order that the defaulter may have a fair value for the property which is sought to be sold. The rules and forms which have been prescribed by the Board of Revenue in this behalf have no statutory force but are in the nature of administrative behests and mere non-compliance with them is not sufficient to vitiate the sale. Whether the misdescription is such as would render the sale liable to be set aside depends on the particular facts of each case, the test being whether the specification of the property put up for sale is sufficiently definite for the purposes already mentioned. The Court has to see if the particulars given are sufficient to identify the property and give prospective bidders information as to what they were going to bid for. The above view is supported by the decisions in the cases of *Raveneshwar Prasad Singh* v. *Baijnath Ram Goenka*, 42 I. A. 79 : (A. I. R. (2) 1915 P. C. 24) and *Sakina Khatoon* v. *Khirod Chandra*, 46 C. W. N. 73 : (A. I. R. (29) 1942 Cal 173). Judged by the above principles it cannot be said that the description of the property sold in the

notification under S. 6, Bengal Land Revenue Sales Act, 1859, was such as to vitiate the sale. The first contention raised on behalf of the appellant must therefore fail.

[8] The second contention raised on behalf of the appellant requires careful consideration. In order to deal with this contention it is necessary to advert to certain provisions of the Village Choukidari Act, 1870.

[9] Section 48, Village Choukidari Act provides for transfer of choukidari chakran lands to the zemindars of the estate or tenure within which such lands are situate.

[10] Section 49 of the said Act then states that all lands transferred should be subject to assessment at half of the annual value of such lands made by the village panchayat.

[11] Section 50 empowers the Collector to approve of the assessment so made and to transfer such lands to zemindars in Form C subject to the assessment approved by him.

[12] Section 52 lays down that the assessment is to be a permanent yearly charge on the lands transferred and is to be payable to the collecting member of the Panchayat "yearly in advance on the 1st day of the year current in the village."

[13] Section 53 then provides that such assessment shall be deemed to be "a demand to be realised in the manner herein after provided."

[14] I have already quoted S. 54.

[15] Section 55 runs as follows :

"Immediately after the receipt of such notice the Collector . . . shall proceed, without preliminary notice for payment, to issue notification for sale under S. 6, Bengal Land Revenue Sales Act, 1859, and unless the arrears be paid within the time mentioned in such notification, shall sell such lands according to the provisions of such law, as if such land was an estate within the meaning of the Bengal Land Revenue Sales Act, 1868."

[16] Act VII B. C. of 1868 was enacted to amend and extend the law for the realistion of arrears of land revenue and of public demands recoverable as arrears of land revenue.

[17] Section 30 of this Act states that the Act is to be read with and as part of Act XI [11] of 1859 as amended by Act III B C. of 1862.

[18] The above provisions have the effect of empowering the Collector to sell choukidari chakran lands in respect of which a requisition has been made under S. 54, under the provisions of the Bengal Land Revenue Sales Act, 1859, after the service of a notification under S. 6, Bengal Land Revenue Sales Act, 1859. There is no dispute that the notification under S. 6, Bengal Land Revenue Sales Act was published in the present case. Mr. Chatterjee ingeniously contends that the use of the words,

"according to the provisions of such law as if such land was an estate within the meaning of the Bengal Land Revenue Sales Act, 1868"

makes all the provisions of the Bengal Land Revenue Sales Act, 1859, applicable; in particular S. 5, Bengal Land Revenue Sales Act, 1859, is attracted and a sale of the choukidari chakran lands cannot take place unless the collector proceeds to serve the notification mentioned in S. 5, Bengal Land Revenue Sales Act, 1859.

[19] In order to test this contention we have to bear in mind the definition of an arrear of revenue as contained in S. 2, Bengal Land Revenue Sales Act which lays down that if an instalment of revenue according to the kists, remains unpaid on the 1st day of the month following that in which the kist is payable the unpaid kists shall be deemed to be an arrear of revenue. Section 3, Bengal Land Revenue Sales Act empowers the Board of Revenue to fix the latest date of payment of the arrears of revenue and it is well known that such dates have been fixed by the Board of Revenue.

[20] Section 5, Bengal Land Revenue Sales Act provides that notifications in the manner prescribed in the section shall be issued when the arrears or demands are of the four descriptions stated in the section, the fourth category being wide enough to include dues in respect of choukidari chakran lands. Section 5 further provides that the notification mentioned in that section shall specify the "nature and amount of arrear or demand and the latest date on which payment thereof shall be received." The notification has to be affixed in the places mentioned in the section for not less than 15 clear days preceding the date fixed for payment under S. 3 of the Act. Section 5 therefore requires the Collector in the cases specified in the section to issue notifications prior to the latest date for payment of revenue and the sale is not to be advertised until such notification has been published. Notification under S. 5 differs from notification under S. 6 in that the notification under S. 5 has to be issued before the sale can be advertised. Section 6 notification, however, follows the expiry of the latest date of payment. It may be stated that the non-service of a notification under S. 5 is an illegality within the meaning of S. 33, Bengal Land Revenue Sales Act : vide *Monindra Deb Roy* v. *Sree Sree Hanseswari Thakurani*, 40 C. W. N. 271. If such a notification under S. 5 was an essential prerequisite before the Collector could issue a notification under S. 6 for the sale of the choukidari chakran lands the result would be that the dates mentioned in Ss. 54 and 55, Village Choukidari Act would have to be varied. The service of such a notification would also be contrary to the express terms of S. 55 which empowers the Collector to proceed to issue a notification under S. 6 immediately after the assessment which is to be paid in respect

of the choukidari chakran lands has become payable. The following words used in S. 55, Village Choukidari Act namely "without preliminary notice for payment" in my opinion obviously refer to any notification which calls upon the defaulter to pay the arrears of demand payable in respect of the choukidari chakran lands. As such the said words would, in my opinion, exclude the issue of a notification under S. 5, Bengal Land Revenue Sales Act which is a public call to the defaulter to pay the arrears within a certain time. In my opinion, quite apart from this consideration, the scheme mentioned in the Village Choukidari Act, 1870, is such as to exclude by necessary implication the service of any notice prior to the service of a notification under S. 6, Bengal Land Revenue Sales Act. Again S. 5, Bengal Land Revenue Sales Act is a proviso to Ss. 2 and 3 of the said Act. As Ss. 2 and 3, Bengal Land Revenue Sales Act have no application to the case of a sale for non-payment of the assessment under the Village Choukidari Act necessarily S. 5 can have no application to such sales.

[21] Mr. Chatterjee was fully alive to the difficulty because of the presence of the words "without preliminary notice for payment" in S. 55, Village Choukidari Act. He therefore argued that these words refer to a notice which is envisaged in S. 6 of Act VII B. C. of 1868. Section 6 of Act VII of 1868 enables the Local Government (now the Provincial Government) by an order published in the Calcutta Gazette (now official Gazette) to empower Collectors if they so think fit, to cause notices to be served on any proprietor before proceeding under Act XI of 1859 to realise from such proprietor any arrear of revenue that may be due from such property. It may be noted that before the passing of the Public Demands Recovery Act, 1880, the words "or any demand" followed the words "any arrears of revenue" in the aforesaid S. 6. This contention raised by Mr. Chatterji cannot be accepted for two reasons. In the first place the notice under S. 6 was not a compulsory notice. It is not known whether the Lt. Governor has made any notification under S. 6. Moreover, even if the Lt. Governor has made such a notification a discretion is left with the Collectors to issue notices under S. 6 only in appropriate cases. In the second place, the words "any demand" occurring in the latter part of S 6 were omitted, as I have said, by the Public Demands Recovery Act, 1880. As such a notice under S. 6 will not thereafter be served upon a proprietor in cases of demands other than arrears of revenue. The retention of the words "without preliminary notice for payment" in S. 55, Village Choukidari Act even after the amendment of S. 6, Public Demands Recovery Act, 1880, clearly indicates that notice under S. 6 of the Act, VII B. C. of 1868, was not the notice which was evisaged in S. 55, Village Choukidari Act.

[22] Mr. Chatterjee further contends that the words "unless the arrears be paid within the time mentioned in such notification" occurring in S. 55, Village Choukidari Act clearly show that S. 55 contemplates a notification which calls upon a defaulter to pay within a certain time, and this must be a notification other than a notification under S. 6, Land Revenue Sales Act. It is true that the notification under S. 6, Land Revenue Sales Act does not specify that the defaulter has to pay the arrears within certain time. On the contrary the last paragraph of S. 6 states that no payment or tender of payment after the sunset of the latest date of payment can bar or interfere with the sale, and the defaulting proprietor is not entitled to stop the sale by payment or tender of payment of the arrears due after the sunset of the latest date of payment. This is quite true but as was pointed out in the case of *Gobind Chundra Gangopadhya* v. *Sherajunnessa Bibi*, 13 C. L. R. 1, a practice had grown up at the time, on acceptance of arrears of revenue even after the sunset of the latest date of payment before the actual sale takes place ; the Collectors in those days generally exercised their powers under S. 18, Bengal Land Revenue Sales Act of exempting the estates from sales even where payment was made after the latest date. It may be mentioned that the practice which was referred to in *Gobinda Chandra's case* (13 C. L. R. 1) was the foundation for the observation of Loch J., in the case of *Raghub Chunder Banerjee* v. *Brojonath Koondoo*, 14 W. R. 489: (9 Beng. L. R. 91*n*), to the effect that the object of S. 6 notice is to give information to the defaulter that unless the amount be paid by a certain date the property will be sold. The aforesaid words relied on by Mr. Chatterjee may have, in this view, referred to the notification under S. 6.

[23] In my opinion, the clear terms of the Village Choukidari Act justify the Collectors in bringing to sale choukidari chakran lands for non-payment of arrears of assessment under the Village Choukidari Act without serving a notification under S. 5, Bengal Land Revenue Sales Act, 1859.

[24] I may point out that it is a matter of some doubt whether S. 5, Bengal Land Revenue Sales Act has any application at the present day to sales for arrears of demands which are recoverable as arrears of land revenue. The Bengal Land Revenue Sales Act does not contain any direction as to how such sales for arrears of demands which are not arrears of revenue may

be dealt with. Moreover, in case the arrears due are not realised by the sale in such cases, the right to sell other properties of the defaulter was extremely problematical after the repeal of Act VIII [8] of 1835. In order to get round this difficulty Bengal Act VII [7] of 1868 was passed. This Act provided for sales of estates for arrears of revenue and also sales of estates and tenures for recovery of demands other than arrears of revenue but which are realisable as arrears of revenue, but that part of Act VIII which dealt with latter class of cases was, however, repealed in 1880 when the Public Demands Recovery Act (Act VII B. C. 1880) was passed, the latter Act providing for a speedy mode of realisation of such demands.

[25] The result of the above discussion leads me to hold that in regard to sales of choukidari chakran lands under the provisions of S. 55, Village Choukidari Act, 1870, the service of a notification under S. 5, Bengal Land Revenue Sales Act, 1859, is not necessary. The second contention raised on behalf of the appellant must also therefore be overruled.

[26] In the result, the appeals fail and must be dismissed with one set of costs for the two appeals.

R.G.D. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 200 *[C. N. 69.]*

HARRIES C. J. AND LAHIRI J.

Gajendra Duary and others — *Accused* — *Petitioners* v. *The King.*

Criminal Revn. No. 500 of 1949, D/- 15th November 1949.

Criminal P C. (1898), S. 107 — Bond for keeping peace pending enquiry.

An order cancelling bail of the person being prosecuted under S. 110, Criminal P. C., and directing him to execute a bond for keeping the peace until conclusion of the enquiry cannot be made on hearsay evidence. It can be made only upon some material amounting to proof, presented to the Magistrate in the proper manner. [Para 4]

Annotation : ('49-Com.) Criminal P. C., S. 107, N. 13, 14.

Sudhangsu Sekhar Mukherjee—for Petitioners.
N. K. Sen — for the Crown.

Harries C. J. — This is a petition for revision of an order of a learned Magistrate directing certain accused persons to execute a bond in the sum of Rs. 500 with two sureties of like amount for keeping the peace until the conclusion of a certain enquiry.

[2] The petitioners were being prosecuted under S. 110, Criminal P. C. The learned Magistrate was hearing the case in camp. Whilst the case was proceeding there was an outcry that there was a fire in a neighbouring house and everybody seems to have run out including the learned Magistrate. The learned Magistrate in his judgment says that he learnt from some man and two females who were inmates of a hut which was burning that they had seen one Tari running out from behind the hut as soon as it was on fire. Tari, it was said, was a sister of three of the petitioners and either the landlord or the paramour of the fourth petitioner. The hut which was burning belonged to two persons, Srinath Roy and Debendra Roy, who were prosecution witnesses in the case. The learned Magistrate said that he inspected the fencing which had been broken down in order to obtain access to the rear of the hut, and then he went out with the police in search of the woman. They failed to find the woman and then returned to continue hearing the case. Apparently fire again broke out in this hut or huts and there was another outcry and people ran about.

[3] The police appear to have applied to the learned Magistrate praying that he should cancel the bail of the four accused persons and direct that they should enter into bonds. The learned Magistrate admits that there were no witnesses whom he could examine. Nevertheless, he came to the conclusion that there was not the slightest doubt that public tranquillity had been badly disturbed by the action of an agent of the accused persons and that there was ground for public apprehension. Unless action was immediately taken further mischief might be engineered by them against the witnesses.

[4] The only basis for this finding is a statement made to the Magistrate outside the Court by some man and two women that they had seen Tari running away from behind the hut. Whether Tari set fire to these huts or not is impossible to say, but the learned Magistrate appears to have overlooked entirely that he was a judicial officer who could only act judicially. Cancelling bail and demanding bonds are matters which cannot be decided on hearsay, but could only be decided upon proper material presented to the learned Magistrate in the proper manner. He cannot act on hearsay and tittle-tattle, and it appears to me that there was no material at all here upon which the order could have been made. The most that can be said was that there was a suspicion that Tari was connected with this fire, but it in no way follows that Tari was the agent of the accused, though of course she might have been. But before an order of this sort would have been made some material should have been before the Magistrate which would have amounted to proof. There was no material of any kind and the learned Magistrate acted on the suggestion of the police immediately.

[5] In my view, this order cannot possibly be sustained and must be set aside, and the accused

must be released on their original bail immediately.

[6] The rule is made absolute and disposed of accordingly.

Lahiri J. — I agree.

D.H. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 201 *[C. N. 70.]*

AMARENDRA NATH SEN J.

The Municipal Commissioners of Howrah, Municipal Office, Howrah — Plaintiffs — Petitioners v. *Jagabandhu Banerjee — Opposite Party.*

Civil Rule No. 1036 of 1949, D/- 5-12-1949.

(a) Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 4 — Scope — Assessment of area as bustee without formal decision by the Commissioners to that effect is not prohibited by S. 4. [Para 6]

(b) Provincial Small Cause Courts Act (1887), S. 25 — Finding of fact based on misappreciation of evidence — High Court would interfere. [Para 8]

Annotation : ('46 Man.) Provincial Small Cause Courts Act, S. 25, N. 11.

Bholanath Roy and Satya Charan Pain — for Petitioners.

Binayak Nath Banerjee and Sushil Kumar Biswas —for Opposite Party.

Order.— This Rule has been obtained by the Municipal Commissioners of Howrah against an order passed by the Munsif, 3rd Court, Howrah, acting as a Judge of the Court of Small Causes, Howrah, dismissing the plaintiffs' suit for the recovery of certain rates on the footing that the subject-matter of the rates was a bustee.

[2] The learned Munsif has held that the subject matter with respect to which the claim has been made is not a bustee and on this ground he has dismissed the suit.

[3] The principal question for decision is whether the learned Munsif's judgment on the question whether the subject-matter is a bustee or not is in accordance with law. The learned Munsif has based his decision on two grounds. First he says, that upon the evidence before him he is satisfied that the area is not a bustee within the meaning of S. 3 (10) read with S. 3 (36), Calcutta Municipal Act, as extended to Howrah. His second ground is that the Municipality of Howrah was bound to decide whether the area was a bustee or not before it could levy the rates claimed and that as there has been no such decision by the Municipality of Howrah, the claim is not sustainable. For this purpose he relies upon S. 4, Calcutta Municipal Act as extended to Howrah.

[4] Learned Advocate appearing in support of the Rule contends that the learned Munsif has erred in law in coming to his conclusion upon the evidence that the land is not a bustee because he has drawn an unwarranted inference regarding some of the plaintiffs' witnesses—an inference which is not based on the evidence. He argues that the question whether the area is a bustee or not should be re-heard upon both parties giving fresh evidence on the point. As regards the second point, his argument is that it is not necessary for the Howrah Municipality to come to a formal decision that a particular area is a bustee before it can realise rates on that area on that basis. His view is that S. 4 abovementioned does not lay down any such principle as is laid down by the learned Munsif in his judgment.

[5] Learned advocate appearing in opposition to the Rule supports the findings of the learned Munsif both on law and on fact. He contends further that no notice was served upon the assessee as is required by the provisions of S. 138 of the aforesaid Act as extended to Howrah.

[6] I shall first deal with the question whether the Municipality is debarred from assessing an area as a bustee until there is a formal decision of the question by the Commissioners at a meeting. Section 4 is in the following terms:

"The Corporation may decide whether any particular area is or is not a 'bustee' as defined in S. 3 and their decision shall be final."

So far as the Howrah Municipality is concerned the word 'Corporation' means the Commissioners at a meeting. It is argued by learned advocate opposing to the Rule that unless the Commissioners at a meeting formally decided this question, there can be no assessment of a bustee. On the other hand, it is argued by learned advocate in support of the Rule that this section would come into operation only when there is a dispute before the Municipality as to whether or not a certain area should be declared a bustee and that where there is no such dispute there is no necessity for a formal decision by the Commissioners at a meeting. In my opinion, S. 4 of the aforesaid Act does not lay down the rule that an area cannot be assessed as a bustee until there has been a formal decision to that effect by the Commissioners at a meeting. Section 4 in my opinion is an empowering section. It gives power to the Corporation to decide whether an area is a bustee or not. Nowhere in the Act is it laid down specifically that before assessment there must be a formal decision. The Act defines what a bustee is and if an assessment is made on an area which conforms to this definition the assessment would, in my opinion, be a good one although no formal decision has been made on the question whether the area is a bustee or not by the Commissioners at a meeting. All that

S. 4 means is this. If there is any dispute or doubt as to whether an area is a bustee or not, the Corporation is empowered to decide that dispute or resolve that doubt and its decision on the question shall be final. It does not in my opinion make the decision of the Commissioners at a meeting a *sine qua non* for the assessment of an area as a bustee. I hold, therefore, that the learned Judge was wrong in coming to this conclusion. In arriving at this view, I am relying on the use of the word 'may.' I am aware of the principle that the word 'may' in certain circumstances should be construed as 'shall,' but it does not follow that in construing this section one must hold that "may" should always be construed as "shall." In my opinion, the word "may" has been used for the following reasons viz., there may be no dispute or doubt regarding the question whether an area is a bustee or not, on the other hand, such a dispute or doubt may arise, when such a dispute or doubt does arise the Municipality must decide the question, when such a dispute or doubt does not arise no such decision need be made. The use of the word 'may' indicates that the Municipality is not bound to decide the question unless the contingency abovementioned occurs. If the legislature intended that in all circumstances the Municipality was bound to decide this question it would have used the word 'shall' and not "may." As stated before the section is essentially an empowering section and not *per se* a directive or mandatory one.

[7] On the question of notice I am of opinion that the learned Judge is wrong. The notice has been placed before me and it clearly shows that it was served on one Jagabandhu who is described in the notice as the grandson of Sm. Ushangini Debi the owner of the bustee. It is true that a witness in his deposition says that the notice was served on the grandson of Jagabandhu. This is clearly an error. The notice itself shows that it was served on Jagabandhu as the grandson of the owner. The person giving evidence had no personal knowledge of service and he misread the notice and much capital has been made of this misreading by the learned Judge and by learned advocate opposing the rule. I hold, therefore, that there is no error in the service of the notice because the Act permits service of notice on an adult member of the owner if the owner cannot be found. Admittedly, Sm. Ushangini Debi was the owner by virtue of the fact that she was the executrix of the late owner and admittedly Jagabandhu is her grandson and stands now in the place of Sm. Ushangini Debi.

[8] There remains the last point as to whether the learned Judge's decision on the question whether the land is a bustee or not is in accordance with law. Learned advocate who appeared in opposition to the rule says that this is a pure finding of fact and that under S. 25, Provincial Small Cause Courts Act I, should not interfere. It is quite true that under S. 25 of the last mentioned Act this Court should not interfere with pure findings of fact, but where the finding is based upon an obvious error in the appraisement of the evidence, then it cannot be described as a finding in accordance with law. If the Judge had merely believed one witness and disbelieved another. I would not be right in interfering with the learned Judge's decision on findings of fact. But here the learned Judge has made a serious error. Two witnesses for the plaintiffs namely witness No. 1 Anukual Chandra Chatterji and witness No. 3 Bishnupada Bose both describe the land as bustee. They were not cross-examined on this point. They were not asked whether or not they had been on the land. The learned Judge, however, says that the witnesses for the plaintiffs "have no personal knowledge about the condition of the huts on suit land." There is no justification for this finding so far as the witnesses I have named are concerned. It is true that there is positive evidence given on behalf of the defendant that the erections on the land consist of walls which are either masonry or half masonry and that they have corrugated iron roofs. If this evidence be true, then the constructions cannot be described as huts and, therefore, the land would not be a bustee. On the other hand, there is the evidence of the witnesses for the plaintiffs which has been misappreciated.

[9] I am of opinion, therefore, that the case should be sent back to the learned Munsif who shall allow the parties to adduce further evidence on the question of the structures on the land and on the question whether the land is a bustee or not within the meaning of the Calcutta Municipal Act as extended to Howrah. After hearing such evidence, the learned Munsif shall decide the matter in accordance with law in the light of the observations made above.

[10] The evidence already on the record shall be evidence in the matter.

[11] The costs will abide the result.

K.S. *Case remanded.*

A. I. R. (37) 1950 Calcutta 202 *[C. N. 71.]*

HARRIES C. J. AND DAS GUPTA J.

Khorshed Ali and others — Accused—Petitioners v. *The King.*

Criminal Revn. Nos. 716 and 717 of 1949, D/- 2nd December 1949.

Essential Supplies (Temporary Powers) Act (1946), Ss. 1 (3), 7, 8 — Resolutions passed by Constituent Assembly on 25th February 1948 and 23rd March 1949 had effect of delaying expiry of period mentioned in S. 4, India (Central Government and Legislature) Act 1946, beyond 31st March 1948 to 31st March 1950 — For validity of resolutions no assent of Governor-General was required—Consequential effect is that up to that date Act XXIV [24] of 1946 is in force—For acts committed before 31st March 1950 Act XXIV [24] of 1946 continues to operate indefinitely after 31st March 1950.

[Paras 10, 11, 16, 17, 18 and 19]

Sudhansu Sekhar Mukharjee and Amaresh Chandra Roy — for Petitioners.

Sir S. M. Bose and N. K. Sen — for the Crown.

Das Gupta J. — These two applications are against two orders of conviction and sentence under S. 7 of Act XXIV [24] of 1946, read with S. 8 of the same Act, in two different cases. In both the cases the petitioners were sentenced to rigorous imprisonment for two and a half months, and the paddy was forfeited.

[2] They were heard together, as both of them raise the same question of law—the question whether on the alleged date of contravention of orders for which the petitioners have been convicted, 23rd September 1948—Act XXIV [24] of 1946 was in force. Mr. Mukherjee who has argued the cases for all the petitioners has contended that Act XXIV [24] of 1946 ceased to be in force after 31st March 1948. If this contention be correct, it must be held that the conviction of the petitioners for acts committed on 23rd September 1948, would be unsustainable.

[3] Admittedly, Act XXIV [24] of 1946 is, or was a temporary Act. As the preamble states, it was enacted to provide for the continuance of certain powers during a limited period. It was therefore necessary to define in the Act itself the period during which it would be in operation. This has been done in sub-s. (3) of S. 1, by saying when the Act will cease to operate. The sub-section is in these words :

"It shall cease to have effect on the expiration of the period mentioned in S. 4, India (Central Government and Legislature) Act, 1946, except as respects things done or omitted to be done before the expiration thereof . . ."

[4] To find out therefore whether this Act is in operation in any case, we have to ascertain first the date of expiration of the period mentioned in S. 4, India (Central Government and Legislature) Act, 1946. If the act or omission complained of was done after that date, Act XXIV [24] of 1946 has no operation, if the act or omission was done before that date, Act XXIV [24] of 1946 has operation.

[5] Turning now to the India (Central Government and Legislature) Act, 1946, we find that was originally enacted "by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons" assembled in the British Parliament, and "by the authority of the same" this Act had six section of which S. 1 repealed a provision in the Government of India Act as regards qualifications of Executive Councillors; S. 2 provided that notwithstanding anything in the Government of India Act, 1935, the Indian Legislature should *during the period mentioned in section 4 of the Act* have power to make laws with respect to certain matters; S. 3 provided that notwithstanding anything in the Government of India Act, 1935, the powers of the Indian Legislature to make laws shall extend to the making of laws providing for continuance of certain powers *until not later than the end of the period mentioned in section 4 of the Act*. The provisions of Ss. 5 and 6 of the Act are not relevant for our present purpose; but it is necessary to set out in full S. 4 of the Act, as originally enacted. It is in these words :

"The period mentioned in the two last preceding sections is the period of one year beginning with the date on which the proclamation of emergency in force at the passing of this Act ceases to operate, or, if the Governor-General by public notification so directs, the period of two years beginning with that date :

Provided that if and so often as a resolution approving the extension of the said period is passed by both Houses of Parliament, the said period shall be extended for a further period of twelve months from the date on which it would otherwise expire so, however, that it does not in any case continue for more than five years from the date on which the proclamation of emergency ceases to operate."

[6] It is not disputed that the proclamation of emergency mentioned in S. 4 ceased to be in force after 31st March 1946. It is also undisputed that before 31st March 1947, the Governor-General had by public notification directed the period mentioned in S. 4 to be the period of two years beginning with the date on which the proclamation of emergency ceased to be in force. The position on 14th August 1947, therefore, was that the period mentioned in S. 4, India (Central Government and Legislature) Act, 1946 was due to expire on 31st March 1948, unless there was further extension under the proviso, by a resolution passed by both Houses of the British Parliament. If, on 14th August 1947, or on an earlier date, the two Houses of British Parliament had passed a resolution, approving the extension of the period for a further period of twelve months, the period mentioned in S. 4 would have been extended up to 31st march 1949. Petitioners' advocate does not dispute the fact that the two Houses of Parliament could have passed such a resolution and that if they had passed such a resolution, the effect would have been as mentioned above.

[7] The British Parliament did not, however, pass any such resolution. On 18th July 1947, the

British Parliament enacted the Indian Independence Act, under which India became an Independent Dominion as from 15th August 1947. Consequently, the British Parliament lost all legislative authority over India, so that the Houses of Parliament could not, I think, pass any resolution under the provision (proviso?) to S. 4, India (Central Government and Legislature) Act, 1946, on or after 15th August 1947, even if this Act had remained unaltered. But it did not remain unaltered. On 14th August 1947, the Governor-General of India made an order in exercise of powers conferred by S. 9 read with S. 19, sub-s. (4), Indian Independence Act, by which, he directed substitution for "both Houses of Parliament," the words "the Dominion Legislature" in S. 4 and the insertion of a new S. 4A. There was no modification, in Ss. 2 and 3 material for our present purpose. The position, after this order had been made by the Governor-General, therefore, was that Ss. 2 and 3 remained unaltered except in matters which are not relevant for our present purpose, while Ss. 4 and 4A stood thus :

"4. The period mentioned in the two last preceding sections is the period of one year beginning with the date on which the proclamation of emergency in force at the passing of this Act ceases to operate or, if the Governor-General by public notification so directs, the period of two years beginning with that date :

Provided that if and so often as a resolution approving the extension of the said period is passed by the Dominion Legislature, the said period shall be extended for a further period of twelve months from the date on which it would otherwise expire so, however, that it does not in any case continue for more than five years from the date on which the Proclamation of Emergency ceases to operate.

4A. *Powers of the Dominion Legislature to be powers of the Constituent Assembly* —The powers of the Dominion Legislature, under this Act shall, until other provision is made by or in accordance with a law made by the Constituent Assembly under sub-s. (1) of S. 8, Indian Independence Act, 1947, be exercisable by that Assembly, and accordingly reference in this Act to the Dominion Legislature shall be construed as references to the Constituent Assembly."

[8] It cannot be seriously disputed that the Governor General had full legal authority to make the order mentioned above, if in fact S. 9 read with S. 19 (4), Independence Act conferred on him the power to make it. The relevant portion of S. 9 is in these words :

"The Governor-General shall by order make such provision as appears to him to be necessary or expedient.

* * * * *

for making omissions from, additions to, and adaptations and modifications of, the Government of India Act, 1935 . . . ."

Section 19 (4) is in these words :

"In this Act, except so far as the context otherwise requires.

References to the Government of India Act, 1935, include references to any enactments amending or supplementing that Act, and, in particular, references to the India (Central Government and Legislature) Act, 1946."

[9] Quite clearly, therefore, these provisions of the Indian Independence Act gave the Governor-General the power to make "omissions from, additions to, and adaptations and modifications" of the India (Central Government and Legislature) Act, 1946. The order made by the Governor-General making the additions and alterations in the India (Central Government and Legislature) Act, 1946, was therefore a good and valid order, and not *ultra vires* the Governor-General, as was, rather faintly suggested by Mr. Mukherjee at one stage of his argument.

[10] The position from 15th August 1947, onwards, therefore, was that the period mentioned in S. 4, India (Central Government and Legislature) Act, 1946, would expire on 31st March 1948, unless the Constituent Assembly, exercising the powers of the Dominion Legislature, passed a resolution approving the further extension of the period under the proviso to S. 4. On 25th February 1948, the Constituent Assembly did pass the following resolution :

"In pursuance of the proviso to S. 4, India (Central Government and Legislature) Act, 1946 as adapted by the India (Provisional Constitution) Order, 1947, this Assembly hereby approves the extension of the period mentioned in Ss. 2 and 3 of the said Act for a further period of twelve months commencing on 1st day of April 1948."

Again, on 23rd March 1949, the Constituent Assembly passed the following resolution :

"In pursuance of the proviso to S. 4, India (Central Government and Legislature) Act, 1946 as adapted by the India (Provisional Constitution) Order, 1947, this Assembly hereby approves the extension of the period mentioned in Ss. 2 and 3 of the said Act for a futher period of twelve months commencing on 1st of day April 1949."

[11] The question for decision is whether these resolutions had the effect of delaying the expiry of the period mentioned in S. 4, India (Central Government and Legislature) Act, 1946, beyond 31st March 1948.

[12] Mr. Mukherjee's main argument is that these resolutions had no legal effect whatsoever, as they did not receive the Governor-General's assent. He found this argument on S. 32, Government of India Act, 1935, which after adaptation by the India (Provisional Constitution) Order, 1947, runs thus :

"When a Bill has been passed by the Dominion Legislature it shall be presented to the Governor-General, and the Governor-General shall declare either that he assents in His Majesty's name to the Bill, or that he withholds assent therefrom :

Provided that the Governor-General may return the Bill to the Legislature with a message requesting that they will reconsider the Bill or any specified provisions thereof, and in particular, will consider the desirability of introducing any such amendments as he may

recommend in his message, and the Legislature shall reconsider the Bill accordingly."

[13] This provision of the Government of India Act, the argument proceeds, puts a limit to the power of the Legislature of the Dominion and so, stands in the way of the Dominion Legislature legislating by a resolution without obtaining the assent of the Governor-General. In this connection, Mr. Mukherjee has drawn our attention to sub-s. (3) of S. 8, Indian Independence Act, which is in these words :

"Any provisions of the Government of India Act, 1935, which, as applied to either of the new Dominions by sub-s. (2) of this section and the orders therein referred to, operate to limit the power of the legislature of that Dominion shall, unless and until other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion in accordance with the provisions of sub-s. (1) of this section, have the like effect as a law of the Legislature of the Dominion limiting for the future the powers of that Legislature."

[14] It is difficult to see how the provision of S. 32, Government of India Act operates to limit the power of the Legislature. It puts no restriction on the power of the Legislature either to consider any matter, or to pass any resolution, or any Bill. In fact, it does not deal with the power of the Legislature at all; but merely provides that when the Legislature has exercised its power by passing a Bill, it should be placed before the Governor-General for his assent.

[15] In my judgment, there is no scope for the operation of S. 8 (3), Indian Independence Act in this case. Quite apart from that however it seems clear to me that the provisions of S. 32, Government of India Act continue to be applicable to the Constituent Assembly, exercising the powers of the Dominion Legislature. These provisions, however, apply only to Bills passed by the Legislature. The section does not provide that a resolution passed by the Legislature will have to be placed before the Governor-General for his assent. There is no justification for reading into the section the words "resolution passed by the Dominion Legislature" when they do not occur there. It must be held therefore that S. 32, Government of India Act does not require that a resolution passed by the Dominion Legislature should be placed before the Governor-General for his assent.

[16] Mr. Mukherjee next argued in a general way that as all legislation by the Dominion Legislature requires for its validity the assent of the Governor-General the passing of a resolution under the proviso to S. 4, India (Central Government and Legislature) Act, 1946, which is also "legislation" requires for its validity the assent of the Governor-General. It is not correct to say however that all legislation by the Dominion Legislature requires the assent of the Governor-General. The principal mode of legislation by the Dominion Legislature is by passing bills. Indeed the passing of a Bill incorporating the provisions is the only mode in which the Dominion Legislature can legislate unless an Act of a legislature with plenary powers has conferred on it—the Dominion Legislature— the power to legislate in a certain matter in some other way viz., by passing a resolution. But there can be such conferment of powers, and when there has been such conferment, as under the proviso to S 4, India (Central Government and Legislature) Act, 1946, it is clear the Dominion Legislature can legislate by passing resolution. Such legislation does not come within the operation of S. 32, Government of India Act, and so, does not require for its validity the assent of the Goveror-General. My conclusion is that the resolutions mentioned above that were passed by the Constituent Assembly functioning as the Dominion Legislature did not require for their validity the assent of the Governor-General.

[17] Mr. Mukherjee contented, however, that even if the resolutions passed by the Constituent Assembly be legally valid, the resolutions as worded have not the effect of extending the period of operation of Act XXIV [24] of 1946. The only effect of the resolutions, according to Mr. Mukherjee, is that the Dominion Legislature can during the extended period exercise certain powers, which it otherwise would not have; that it could have enacted legislation extending the period of operation of Act XXIV [24] of 1946, but as this has not been done, the act expired on 31st March 1948. This argument is in my judgment entirely misconceived. As we have seen sub-s. (3) of S. 1 of Act XXIV [24] of 1946 fixes the period of operation of the Act to be the period mentioned in S. 4, India (Central Government and Legislature) Act, 1946. If the resolutions have produced the effect of extending the period mentioned in S 4, India (Central Government and Legislature) Act, 1946, to a certain date, the consequential effect is that up to that date, Act XXIV [24] of 1946 is in force. The question of enacting fresh legislation to extend Act XXIV [24] of 1946 does not arise at all. If the period mentioned in S. 4, India (Central Government and Legislature) Act, 1946, had not been extended, the Dominion Legislature could still have passed an Act with the assent of the Governor-General amending sub-s. (3) of S. 1 of Act XXIV [24] of 1946, in order to extend the period of its operation.

[18] The resolutions mentioned above approved of the extension of the period mentioned in Ss. 2 and 3, India (Central Government and Legislature) Act, 1946. The necessary conse-

quence under the proviso to S. 4 of the same Act, is that the period mentioned in that section was extended for a period of twelve months from 31st March 1948, by the first resolution dated 25th February 1948; and for another period of twelve months from 31st March 1949 by the second resolution.

[19] The period mentioned in S. 4, India (Central Government and Legislature) Act, 1946, did not therefore expire on 31st March 1948, but at the present moment, stands extended to 31st March 1950. Act XXIV [24] of 1946 did not therefore cease to be of effect after 31st March 1948, but will cease to have effect unless there is further extension of the period mentioned in S. 4, India (Central Government and Legislature) Act, 1946 only after 31st March 1950 as regards acts or omissions after that date. As regards acts omitted or committed before 31st March 1950, Act XXIV [24] of 1946 will continue to operate indefinitely after 31st March 1950.

[20] The alleged date of the acts in both the applications is 23rd September 1949. Act XXIV [24] of 1946 is therefore inforce as regards these.

[21] The legal objection raised by Mr. Mukherjee therefore fails.

[22] As regards merits, it is necessary to consider the two applications separately.

[23] The petitioners in Revision Case No. 716 of 1949 were convicted for attempt to move twenty five maunds of paddy from West Dinajpur District into Malda District, without permit. It is not disputed that such movement would contravene the West Bengal Government notification dated 17th September 1947. The question for the decision of the Courts below was whether the prosecution had been able to prove that the accused persons were attempting to move such paddy from West Dinajpur District to Malda District. The prosecution case was that on the night of 23rd September 1948, a boat with twenty bags of paddy containing twenty-five maunds, was caught, when moving down a river, towards the Malda border, about a rashi from the border. The defence story was that when these persons were loading paddy into a boat about one and a half miles from the border, they were arrested, and the boat with the paddy seized. Evidence that they were caught, about a rashi from the border from the boat, when it was moving towards the border, with these petitioners and twenty bags of paddy on board, has been given by an Assistant Sub-Inspector of Police and two other persons, who were on duty there. The defence story sought to be proved by the evidence of one witness who says that he gave a loan of fifty maunds of paddy to the petitioners, and there other witnesses who say that the petitioners were arrested and the paddy seized, near Rangapukur about one and a half mile from the Malda border. The most striking circumstance is that D. W. 1 who claims to have given the paddy on loan did not say anything to the police that night or the following morning though the seizure is said to have taken place just when the paddy was being loaded into a boat near his house. That is not the conduct of a person who knows that he is going to lose fifty maunds of paddy, as a result of police high handedness.

[24] The learned Magistrate who had the opportunity of seeing the witnesses believed the prosecution witnesses, and found the defence witnesses unworthy of credit. Not a single circumstance has been mentioned by the learned defence Advocate, why the assessment of evidence made by the Magistrate should not be accepted. On a consideration of probabilities, and the ordinary course of human conduct, I agree with the learned Magistrate, and the Court of appeal below, that the prosecution witnesses told the truth in saying that the boat, with these petitioners, and twenty bags of paddy on board, was caught about a rashi from the Malda border, when moving towards that border. Admittedly they had no permit for this attempted movement of the paddy into Malda. They have therefore been rightly convicted, in my opinion under S. 7 read with S. 8 of Act XXIV [24] of 1946. The sentence in my opinion is not too severe.

[25] The petitioners in Revision Case No. 717 of 1949 were convicted under S. 7 of Act XXIV [24] of 1946 read with S. 8 of the same Act for attempting to move twenty bags containing twenty-five maunds of paddy from West Dinajpur District into Malda District.

[26] The prosecution case was that on 23rd September 1948, the patrol men on duty in West Dinajpur near the West Dinajpur Malda border found a boat with these petitioners and 20 bags of paddy on boat moving down the stream, about a rashi from the Malda border, and arrested the men, and seized the boat and the paddy. The defence story was that they were caught when they were loading paddy which they had borrowed from one Abdul Hossain Beg, near his house, about one mile and a half from the border.

[27] Evidence that these petitioners were caught on the boat which had in it twenty bags of paddy, about a rashi from the Malda border, when the boat was moving towards the Malda border has been given by an Assistant Sub-Inspector of Police, and two other persons, who were on patrol duty near the West Dinajpur Malda border. The learned Magistrate who had the opportunity of seeing the witnesses believed the testimony of these prosecution witnesses, and

considered the defence witnesses who had given evidence that the men and the boat with the paddy were caught one and a half mile away, unworthy of credit. Abdul Hossain Beg who gave evidence that he had given fifty maunds of paddy on loan to these petitioners, admitted that though he was informed immediately that the paddy he had lent and the men to whom he had lent it had been seized near his house, he took no action whatsoever. That is not normal human conduct. On a consideration of probabilities, and the ordinary course of human conduct I think the learned Magistrate rightly rejected the defence evidence, as unworthy and believed the prosecution case that these petitioners were caught in a boat, with twenty bags of paddy, about a rashi from the Malda border when the boat was moving towards the Malda border. Admittedly they had no permit for the movement of the paddy from West Dinajpur into Malda. They were, therefore, rightly convicted under S. 7 of Act XXIV [24] of 1946, read with S. 8 of the same Act.

[28] The sentence is not in my opinion too severe and the order of forfeiture was rightly made.

[29] I would, therefore, discharge the rules. The petitioners should surrender to their bail to serve out their sentence.

[30] Certificate under S. 205, Government of India Act, 1935, is granted.

Harries C. J.—I agree.

D.H. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 207 *[C. N. 72.]*

HARRIES C. J. AND BANERJEE J.

Dominion of India—Defendant—Petitioner v. *M/s. R. C. K. C. Nath and Co., Khulna—Plaintiff—Opposite Party.*

Civil Rule No. 802 of 1949, D/- 5-12-1949 from order of Munsiff, 1st Court, Sealdah, D/- 23-3-1949.

(a) Civil P. C. (1908), Ss. 20,80—Suit for damages for short delivery against Government—Cause of action wholly outside jurisdiction of Court—Jurisdiction over suit on ground of defendant's residence or carrying on business, etc.—Notification of E. I. R. Administration published on 27-5-1948—Construction.

The Court has no jurisdiction to entertain a suit brought against the Dominion of India where the cause of action has arisen wholly outside the ordinary original jurisdiction of that Court, on the sole ground that the Government of India dwelt or carried on business or personally worked for gain within the local limits of that Court. 40 Cal. 308, *Rel. on.* [Para 10]

The plaintiff sued the Dominion of India for damages for short delivery of goods entrusted to the Railway Administration for carriage from Aligarh (U. P.) to Khulna, which is now within the Dominion of Pakistan. The suit was instituted at Sealdah. The Munsif held that the Court had jurisdiction to try the suit relying upon the Notification of the E. I. R. Administration published on 27th May 1948 according to which the plaintiff was asked to submit his claim at the Accounts Office at Sealdah:

Held (i) that Sealdah Court could not assume jurisdiction over the suit on the ground of defendant's residence or their carrying on business or their personally working for gain within the jurisdiction of the Sealdah Court; [Para 11]

(ii) that no part of the cause of action was furnished by the Notification. By reason of the Notification the Railway Administration did not undertake to make the payment to the plaintiff within the jurisdiction of Sealdah Court and so no part of the cause of action arose within that jurisdiction. Nor did it arise in Sealdah merely by reason of the fact that plaintiff was asked to submit his claim at the Accounts Office at Sealdah: A. I. R. (30) 1943 Cal. 199, *Disting.*

[Paras 18, 19, 20, 22 & 23]

Annotation:—('44-Com.) Civil P. C., S. 20, N. 10; S. 79 N. 7.

(b) Civil P. C. (1908), S. 20—Cause of action must be complete before suit can be filed. [Para 20]

Annotation:—('44-Com.) Civil P. C., S. 20 N. 14.

Bhabesh Narayan Bose—for Petitioner.

Manindra Nath Ghose and Sachindra Chandra Dass Gupta—for Opposite Party.

Banerjee J.—This is an application on behalf of the defendant Dominion of India asking for a revision, under S. 115, Civil P. C., of an order made by the learned First Munsiff at Sealdah. By that order, he held that the Sealdah Court had territorial jurisdiction to try the suit.

[2] The facts of the case are very simple and may be shortly stated: The plaintiff sued the Governor-General of India in-Council for damages for short delivery of goods which, he alleges, he entrusted to the Railway Administration for carriage from Aligarh (U P.) to Khulna Railway station, which is now within the Dominion of Pakistan.

[3] After due notice under S. 80, Civil P. C. the plaintiff filed the suit on 7th December 1945, in the Munsiff's Court at Khulna.

[4] On 15th August 1947, two Dominions were set up in what previously was British India. One was the Dominion of India and the other the Dominion of Pakistan. There is a Governor General for the Dominion of India and there is a Governor-General for the Dominion of Pakistan.

[5] After that date, the plaintiff amended his plaint by substituting the two Governor-Generals in place and stead of then defendant the Governor-General of India in-Council.

[6] On 19th July 1948, the Khulna Court held that it had no jurisdiction to try the suit and returned the plaint for presentation to the proper Court. We are not concerned in this application with the correctness or otherwise of the decision of the Khulna Court. No legal proceeding has been taken to challenge its correctness.

[7] On 23rd August 1948, the plaintiff opposite party filed the plaint in the Court of the First Munsif at Sealdah, and amended the cause title

of the plaint, by substituting the petitioner the Dominion of India for the Governor-General of India, by striking out the name of the Governor-General of Pakistan and by adding the General Manager, East Indian Railway as defendant 2 and the Chief Commercial Manager, of that Railway as defendant 3.

[8] The plaint was further amended by averments made in the body of it to show how and when the cause of action arose. The amendments were allowed after notice to the defendant.

[9] The petitioner entered appearance. Various issues were framed. One of them was whether the Sealdah Court had territorial jurisdiction to try the suit. On the prayer of the petitioner, this issue was taken first and decided as a preliminary issue, and the learned Munsif has held that the Court has jurisdiction to try the suit. Against this decision, this application has been made.

[10] Defendants 2 and 3 do not reside or carry on business or personally work for gain within the local limits of the jurisdiction of the Sealdah Court. So far as defendant 1, the Dominion of India is concerned, I think, the same principle applies, which was applicable in suits against the Secretary of State for India in Council. That principle, as stated in *Rodricks* v. *Secy. of State*, 40 Cal. 308 : (21 I. C. 1) is this:

"The Court has no jurisdiction to entertain a suit brought against the Secretary of State for India in Council, where the cause of action has arisen wholly outside the ordinary original jurisdiction of that Court, on the sole ground that the Secretary of State for India in Council dwelt or carried on business or personally worked for gain within the local limits of that Court."

[11] Therefore, the Sealdah Court could not assume jurisdiction over this suit on the ground of defendants' residence or their carrying on business or their personally working for gain within the jurisdiction of the Sealdah Court.

[12] The question, therefore, is whether the cause of action or any part of it arose within the jurisdiction of the Sealdah Court?

[13] In this case, the cause of action obviously is (1) entrustment of the goods to the Railway Administration and (2) short delivery.

[14] If the plaintiff succeeds in proving these two facts, the Railway Administration or for the matter of that defendant 1, who now represents the Railway Administration would be liable unless it can show circumstances which exempt it from liability.

[15] It is clear, therefore, that no part of the cause of action arose within the jurisdiction of the Sealdah Court.

[16] But the learned Munsif has taken the view that a part of the cause of action arose within that jurisdiction by reason of a certain notification of the East Indian Railway Administration published on 27th May 1948. It is headed "Re: Partition of claims against the late Bengal Assam Railway". It says:

"All claims for work done or services rendered to the late Bengal Assam Railway up to 14th August, 1947 and other miscellaneous claims outstanding on that date, should be submitted for registration with the Accounts Department of the East Indian Railway, Calcutta. A separate section to deal with these claims will be formed soon; for the present, public and ex-employees are requested to register their claims as quickly as possible and at the latest within the 1st July 1948, with the Divisional Accounts Officer, East Indian Railway, Sealdah. On receipt of these claims arrangements will be made for their verification with the East Bengal Railway Administration, where necessary, and payments will be made thereafter."

[17] It is not necessary to set out the other portions of the notification.

[18] Relying upon this notification, the learned Munsif has taken the view that the Railway Administration undertook to make the payment to the plaintiff within the jurisdiction of the Sealdah Court. We are unable to take that view. There is nothing in the notification to show that the Railway Administration undertook so to do. All that the notification says is that persons concerned should put in their claims before the Divisional Accounts Officer, East Indian Railway at Sealdah, which, after verification with the proper authorities, would be paid. But it is not said that it would be payable or paid at the Accounts Officer's office at Sealdah or any other place at Sealdah. Therefore, the opinion of the learned Munsif is clearly wrong.

[19] And indeed counsel for the respondent has not sought to support the judgment on that view of the learned Munsif. He has contended that a part of the cause of action arose within the jurisdiction of the Sealdah Court by reason of the fact that the plaintiff was asked to submit his claim at the Accounts Office at Sealdah.

[20] There are two difficulties in the way of the respondent's counsel; first, if the suit be treated as a suit as filed in the Khulna Court the plaint of which was returned and then presented to the Sealdah Court, nothing in the notification can form a part of the cause of action as it was published after the institution of the suit at Khulna. A cause of action must be complete before a suit can be filed. Secondly, if the suit be treated as a new suit filed on 23rd August 1948, no fresh court-fee was paid and there may be the question of limitation. And assuming that we treat it as a new suit filed in the Sealdah Court on that day, it is clear that the filing of the claim by the plaintiff in the office of the Accounts Officer, Sealdah, cannot be a part of the cause of action. The cause of action, as I have said, is entrustment of the goods and short delivery thereof.

[21] The test is this; Suppose the plaintiff does not file the claim before the Officer, or filing the claim he does not allege that in the plaint, can the suit be dismissed? I think not. It is not incumbent on the plaintiff to file the claim before that Officer. That notification has not the force of a statute or any rule or order having the force of a Statute which compels the plaintiff to file the claim in that office and default of which entails dismissal of the suit.

[22] We are therefore of the opinion that no part of the cause of action was furnished by the notification.

[23] Consequently, we are unable to hold that any part of the cause of action arose within the local limits of the Sealdah Court.

[24] Counsel for the respondent referred us to the case of *Peoples Insurance Co. Ltd.* v. *Benoy Bhusan*, 47 C. W. N. 292: (A. I. R. (30) 1943 Cal. 199). That was a case for the recovery of certain insurance money. The death of the insured took place at Dacca, where the Insurance Co., had a branch office. It was held that

"the cause of action in this case arose within the jurisdiction of the Dacca Court and as the company has a branch office in that place, the suit could be instituted at Dacca, under Explanation 2 to S. 20, Civil P. C."

[25] There cannot be any doubt about this proposition. Explanation 2 of S. 20, puts the matter beyond doubt. That section says that a Corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

[26] The Insurance Co., had a subordinate office at Dacca and the death of the insured took place at Dacca. Therefore, the suit could be instituted within the jurisdiction of the Dacca Court.

[27] In this case, the petitioner, Dominion of India, is not a Corporation and secondly no part of the cause of action arose within the local limits of the Sealdah Court. This case, therefore, is of no assistance to the respondent opposite party.

[28] We are, therefore, unable to accept the view taken by the learned Munsif. The order made by him is clearly wrong and it must be set aside.

[29] We make the rule absolute with costs.

[30] In conclusion, we may add that other points were argued by counsel in this case, viz., (1) whether the Khulna Court was right in rejecting the plaint, (2) what is the effect of the order of Khulna Court in the light of sub-r. 3 of R. 4, Indian Independence (Legal Proceedings) Order 1947, whereby in certain circumstances stated in that rule an order made by a Court within Pakistan becomes equivalent to an order made by a competent Court of the Dominion of India and (3) whether the suit is barred by limitation.

[31] We have not considered these matters as they are not necessary to be considered in this application. We do not, therefore, express any view on these points.

[32] The only question that we have decided is that no part of the cause of action arose within the jurisdiction of the Sealdah Court, and as such, it has no territorial jurisdiction to try the suit.

Harries C. J.—I agree.

D.H. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 209 *[C. N. 73.]*

DAS GUPTA AND MITRA JJ.

Subodh Chandra Mukherjee —*Petitioner* v. *Sudhir Kumar Basu and others*— *Opposite Party.*

Civil Revn. Case No. 1216 of 1948, D/- 16th March 1949, from order of Munsif, 1st Court, Baruipore, D/- 12th June 1948.

(a) Civil P. C. (1908), S. 151 — Change in presiding officer of Court—Whether succeeding officer will interfere under S. 151 with orders passed by his predecessor depends upon facts of each case — In suitable case such officer is entitled to interfere — Fact of change not to come in his way.

The fact that one officer has ceased to preside over a Court and is succeeded by another gentleman does not mean that the Court has ceased to exist, or that the Court is another Court. It is the Court which, in the exercise of its inherent power, can, and where necessary should, make orders for the ends of justice. Whether a succeeding presiding officer can interfere with an order passed by his predecessor in office or not depends entirely on the circumstances of each case. The case may not be a suitable case for the exercise of powers under S. 151 at all; but if it is a suitable case the fact that there has been a change in the officer presiding over the Court would create no difficulty in his way : A. I. R. (11) 1924 Pat. 136, *Disting.* [Paras 8 and 11]

Annotation : (44-Com.) Civil P. C. S. 151 N. 1.

(b) Civil P. C. (1908), S. 151— Application under S. 174 (3), Bengal Tenancy Act (VIII [8] of 1885)— Application adjourned to 28th April 1947 for orders awaiting receipt of record — Record received and put up on 14th March 1947 before Court in absence of parties — Court directing applicant to take step for service on opposite party by 19th March 1947— Case dismissed for default on 19th March 1947— Application under S. 151 for setting aside dismissal —Court, held, was justified in allowing application.

A person applied on 1st March 1947 under S. 174 (3), Bengal Tenancy Act. The hearing was adjourned to 28th April 1947 for orders awaiting receipt of the record from the appellate Court. But the record on being received was put before the Court on 14th March 1947 in the absence of the parties. The Court passed order directing the applicant to take necessary steps for service of fresh notice upon the opposite party by 19th March 1947. The record was put up on 19th March 1947 and the Court dismissed the case for default as its orders were not complied with by the applicant. Subsequently the applicant applied under S. 151 for setting

aside the order of dismissal and the Court allowed the application :

Held that though an appeal lay under S. 174 (5) against the order dismissing the application under S. 174 (3) and though ordinarily the Court would not interfere under S. 151, Civil P. C., with order against which the party had other redress in law, in the peculiar circumstances of the case the Court was justified in interfering under S. 151. It was really the mistake of the Court itself to take up a case for hearing on a date other than the date it had fixed in the presence of the parties and dismiss the case on the mistaken view that the party had not taken proper steps which he ought to have taken. Hence it was not only right but the duty of the Court to correct its mistake. [Para 13]

Annotation : (44-Com.) Civil P. C., S. 151, N. 4, Pt. 23.

(c) Tenancy laws—Bengal Tenancy Act (VIII [8] of 1885), S. 174 — Application under S. 174 (3) dismissed for default—Appeal lies under S. 174 (5).

An order dismissing an application under S. 174 (3) for setting aside a sale for default amounts to an order refusing to set aside a sale and so an appeal lies under S. 174 (5). 42 C. W. N. 128 and A. I. R. (25) 1938 Cal. 454, *Rel. on.* [Para 12]

Provat Kumar Sen Gupta—for Petitioner.

Harideb Chatterjee—for Opposite Party.

Das Gupta J.— This application is directed against an order setting aside under S. 151, Civil P. C., an order of dismissal of an application under S. 174 (3) of the Bengal Tenancy Act.

[2] It appears that the application for setting aside the sale was put up before the Munsif on 1st March 1947, and on that date, hearing was adjourned to 28th April 1947, "for orders awaiting reciept of the record from the appellate Court." The case was, however, never put up on 28th April because on an earlier date it was dismissed for default. The circumstances under which it was dismissed for default are peculiar. It appears that after the Court had, on 1st March 1947, adjourned the case to 28th April 1947, the records on being received from the High Court were put up before the Munsif on 14th March 1947. On that date, apparently in the absence of either party, the Munsif passed the following orders:

"Applicants are directed to take necessary steps for service of fresh notice upon opposite parties Nos. 4 and 9 by 19-3-47. Put up on that date for further orders. Inform."

[3] Accordingly, on 19th March 1947, the record was put up before the Munsif and the following order was passed:

"No further steps taken by the applicants and the Order No. 40 of 14-3-47 has not been complied with. Ordered that the Miscellaneous Case be dismissed for default."

[4] It was in these circumstances that an application under S. 151, Civil P. C., was filed by the applicant praying for restoration of the miscellaneous case, that is to say, the case started on the application under S. 174 (3) of the Bengal Tenancy Act, after vacating the order passed on 19th March 1947.

[5] On 12th June 1948, this application for restoration was allowed by the learned Munsif and as stated above the dismissal order passed on 19th March 1947, was set aside.

[6] In support of the present application, it is argued, in the first place, that an appeal lay under the provisions of S. 174 (5), Bengal Tenancy Act against the order of dismissal for default and consequently the Court acted illegally in the exercise of jurisdiction in allowing the application under S. 151, Civil P. C. Secondly, it is argued that the Munsif, who passed the order of dismissal for default, having ceased to be the presiding officer of the Court, his successor in office was not entitled in law to give any relief under the provisions of S. 151, Civil P. C.

[7] Taking the second point first, we are unable to agree that any such limitation, as suggested by the learned Advocate, can be placed in the way of the Court making orders under S. 151, Civil P. C. What this section lays down is this:

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court."

[8] The fact that one officer has ceased to preside over a Court and is succeeded by another gentleman does not mean that the Court has ceased to exist, or that the Court is another Court. It is the Court, which in the exercise of its inherent power, can, and where necessary should, make orders for the ends of justice. There seems no reason why we should limit this power given by the Legislature to the Court by laying down that it is only when the same presiding officer continues that an order already passed can be altered. Reliance was placed by the learned advocate on the decision of the Patna High Court in the case of *Bisheshwar Pratap Narain Sahi* v. *Asarfi Singh*, 74 I.C. 110 : (A. I. R. (11) 1924 Pat. 136). In that case a decree had been passed declaring that the plaintiffs were entitled to, among other things, profits with respect to properties of schedule IV, but subject to the decision of the Privy Council, for three years before suit and for subsequent period until delivery of possession, or three years after the decree whatever event first occurred. The application for execution of the decree having been made before the Judge who actually passed the decree, the learned Judge allowed execution in respect of the properties of schedule IV, also, on an application under S. 144, Civil P. C., having been made by the opposite party, the presiding officer, who was not the Judge who had passed the decree and dealt with the execution application in the first stage, passed an order, purporting to Act under S. 151, Civil P. C., for the restoration of these properties to the opposite party on the

ground that in his opinion "possesion over these properties could not be delivered before the decision of the Privy Council."

[9] The learned Judges of the Patna High Court held that this order of the learned Subordinate Judge could not be supported and that S. 151, Civil P. C., gave him no power whatever to recall an order which had been passed by his predecessor in office.

[10] I am unable to agree that this observation is intended to lay down, or does lay down any general proposition that whenever there has been a change in the presiding officer of the Court, the succeeding officer cannot pass any order in exercise of powers under S. 151, Civil P. C. if such orders would have the effect of altering some decision of his predecessor. Quite clearly in the case before the Patna High Court, the succeeding officer was of opinion that his predecessor had made a mistake in law in ordering delivery of possession of certain properties and he thought that under S. 151, Civil P. C. he was competent to pass another order setting aside his predecessor's order in order to correct the mistake of law. In this way, the Subordinate Judge was really sitting in appeal over his predecessor which he in law was certainly not entitled to do. It was in these circumstances, that the Patna High Court in substance, held that by calling his order an order under S. 151, Civil P. C. the learned Subordinate Judge could not act in a way which really amounted to sitting in appeal over his predecessor.

[11] In our opinion, whether a succeeding presiding officer can interfere with an order passed by his predecessor in office or not depends entirely on the circumstances of each case. The case may not be a suitable case for the exercise of powers under S. 151, Civil P. C. at all; but if it is a suitable case the fact that there has been a change in the officer presiding over the Court would create no difficulty in his way. For, as we have already stated, the Court remains the same Court, though the presiding officer changes.

[12] The other contention pressed by the learned advocate is that when an appeal lay against the dismissal order, the Court acted wrongly in restoring the case under S. 151, Civil P. C. Sub-section (5) of S. 174, Bengal Tenancy Act provides for an appeal against an order setting aside or refusing to set aside a sale. It has been held more than once by this Court that, an order dismissing an application for setting aside a sale for default amounts to an order refusing to set aside a sale and so an appeal lay. *Vide* the cases of *Debendra Nath* v. *Gopal Chandra Das*, 42 C. W. N. 128, and *Haji Mohammad Kazibulla Mondal* v. *Humayun Reza Choudhury*, 42 C. W. N. 612 : (A. I. R. (25) 1938 Cal. 454). I respectfully agree with these decisions, and with the learned advocate that an appeal did lie against the order of dismissal passed by the Munsif on 19th March 1947.

[13] It is also correct to say that ordinarily speaking the Court should not interfere under the provisions of S. 151, Civil P. C. with orders against which the parties have other redress in law. Ordinarily, the exercise of inherent jurisdiction under S. 151, Civil P. C. should be limited only to cases where the parties have no other redress in law. The circumstances in this case are, however, very peculiar. Though the order dated 19th March 1947, purports to be an order of dismissal for default, what really happened was that the case was taken up by the Munsif on a date other than the date which had been fixed by him in the presence of the parties for the hearing of the case. It was really the mistake of the Court itself and a very serious mistake to take up a case for hearing on a date other than the date it has fixed in the presence of the parties. This can only be done where the alteration of the date is made with the knowledge and consent of the parties concerned. That was obviously not done in this case. It seems to me that in circumstances of this nature it is not only the right but the duty of the Court to try to correct its own mistake. That mistake consisted in taking up the case for hearing on a date other than the date fixed and dismissing the case on the mistaken view that the parties had not taken steps which they ought to have taken. The only way to correct that mistake was to set aside the order passed under this misapprehension by taking up the case on a wrong date and that was the order which was actually passed, under S. 151, Civil P. C. I think this a proper use of powers under S. 151, Civil P. C.

[14] Even supposing that as an appeal lay against the order of dismissal for default, this was an unorthodox use of the powers under S. 151, Civil P. C. I am of opinion that in the circumstances of this case it would be an improper use of our discretionary juridsiction, to interfere with the order passed by the learned Munsif restoring the case.

[15] For all these reasons I would dismiss this application and discharge the rule. Parties will bear their own costs.

P. N. Mitra J.—I agree

D.H. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 212 *[C. N. 74.]*

ROXBURGH J.

Dominion of India and another — *Petitioners* v. *Ashutosh Das and others*—*Opposite-Party.*

Civil Rule No. 1820 of 1949, D/- 4-1-1950, from order of Munsif, 1st Court, Burdwan, D/- 25-8-1949 and 4-11-1949, Respectively.

Civil P. C. (1908), O. 40, R. 1 — Receiver in execution proceedings—Judgment-debtor in service—Provident fund money—Appointment of Receiver—Civil P. C. (1908), Ss. 51 and 60 (k) — Provident Funds Act (1925), S. 3 (1).

The appointment of a Receiver in execution proceedings has been described as a form of equitable relief which is granted on the ground that there is no effective remedy by execution at law. Surely it is an improper use of that equitable remedy to employ it to avoid a very definite bar created by statute law to achieving the very object for which the Receiver is appointed. Hence, where the decree-holder is unable to attach the provident fund money of the judgment-debtor as he at the time is still in service, the Court should refuse to direct the appointment of a receiver as the only object of such appointment is to avoid the bar created by S. 60 (k) of the Code of Civil Procedure and S. 3(1), Provident Funds Act. [Paras 2, 3 and 5]

Annotation: ('44-Com) Civil P.C., S. 51, N. 6; S. 60 N. 18; O. 40 R. 1 N. 19.

Bhabesh Narayan Bose —for Petitioners.

Amarendra Narain Bagchi— for Opposite Party.

Order.— This is a Rule obtained at the instance of the Dominion of India representing the East Indian Railway Administration and the Divisional Accounts Officer, E. I. Rly., Asansol, against an order of a Munsif of Burdwan, dated, 25th August 1949, appointing a Receiver in the following terms:

"In view of the circumstances it is considered just and proper that the entire provident fund money of the judgment-debtor lying in the hand of the Divisional Accounts Officer, Asansol, do vest in the Receiver. The Receiver shall deposit the entire sum in Court. The judgment-debtor shall get the balance of the money after deduction of the decretal dues and costs, receiver's fees and incidentals."

[2] The circumstances of course were that the decree-holder was unable to attach the provident fund money in question as the judgment debtor at the time was still in service. Under S. 3 (1), Provident Funds Act No. XIX [19] of 1925,

"a compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor, and neither the Official Assignee nor any Receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to, or have any claim on, any such compulsory deposit."

[3] The learned Munsif, however, thought that it was just and proper (following the terms of O. 40, R. 1) that these circumstances should be avoided by the simple device of appointing a Receiver so that instead of the Court sending its own order of attachment to the authorities, the Receiver would write a letter to them to pay the money in question to him and he was then to deposit it in Court. Manifestly it was most unjust and improper in the circumstances in my opinion to appoint a Receiver for that purpose. The appointment of a Receiver in execution proceedings has been described as a form of equitable relief which is granted on the ground that there is no effective remedy by execution at law. Surely it is an improper use of that equiable remedy to employ it to avoid a very definite bar created by statute law to achieving the very object for which the Receiver is appointed.

[4] My attention has been drawn to two cases arising out of the same suit, *Baramdeo Pandey* v. *Mrs. F. Smith*, 44 C. W. N. 636 and 637, in which it was held that there was no bar to the appointment of a Receiver in respect of the provident fund money. The money in that case was the provident fund money of a deceased person and was in the funds of the Calcutta Tramways Company Limited. There were special features in the case in that the rules of the fund were not such as to bring in the operation of S. 3 (2) and S. 5 (1), Provident Funds Act. In the latter case reference was made by Mc. Nair J. to the case of *Rajindra Narain Singh* v. *Mt. Sunder Bibi*, 30 C. W. N. 818 : (A. I. R. (12) 1925 P. C. 176), as an authority for the proposition that a Receiver might be appointed in respect of a right to future maintenance, although attachment of that right was barred under S. 60 (n), Civil P. C. That case has been discussed by Beaumont, C. J., as he then was, in the case of the *Secretary of State for India in Council* v. *Bai Somi*, (A. I. R. (20) 1933 Bom. 350), in which he held that even if the decision in question did amount to a decision that there could be jurisdiction to appoint a Receiver in the particular case, this ought not be done in the particular circumstances. He also pointed out, what is sufficiently obvious, that many payments in addition to future maintenance are exempted from attachment under S. 60, Civil P. C. and if these could be reached in execution by the appointment of a Receiver the protection afforded by the section is to a great extent lost.

[5] In my opinion, therefore, in the present case, the trial Court should have refused to direct the appointment of a receiver, as the only object of such appointment was to avoid the bar created by S. 60 (k), Civil P. C., and S. 3 (1), Provident Funds Act, 1925.

[6] The Rule is accordingly made absolute and the order appointing the Receiver is set aside.

[7] The petitioners will have costs of this Rule.

V.R.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 213 *[C. N. 75.]*

ROXBURGH J.

Jyotindra Nath Sanyal, Defendant No. 2—Petitioner v. *Sm. Taradasi Ghose w/o Satish Chandra Ghose, Plaintiff and others—Defendants—Opposite Party.*

Civil Revn. No. 1109 of 1949, D/- 11-1-1950, from order of Addl. Court of Munsif, Sealdah, D/-30-6-1949.

Houses and Rents—West Bengal Premises Rent Control (Temproary Provisions) Act, (XXXVIII [38] of 1948), S. 45 (2)— Calcutta House Rent Control Order (1943), Cl. 9A—Absence of permission—Effect.

Section 45 (2), West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, does not dispense with permission required by Cl. 9A, Calcutta House Rent Control Order (1943) in case of suit for eviction on the ground of bona fide requirements of the landlord which was filed under the latter Order and which was pending when the Act came into force. A. I. R. (36) 1949 Cal. 674, *Approved*, 83 Cal. L. J. 278, *Disting*. [Para 3]

Nalini Kumar Mukherjee—for Petitioner.
Sarat Chandra Jana—for Opposite Party.

Order. — This is a rule against an order of the Additional Court of the Munsif at Sealdah refusing the defendants' prayer that a plaint in an ejectment suit be returned under O. 7, R. 11, Civil P.C. The suit in question was brought in 1945, under the provisions of the Calcutta Rent Control Order, 1943. At the time when it was brought the amendment made by the insertion of cl. 9A, in the order which took effect on 22nd May 1944, was in force; in other words, the permission of the Rent Controller was necessary in respect of a suit filed on the ground mentioned in cl. 9 (1) (c) of the Order which may be briefly referred to as the ground of *bona fide* requirement by the landlord. The plaint here includes a cause of action on this ground of *bona fide* requirement and also one on the ground of default in payment of rent.

[2] On 1st October 1946, the Rent Control Ordinance replaced the order and on 1st December 1948 the West Bengal Premises Rent Control Act replaced the Ordinance. The plaintiff had not obtained the permission of the Rent Controller as required under the provisions of cl. 9A of the Order. In fact, he had applied for permission and it had been refused.

[3] The learned Munsif has disposed of the matter by referring to S. 45 (2), Rent Control Act of 1948 holding that as permission is now no longer required in such cases the absence of permission at the time when it was required is immaterial. I have no doubt that the learned Munsif is in error in this view and the reference to S. 45 (2) certainly does not in any way help in arriving at that view. A similar question was considered in the case of *Tarini Gupta* v. *Manmatha Nath*, 53 C. W. N. 855 : (A. I. R. (36) 1949 Cal. 674). That was a case filed under the Ordinance, S. 13 (1) of which, required permission of the Rent Controller in the case of a suit for ejectment on the ground of *bona fide* requirement by the landlord. The suit was pending after the Ordinance was replaced by the Act and it was held that the absence of permission as required under the Ordinance was fatal to the suit. A contrary view appears to have been taken in *Hari Mohan Dutt* v. *C. K. Sen & Co. Ltd.*, 83 C. L. J. 278. It would appear that in fact the present question really was never in issue there because the suit in question was not based on the ground of *bona fide* requirement by the landlord. It appears to have been assumed therein however, that in the particular case permission of the Rent Controller was necessary for the suit, when it was filed and it was held that subsequent amendments had rendered this unnecessary. My own view is that the decision in the first mentioned case is clearly correct. I may point out that a similar problem arose, as it was on the obverse side, when cl. 9A was introduced in the Rent Control Order. The question arose then as to what should be the law as regards pending cases when an amendment was being made requiring the sanction of the Rent Controller for the entertainment of certain suits. The problem then was specifically dealt with both as regards pending suits and indeed as regards suits disposed of but still pending in execution. If that specific provision had not been made, there can be no doubt that it would have been held that suits instituted at a time when no permission was necessary would be good and would not be barred by the amendment which would clearly only apply to suits instituted after the amendment came into force. The same principle clearly applies, in my opinion, where the requirement of permission has been removed, the position which we are now considering in the present case.

[4] The ground therefore given by the learned Munsif for rejecting the application of the defendants cannot be supported, but Mr. Jana rightly contends that as his other cause of action on the ground of default in payment of rent is not in any way hit by the requirement for permission, his suit so far as that cause of action is concerned is good and therefore the plaint ought not to be rejected under O. 7, R. 11, Civil P. C. The suit will continue on that cause of action. It cannot be entertained on the other cause of action in the absence of the permission of the Rent Controller.

[5] The result is that the present rule must be discharged. There will be no order as to costs.

D.R.R. *Rule discharged.*

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A. I. R. (37) 1950 Calcutta 214 *[C. N. 76]*

G. N. DAS AND LAHIRI JJ.

Dawoo Doyal Kothari — Petitioner v. *Giridhari Laha—Opposite Party.*

Civil Rule No. 1185 of 1947, D/- 22-3-1949, from order of Sm. C. C. J., Calcutta, D/- 6-12-1946.

Houses and Rents—Calcutta House Rent Control Order (1943), S. 9B (as amended in 1946)— Consent decree for possession in favour of landlord — Proceeding under S. 9B by tenant for setting aside decree started before expiry of Control Order— Effect of S. 102 (4), Government of India Act was to continue proceeding even after expiry of Control Order—Government of India Act (1935), S. 102 (4).

Though the General Clauses Act does not apply to a temporary statute like the Defence of India Act and though the language of the saving clause in S. 102 (4), Government of India Act is elliptical and less comprehensive than the language of S. 2 of the Defence of India (Second Amendment) Ordinance of 1946, it is wide enough to authorise the continuation of the proceeding for setting aside a consent decree in favour of the landlord for possession started by an application made by the tenant under S. 9B, Calcutta House Rent Control Order before the expiry of the Order. Section 9B remained alive for the purposes of a proceeding commenced under it before the date of its expiry although it was dead for all other purposes. Though the Order was issued by the Governor, the ultimate source of the authority of the Governor to issue the Control Order is S. 102 of the Government of India Act and the effect of the expiry of the Control Order must be determined by reference to the provisions of S. 102. 51 C. W. N. 148 *Dissent.* (1947) A. C. 362, 62 T. L. R. 674 and A. I. R. (34) 1947 F. C. 38, *Rel on.* [Paras 9 & 11]

Annotation.—('46-Man.) Government of India Act S. 102 N. 1.

Hemanta Kumar Bose—for Petitioner.

Panchanon Ghose, Probodh Kumar Shome and Benoy Kumar Ghose—for Opposite Party.

Lahiri J.—This Rule was obtained by the plaintiff landlord in a proceeding under S. 41, Presidency Small Cause Court Act for the recovery of possession of room No. 27 of premises No. 57 Clive Street of which the opposite party was a monthly tenant at a rent of Rs. 75 per month. The facts of the case, which are undisputed, are as follows: the present proceeding was started on 7th March 1945, *inter alia*, on the ground of default in payment of rent after service of a notice to quit and on 27th July 1945 it was decreed on consent in favour of the landlord. On 29th August 1945, the Calcutta House Rent Control Order was amended by the insertion of Para. 9B which *inter alia* provided by sub-para. (3) that where any decree or order for recovery of possession had been made before 29th August 1945 on the ground of default in payment or deposit of rent but possession had not been recovered, the proceeding for recovery of possession in execution of the decree or order shall be stayed till 29th September 1945 and if during that period the tenant made an application for setting aside the decree or order and deposited all arrears of rent and costs within such period as might be allowed by the Court, the Court which made the decree shall set it aside. On 1st October 1945 the opposite party applied for relief under Para. 9B as it then stood and it was allowed by the Presidency Small Cause Court Judge; but on revision this Court set aside the order of the Small Cause Court Judge on 10th June 1946 on the ground that Para. 9B (3) as it then stood did not apply to consent decrees.

[2] On 15th June 1946, Para. 9B was further amended by making it expressly applicable to consent decrees and orders and the time granted for filing an application for setting aside a consent decree or order was one calendar month expiring on 15th July 1946. On 12th July 1946 the opposite party filed a second application under the amended para. 9B for getting the reliefs contemplated by that paragraph and before this application was finally decided the Calcutta House Rent Control Order expired on 30th September 1946 and was replaced by the Calcutta Rent Ordinance (Bengal Ordinance No. V [5] of 1946) which came into operation on 1st October 1946. In spite of that, the learned Small Cause of Court Judge proceeded to decide the application and set aside the consent decree on 6th December 1946 in exercise of powers conferred by Para. 9B (3), Calcutta House Rent Control Order.

[3] The principal question that has arisen in this case therefore is whether in spite of the expiry of the Calcutta House Rent Control Order the Small Cause Court Judge had jurisdiction to continue the proceeding under Para. 9B (3) started by the application dated 12th July 1946.

[4] Mr. Bose appearing for the petitioner has argued that after the expiry of the Calcutta House Rent Control Order there was no provision in law under which the proceeding could be continued; because Para. 9B (3) of the Control Order was not reproduced or re-enacted by the Calcutta Rent Ordinance. Mr. Bose has argued that S. 26 of the Rent Ordinance keeps alive only those proceedings under the Control Order for which there is a counter part in the Ordinance and as there is no provision in the Rent Ordinance corresponding to Para. 9B (3) of the Control Order the proceeding under that paragraph cannot be continued under the Ordinance. This argument is of great force. The nearest approach in the Rent Ordinance to the provisions of Para. 9B (3) of the Control Order is to be found in S. 17; but that section does not reproduce all the provisions of Para. 9B; for example, it does not give the tenant an option to have the decree for ejectment set aside as a matter of right, on payment of arrears of rent and costs. In the case of *Manindra Nath*

Banerjee v. *A. K. Fazlul Huq*, 51 C. W. N. 148 Khundkar J. took the view that an application under Para. 9B filed on 15th July 1946 could be continued, if at all, only under S. 17 of the Rent Ordinance and as the provisions of S. 17 (unlike the provisions of Para. 9B of the Control Order) were not mandatory the tenant had no right to have the decree set aside as a matter of right. With regard to the effect of the expiration of a temporary statute Mr. Bose has relied upon Craies on Statute Law (4th Edn.) P. 347 where the learned author states as follows:

"Unless it contains some special provision to the contrary, after a temporary statute has expired no proceedings can be taken upon it and it ceases to have any further effect. Therefore offences committed against temporary Acts must be prosecuted and punished before the Act expires and as soon as the Act expires any proceedings which are being taken against a person will *ipso facto* terminate."

Similar observations are also to be found in Halsbury's Laws of England (2nd Edn.) Vol. 31 *Art. 666* where the following passage appears:

"After the expiration of a Statute, in the absence of provision to the contrary, no proceedings can be taken on it and proceedings already commenced *ipso facto* determine."

The argument of the petitioner is that the Calcutta House Rent Control Order having the force of a temporary Statute the proceeding under Para. 9B initiated by the application filed on 12th July 1946 *ipso facto* terminated on 30th September 1946 on which date the statute expired.

[5] If the present case were to be decided by reference to the provisions of the Calcutta House Rent Control Order and the Rent Ordinance only we would be bound to give effect to the contention of the petitioner. Mr. Ghose appearing for the opposite party has however relied upon S. 102 (4), Government of India Act and also upon the language of S. 2, Defence of India (Second Amendment) Ordinance (Ordinance XII [12] of 1946) which came into effect on 30th March 1946. Section 2 of Ordinance XII [12] of 1946 *inter alia* provides that the expiry of the Defence of India Act shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the Defence of India Act or any rule made thereunder or any order made under such rule or any investigation or legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid.

[6] The Calcutta House Rent Control Order was passed by the Governor of Bengal under R. 81 (2) (bb), Defence of India Rules which again were framed under S. 2, Defence of India Act. The Defence of India Act itself was enacted under S. 102, Government of India Act under which the Central Legislature was given power to legislate on provincial subjects after a Proclamation of Emergency had been made. By sub-s. (4) of S. 102 as amended by S. 5, India (Central Government and Legislative) Act, 1946 (9 and 10 Geo. VI Ch. 39), it was provided that an emergency legislation on a provincial subject by the Central Legislature shall to the extent of the incompetency cease to have effect on the expiration of six months after the Proclamation of Emergency has ceased to operate, "except as respects things done or omitted to be done before the expiration of the said period." If we are to read the Calcutta House Rent Control Order as a part of the Defence of India Act, as we must, we are bound to hold that on 30th September 1946 the Calcutta House Rent Control Order ceased to have effect except as respects things done or omitted to be done before the said date.

[7] The ultimate question that we have to decide in the present case, therefore is whether the application filed by the opposite party on 12th July 1946 for the reliefs contemplated by Para. 9B (3), Calcutta House Rent Control Order come under the saving clause of S. 102 (4), Government of India Act. The effect of a saving clause like the present one upon expiring statutes has been considered in several cases two of which deserve special mention.

[8] In *Wicks* v. *Director of Public Prosecutions*, (1947) A.C. 362 : (1947-1 ALL E. R. 205) the House of Lords had to consider the effect of a saving clause the language of which very nearly corresponds to the language of S. 102 (4). Section 11 (3), English Statute named the Emergency Powers (Defence) Act, 1939, runs as follows:

"The expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done."

The parent Act expired on 24th February 1946 and the defendant Wicks was arrested in March, 1946 for acting in contravention of a Regulation framed under the Act on various dates between April 1943 and January 1944. On 27th May 1946, the defendant was found guilty and sentenced to four years' penal servitude. The validity of the prosecution was challenged on the ground that it took place after the expiry of the parent Act and the Regulation; but the challenge was held to be untenable on the ground that the presence of sub-s. (3) preserved the right to prosecute after the date of the expiry. It was pointed by Viscount Simon in his speech that though S. 38, Interpretation Act (1889) does not apply to a statute which expires by effluxion of time, S. 11 (3), Emergency Powers (Defence) Act has the same effect. In the judgment of Lord Goddard which was affirmed by the

House of Lords and which is reported in (1946) 62 T. L. R. 674 : (1946) A. E. R. 529 there is good deal of discussion on the language of S. 11 (3) and it was pointed out though the language of that sub-section is somewhat elliptical and less comprehensive than the language of S. 38, Interpretation Act it was wide enough to allow the expiring Act to operate in respect of a thing done or omitted to be done before the expiry. In *J. K. Gas Plant Manufacturing Co.* v. *Emperor*, 52 C. W. N. (F. C. R.) 25: (A. I. R. (34) 1947 F. C. 38) the Federal Court of India had to consider the effect of the saving clause in S. 102 (4), Government of India Act in considering the question of the validity of a prosecution for the violation of the Indian Iron and Steel (Control of Production and Distribution) Order, 1941, after the expiry of the Defence of India Act. Spens C. J., held that though the Defence of India Act expired on 30th September 1946 the saving clause in S. 102 (4), Government of India Act authorised a continuation of the prosecution. It was also pointed out that the general rule to the effect that after a temporary statute has expired no proceeding can be taken upon it is modified by the express insertion of the saving clause in S. 102 (4) and reliance was placed upon the observations of Viscount Simon in *Wick's case*: (1947 A. C. 362 : 1947-1 ALL E. R. 205).

[9] Applying the above principles to the circumstances of the present case we have come to the conclusion that though the provisions of the General Clauses Act (which corresponds to the English Interpretation Act, 1889) do not apply to a temporary Statute like the Defence of India Act and though the language of the saving clause in S. 102 (4), Government of India Act is elliptical and less comprehensive than the language of S. 2 of Ordinance XII [12] of 1946, it is wide enough to authorise the continuation of the proceeding for setting aside the consent decree which was started by the application filed by the opposite party on 12th July 1946 before the expiry of the Calcutta House Rent Control Order. Mr. Bose has argued that the provisions of the Government of India Act cannot be invoked for considering the effect of the expiry of the Control Order which was issued by the Governor of the Province. Both upon principle and upon the authority of the judgment of the Federal Court referred to above we cannot accept this argument. The ultimate source of the authority of the Governor to issue the Control Order is S. 102, Government of India Act and the effect of the expiry of the Control Order must be determined by reference to the provisions of S. 102.

[10] The above decision on the scope of S. 102 (4), Government of India Act is sufficient for the disposal of the Rule; but we have to place it on record that Mr. Bose for the petitioner objected to the application of Ordinance XII [12] of 1946 to the facts of the case on the ground that the Ordinance ceased to have effect on a provincial subject after 30th September 1946 under the provisions of S. 102 (4) as amended by S. 5, India (Central Government and Legislative) Act of 1946 (9 and 10 Geo. VI Ch. 39). Mr. Ghose on the other hand contended for the opposite party that the promulgation of the Ordinance being a "thing done" within the meaning of the saving provision in S. 102 (4) the Ordinance is alive even with regard to 'Provincial Subjects.' In view of our decision as to the scope and effect of the saving provision in S. 102, Constitution Act it is not necessary for us to decide this question.

[11] With regard to the decision of Khundkar J., in the case of *Manindra Nath Banerjee* v. *A. K. Fazlul Huq*, reported in 51 C. W. N. 148, it is to be noticed that it consists of two parts. The first part decides that after the expiry of the Control Order on 30th September 1946 a proceeding under para. 9B of the Control Order could be continued only under S. 17 of the Rent Ordinance (V [5] of 1946) and the second part decides that the relief under S. 17 of the Ordinance is discretionary and not mandatory. From what we have stated above as to the scope and effect of S. 102 (4), Constitution Act as interpreted by the Federal Court in the case of *J. K. Gas Plant Manufacturing Co.* v. *Emperor*, 52 C. W. N. (F. C. R.) 25 : (A. I. R. (34) 1947 F. C. 38), it will appear that Para. 9B of the Control Order remains alive for the purposes of a proceeding commenced under it before the date of expiry although it is dead for all other purposes. We therefore respectfully differ from the first part of the decision of Khundkar J., in the aforesaid case and express no opinion on the second part.

[12] The result of our decision is that in spite of the expiry of the Control Order on 30th September 1946 the Small Cause Court Judge had jurisdiction to decide the application filed by the opposite party on 12th July 1946 and that Para. 9B of the Control Ordinance remained alive for the purposes of this proceeding.

[13] As all the points raised by the petitioner fail the Rule must be discharged; with regard to costs it appears that the case was kept pending in this Court for an unnecessarily long period at the instance of the opposite party. There will therefore be no order as to costs.

[14] Certificate is granted under S. 205, Government of India Act as this case involves the question of construction of S. 102 of the said Act.

G. N. Das J.—I agree.

D.H. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 217 [C. N. 77.]

P. B. MUKHARJI J.

Debendra Nath Dutt—Applicant v. *Sm. Satyabala Dasi and others—Respondents.*

Suit No. 1865 of 1946, D/- 21st September 1949,

(a) Calcutta High Court Rules (Original Side), Chaps. 8 and 9—"Enter appearance" — Party not entering appearance—Consequences of — Right to appear at hearing.

There is nothing under the Rules on the Original Side which can be said to prevent the party from appearing when a suit is called on for hearing even though he has not "entered appearance." The words "enter appearance" are technical words used in the Rules and must not be given any meaning save that the Rules attribute. There are two consequences of not entering appearance under the Rules. One is that the suit is liable to be heard ex parte and the other is that no written statement can be filed. Therefore, a party subject to these handicaps imposed by the Rules can still appear under the Civil Procedure Code when the suit is called on for hearing from the undefended list, not only to cross-examine the witnesses of the plaintiff and demolish in such manner the plaintiff's case on evidence that the Court will not pass any decree in the plaintiff's favour but also to make such arguments and submissions on law and on such evidence as the plaintiff may have brought to the Court. These are valuable rights under the Code which are not taken away by Rules of the Original Side.

[Para 15]

(b) Limitation Act (1908), Art. 163—Applicability to Original Side of High Court.

Article 163 is not confined only to applications made under Civil Procedure Code. The language of the Article is such that it covers any application by the plaintiff for an order to set aside any dismissal for default of appearance and there is nothing in the Limitation Act either to exclude from its operation, or to give special privilege to, an application on the Original Side by the plaintiff to set aside a dismissal for default.

[Paras 22 and 23]

Annotation: ('42-Com.) Limitation Act, Art. 163 N.2.

(c) Calcutta High Court Rules (Original Side), Chap. 10, R. 36—Order of dismissal signed—Jurisdiction to vary order.

Where the order of dismissal has not only been drawn up, completed and filed but is also signed, a Judge sitting in the Original Side cannot recall or vary any order that he may have passed before such order is drawn up or completed or signed and filed.

[Para 28]

(d) Civil P.C. (1908), S. 151—Principle of section.

Section 151 does not formulate any new doctrine but is only a legislative recognition of the well-known principle that every Court has inherent power to act *ex debito justitiæ* and to do that real justice for the administration of which alone it exists. [Para 29]

Annotation :('44-Com.) Civil P.C., S.151 N. 1 Pt. 14.

(e) Civil P. C. (1908), S. 151—"Ends of justice."

The words 'ends of justice' in S. 151 do not permit the Court to take a step or a procedure which defeats a statutory provision or the law of the land.

[Para 29]

Annotation : ('44-Com.) Civil P. C., S. 151, N. 1 P. 19.

(f) Civil P. C. (1908), O. 9, Rr. 8 and 9—Applicability to Original Side of High Court.

Order 9, R. 8 and O. 9, R. 9 are applicable to the Original Side of the Calcutta High Court. The words 'appear' in O. 9, R. 8 and "his non-appearance" in O. 9, R. 9 are not such as would indicate that these rules in terms do not apply to the Original Side. The words must be read and construed so as to mean and include not merely appearance by the party himself but also appearance through recognised agents and solicitors on the Original Side who hold power of attorney. These words should be read and interpreted in accordance with the meaning of the word "appearance" as provided by R. 1 and R. 2 of O. 3 of the Code.

[Para 30]

Annotation : ('44-Com.) Civil P. C., O. 9, R, 8 N. 1; O. 9, R. 9 N. 1.

(g) Limitation Act (1908), Art. 162 — Starting point.

An application for review of a judgment of the Original Side of the High Court must be made within 20 days from the date of the decree or order and not from the date of the knowledge of the decree or order.

[Para 32]

Annotation : ('42-Com.) Limitation Act, Art. 162, N. 6.

(h) Limitation Act (1908), S. 5, Art. 163—Application under O. 9, R. 9, Civil P. C. — Extension of period of limitation.

When an application is made by the plaintiff under the provisions of O. 9, R. 9, Civil P. C., after the expiry of the period of limitation prescribed under Art. 163, Limitation Act, the Court is not entitled to extend the period of limitation by taking into consideration circumstances which appear to operate harshly against the plaintiff. [Para 33]

Annotation : ('42-Com.) Limitation Act, S. 5 N. 3; Art. 163 N. 12 Pt. 1.

P. P. Ghosh—for Applicant.

S. Sinha—for Respondents.

Judgment.—This is an application made by a notice of motion. The notice of motion is taken out by the attorney for the plaintiff and is dated 19th August 1949. By special leave the notice of motion was made returnable for 22nd August 1949. The notice of motion asks for the following reliefs :

"1. Order setting aside the order of dismissal dated 5th May 1949.

2. Restoration of the suit for hearing.

3. If necessary, extension of time for making this application."

[2] On the day when special leave was asked from the Court to make the notice of motion returnable on 22nd August 1949 the application was not noted as made on that date when the application came on the list on22nd August 1949 the plaintiff did not have the application noted as made even on that date. On 22nd August 1949 directions were obtained from this Court for filing affidavits. Time was taken to file affidavit in opposition by Tuesday week i. e., 30th August 1949 and to file affidavit in reply by the following Monday, i. e., 5th September 1949 and the application remained adjourned for hearing till 6th September 1949 when adjournment was asked for and granted till the following Tuesday i. e. 13th September 1949. Even on 6th September when the motion was on the list the applicant did not have the motion noted as made on that

date. When the motion appeared on the list on 13th September, it was again adjourned at the instance of the parties till the following Friday, 16th September 1949. The application was heard on 16th September 1949. I have stated in detail the career of this motion because an important point of limitation has been raised in defence to to this application.

[3] The facts giving rise to this application may be stated briefly.

[4] This is a liquidated claim and the suit was instituted by the plaintiff on 1st December 1946. Plaintiff claimed in the suit the recovery of the sum of Rs. 2,570-1-6 alleged to be due on a hatchita. The hatchita was executed by the father of defendant 1 Kartick Chandra Nayak Saha as early as 9th January 1938. The drawer of the promissory note died in June 1946. The plaintiff filed the suit against the widow and the other minor sons of the deceased drawer. The suit appeared in the prospective list from 11th March 1948 and continued in the Prosective List for over a year till 30th April 1949. Under Chap. 10, R. 7 of the Original Side Rules of this Court a suit is placed on the prospective list when it is ready to be heard, which, in my opinion, means when inspection, discovery and translation of documents have all been completed.

[5] On 4th May 1949, the suit appeared in the warning list of liquidated claims of Sinha J. On 5th May 1949, the suit appeared in my daily list of liquidated claims for disposal. It was called on twice. On the first call no one appeared for the plaintiff when it was passed over. On the second call also, nobody appeared for the plaintiff. On both these occasions defendant 1 and his counsel were present. On the second call when no one appeared Mr. S. Sinha learned advocate for defendant 1 asked for the dismissal of the suit. The suit was accordingly dismissed and I consider the provision of O. 9, R. 8, Civil P. C, to be mandatory.

[6] On behalf of the plaintiff, this application is now made to set aside that order of dismissal which was made on 5th May 1949. In support of the notice of motion the only ground used is an affidavit of one Kanai Lal Chatterjee affirmed on 19th August 1949. The said Kanailal Chatterjee is a court clerk of the attorney for the plaintiff. The case made in his said affidavit may be summarised as follows :

(i) He did not know that the suit had been dismissed for default on 5th May 1949. The Court closed for the summer holidays after 14th May 1949 and re-opened on 15th June 1949.

(ii) Between 4th May 1949 when he saw the suit appearing on the warning list of Sinha J. and until 14th May 1949 when the Court closed for the summer holidays apparently no interest was taken in this suit. It is stated in para. 6 of the said affidavit the suit did not appear on the warning list or the prospective list of Sinha J.

(iii) After the Court reopened on 15th June 1949, he thought that the omission of the suit from the list was due to some reason or other and that the same would reappear on the warning list in due course and it is stated in paras. 7 and 9 of his affidavit that he was under the "impression" that the suit went out of the list through mistake or inadvertence. No reason or cause is given as to why he should have that impossible "impression".

(iv) That after the Court reopened on 15th June 1949 he gave requisition to the Registrar for translation of three vernacular documents which the plaintiff had disclosed in his affidavit of documents.

(v) On 8th August 1949, the plaintiffs' younger brother Babu Ballav Dutt called at the office of the attorney for the plaintiff and made enquiries as to when the suit was expected to be heard, although there is no supporting affidavit from Dutt. Thereafter he went to make enquiries at the court-office to put the suit in the warning list when he came to learn from the department of this Court that the suit had been dismissed for default on 5th May 1949. This enquiry according to para. 11 of his affidavit was made on 11th August 1949 so that the knowledge of the dismissal of the suit on 5th May 1949 was gathered on 11th August 1949.

(vi) It is said in para. 13 of his affidavit that although the names of the parties and the cause title in the suit were correctly set out the registered number of the suit and the respective names of the solicitors were not correctly set out in the daily list of 5th May 1949.

(vii) The notice of motion was taken out as I have said before on 19th August 1949.

[7] Mr. S. Sinha, learned advocate appearing for the respondent, has urged before me that the application is out of time and barred by Art. 163, Limitation Act, and should therefore be dismissed. His argument is that the dismissal of the suit for default of the plaintiffs' appearance made on 5th May 1949, was under O. 9, R. 8, Civil P. C., when a suit is so dismissed under O. 9 R. 8 the Code provides by specific provision how the suit is to be restored. That provision is contained in O. 9, R. 9 of the Code which gives the plaintiff the right to apply for an order to set the dismissal aside on sufficient cause being shown for his non-appearance. According to Mr. Sinha this application is and must be treated under O. 9, R. 9 of the Code and Art. 163, Limitation Act provides that such an application should be made within 30 days

from the date of dismissal. Unlike Art. 164, Limitation Act, Art. 163, Limitation Act, in my opinion, makes it clear that the starting point of limitation is the date of dismissal and not the date when the applicant has knowledge of the dismissal. The dismissal having taken place on 5th May 1949 and the notice of motion being dated 19th August 1949 the applicant is clearly out of time.

[8] Mr. Sinha's further argument is that even assuming that time runs from the date of knowledge of the dismissal which is stated in the affidavit to be 11th August 1949 this application not having been actually "moved" before 16th September 1949 and it not having been "noted" as made on any date within 30 days from 11th August 1949, is in any event barred by limitation.

[9] Mr. P. P. Ghose, learned counsel for the applicant, has submitted before me that Rr. 8 and 9 of O. 9, Civil P. C., are not applicable to the original side of this Court. He has relied on the well known decision of the Court of appeal of this Court *S. N. Banerjee* v. *S. Surhawardy*, *reported in* 32 C. W. N. 10 : 55 Cal. 473 : (A. I. R. (15) 1928 Cal. 772), where learned Chief Justice Rankin holds that O. 9, R. 13, Civil P. C., is couched in a language which indicates that a practice different from that which obtains from the original side of the High Court was in the contemplation of O. 9, R. 13. Although this case does not turn on the interpretation of O. 9, R. 13, Mr. Ghose has argued on a parity of reasoning that for the same reasons I should hold R. 8 and R. 9 of O. 9 of the Code are not applicable to the original side.

[10] His next submission is that it is open to me to treat this application for restoration as within the inherent jurisdiction of this Court and such appiication should be treated as one under S. 151 of the Code. In that event Mr. Ghose argues that Art. 163, Limitation Act, does not apply.

[11] Both these arguments of Mr. Ghosh require careful consideration.

[12] The decision in *S. N. Bannerjee* v. *H. S. Suhrawardy*, 32 C. W. N. 10 : 55 Cal. 473 : (A. I. R. (15) 1928 Cal. 772), being a decision of the Court of Appeal is binding on me on the point it decides. But unfortunately for the applicant, that is not a decision on O. 9, R. 8 or R. 9 and it does not deal with or decide the question of Art. 163, Limitation Act. This decision is therefore distinguishable from the present case. The Court of appeal in that case was concerned with O. 9, R. 13 and with an application by the defendant and not by the plaintiff. The question therefore before me in the present application is not concluded by the decision of the Court of appeal. Although at the bar attention was drawn to O. 49, R. 3 of the Code *S. N. Banerjee* v. *H. S. Suhrawardy*, 32 C. W. N. 10 at p. 13 and 55 Cal. 473 at p. 475 : (A. I. R. (15) 1928 Cal. 772), it is unfortunate that the decision of the Court of appeal contains no discussion as to how that point is met in the judgment. The judgment of the Court of appeal as reported in the authorised report does not state the reason why inspite of O. 49, R. 3 of the Code it was held that O. 9, R. 13 of the Code did not apply to the original side.

[13] It has been observed in that judgment that O. 9, R. 13 "is directed in terms to a different practice from that which obtains on the original side of the High Court because of the words "appearing when the suit was called for hearing" in O 9, R. 13. But there again it appears from the judgment that the provisions of Rr. 1 and 2 of O. 3, Civil P. C., which provide for appearance under the Code through agents and solicitors holding power of attorney escaped the notice of the Court of appeal.

[14] This judgment proceeds to deal with the difference between the mode of appearance in the Districts (moffusil) and the original side of this Court and the decision there arrived at that O. 9 R. 13 of the Code does not in terms apply to the original side appears to have been reached *inter alia* on account of that difference. It is necessary however to observe that in the case before the Appeal Court no appearance was entered unlike the present case before me where not only appearance has been entered but also written statement has been filed. On that ground also, this present case is distinguishable and therefore it would still remain to be decided in future whether in such a case the terms of O. 9 R. 13 of the Code would apply to the original side.

[15] At the same time, I find nothing under the Rules on the original side which can be said to prevent the party from appearing when a suit is called on for hearing even though he has not "entered appearance". The words "enter appearance" are technical words used in the Rules of the original side of this Court. They must not be given any meaning save that the Rules attribute. And what are the Rules? They are contained in Chaps. VIII and IX of the Original Side Rules of this Court. Forms 4 and 5 under Chap. 8 of the Rules give the standard forms in which an "appearance is entered" which run as follows:

"To
The Registrar,
Please enter an appearance for the defendant (or me) to the plaint in the above suit.
Signature of the Attorney or of the defendant in person."

They materially follow and imitate the forms and procedure under O. 12 of the Rules of the

Supreme Court of London. Chapter 8 R. 6 of our Rules provides that if such appearance is not entered "the suit is liable to be heard *ex parte*", while Ch. 9 R. 2 of our Rules provides that no written statement will be allowed to be filed if no appearance has been entered. Thus then there are two consequences of not entering appearance under the Rules. One is that the suit is liable to be heard *ex parte* and the other is that no written statement can be filed. In that context, I am not inclined to impose more punishment than those two so explicitly stated by the Rules. Therefore I am of the opinion that a party subject to these handicaps imposed by the Rules can still appear under the Civil Procedure Code when the suit is called on for hearing from the undefended list, not only to cross-examine the witnesses of the plaintiff and demolish in such manner the plaintiff's case on evidence that the Court will not pass any decree in the plaintiff's favour but also to make such arguments and submissions on law and on such evidence as the plaintiff may have brought to the Court. These are, in my opinion, valuable rights under the Code which are not taken away by any Rules of the original side. If that be so I fail to see why in such a case the terms of O. 9 Rr. 8 and 9 of the Code cannot be made applicable to the original side of this Court notwithstanding the technicalities of "entering appearance" as introduced by the Rules of the original side practice. It may be that when because of the default in "entering appearance" the suit is liable to be heard *ex parte*, the defendant may not know or have notice when the suit is going to be heard. But that is immaterial and that is a risk to which such a defendant makes himself open by such default. But should he by any means whatever know that the suit is being heard from the undefended list he can nevertheless appear at such hearing and exercise the rights I have mentioned. Rankin C. J. in the Court of appeal sees the possibility of cross-examination in such a case by the defendant of plaintiff's witnesses. The learned Chief Justice observes as follows at p. 477 of that Report:

"If he does not enter appearance within the time limited the case will go into what is called the undefended list and when the case is on the undefended list it is not possible for the defendant without obtaining leave to enter appearance. *He has a limited right to cross-examine witnesses adduced on behalf of the plaintiff if he appears at the time when the undefended case is down for hearing*, but his position is that of a man who for not entering appearance in time is precluded from defending the suit whether he appears at the hearing or does not appear at the hearing."

[16] I have not been able to pursuade myself to take the view that a suit can only be defended by filing a written statement or by "entering appearance" under the Rules. In my opinion filing of written statement is not the only way of defending a suit. A defendant in my judgment may ably and successfully defend a suit against him by cross-examination and arguments. The confusion that should be avoided in this context is that the expression "entering of appearance" under the original side Rules is not co-extensive in its signification and import with the word "appears" or "appearance" of O. 9, Civil P. C. Rules of the original side do not say that a defendant who has not "entered appearance" cannot in any way "defend" the suit. They punish default of entering appearance only in two ways that I have mentioned, and in no other.

[17] This judgment in *S. N. Banerjee* v. *H. S. Suhrawardy*, 32 C. W. N. 10 : 55 Cal. 473 : A. I. R. (15) 1928 Cal. 772), not only binds me but has acquired all the veneration of a *stare decisis* and has been regarded and followed as a well-known authority on the original side of this Court. It may perhaps be necessary in future for a Full Bench of this High Court to reconsider the grounds and limits of this decision. I will only be content here to say as I have said before that this decision does not conclude the point that has been raised before me, and is distinguishable from the present case in the manner I have already indicated.

[18] Reliance has been placed by Mr. Ghosh on three other decisions. The first decision is *Lalta Prasad* v. *Ramkaran*, 34 ALL. 426 : (14 I. C. 187), where the Court held that notwithstanding the provision contained in O. 9 R. 9 of the Code it has inherent powers of passing orders necessary for the ends of justice. At page 428 of that Report the following observation appears:

"Nothing in the Code of Civil Procedure can limit or otherwise affect such power under which in our opinion a Court can restore such a case as this on grounds other than sufficient cause for non-appearance. Order 9 R. 9 makes it compulsory on a Court to set aside a dismissal under O. 9 R. 8 where the plaintiff satisfies the Court that there was sufficient cause for non-appearance. It however cannot take away the Court's power to restore the case for any other valid reason."

This case however was not concerned with the question of limitation. Morover I find it difficult to imagine a case where the Court finds that there is no "sufficient cause" for non-appearance and yet can hold that there is a "valid reason" for such non-appearance under its inherent jurisdiction. A Division Bench of the appellate side of this High Court presided over by Sir Ashutosh Mukherjee J. sitting with Beachcroft J. in *Charu Chandra* v. *Chandi Charan*, 19 C. W. N. 25 : (A. I. R. (2) 1915 Cal. 539), did not follow this Allahabad decision and made the following observations at p. 27 of that Report:

"Reliance however has been placed upon the cases of *Somayya* v. *Subamma*, 26 Mad. 599 and *Lalta Prasad*

v. *Ramkaran*, 34 All. 426 : (14 I. C. 187), in which an attempt was made to draw a distinction between "sufficient cause" and "valid reason" for non-appearance. We are not impressed by the distinction suggested."

I am in respectful agreement with the views expressed by the Division Bench of the appellate side of this High Court and I respectfully dissent from the Allahabad decision.

[12] The second decision is *Bilasrai Laxminarayan* v. *Cursondas Damodardas*, 44 Bom. 82 : (A. I. R. (7) 1920 Bom. 337). Sir Norman McLeod C. J. delivering judgment relied on the observation in the Allahabad decision and exercised the inherent jurisdiction of the Court for ends of justice independently of the fact whether under O. 9, R. 9, Civil P. C. there was or was not sufficient cause for such restoration.

[13] The third decision is to the same effect and reported in *Saw Mg.* v. *Ma Bwin Byu*, 4 Rang. 18 : (A. I. R. (13) 1926 Rang. 109).

[14] Neither the Bombay nor the Rangoon decision is an authority on the point of limitation and no question of limitation arose for decision in any one of those cases, and both these cases are based on the Allahabad decision which I am not able to follow for reasons I have given above.

[15] I propose to refer to certain decisions of of this Court which in my opinion are binding on me and which I regard as authorities dealing with the point that is raised on this application. In *Biswanath* v. *Gostabehari*, 44 C. W. 576 Panckridge J., one of the most experienced Judges on the original side of this Court, made the following observations at p. 577 :

"If the suit was dismissed under the circumstances contemplated by O. 9, R. 8, Civil P. C., the plaintiff was entitled as of right to apply to have this dismissal set aside under O. 9, R. 9 and the Court was bound to set aside, if satisfied, that there was sufficient cause for plaintiff's non-appearance. On the other hand, if the circumstances in which the suit was dismissed did not fall within the purview of R. 8 the *only remedy* would be by way of an appeal."

[16] This decision implies that there is no inherent jurisdiction of this Court to restore the suit which has been dismissed and which dismissal does not come within the purview of O. 9, R. 8 and appeal is the only remedy according to Panckridge J. It is needless for me to say that the learned Judge was dealing with an application on the original side of this Court.

[17] The other decision is one of the Court of appeal from the original side of this Court and is the case of *Surendra Nath* v. *Hrishikesh*, 46 C. W. N. 280 there it was held that an application to have an *ex parte* decree passed on the original side of the High Court set aside is covered by Art. 164, Limitation Act and must be made within 30 days from the date of the decree or the date of the applicant's knowledge. An application to set aside an *ex parte* decree is provided in O. 9, R. 13 of the Code. If according to the decision of the Court of appeal in *S. N. Banerjee* v. *H. S. Suhrawardy*, (32 C. W. N. 10 : 55 Cal. 473 : A. I. R. (15) 1928 Cal. 772) such an application on the original side cannot be made under O. 9, R. 13 and is only made under the inherent jurisdiction of this Court under S. 151 of the Code then the decision of the Court of appeal in *S. N. Roy* v. *Hrishikesh Saha*, (46 C. W. N. 280) can only be reconciled by saying that even an application under the inherent jurisdiction of the Court to set aside an *ex parte* decree of the original side is also governed by Art. 164, Limitation Act. Derbyshire C. J. in delivering judgment in *S. N Roy* v. *Hrishikesh Saha*, in 46 C. W. N. 280 and 281 says as follows :

"I see no reason why the matter should not be governed by Art. 164, Limitation Act which provides that an application for an order to set aside a decree passed *ex parte* should be made not later than 30 days from the date of the decree or where the summons were not duly served when the applicant had knowledge of the decree.

"It has been suggested that this Court is not bound by the provision of the Art. 164, Limitation Act. I would say with regard to that contention that if it were correct then there is every reason why the Court if it is indeed free to decide after what period it may set aside *ex parte* decree should be guided by the provision of Art. 164. It would be unfortunate if the length of time which would be a bar to an application of this kind would be different from one side of the circular road from the other."

[18] While delivering this judgment Derbyshire C. J. referred to and passed by the decision of Rankin C. J. in the case of *S. N. Banerjee* v. *H. S. Suhrawardy*, (32 C. W. N. 10 : 55 Cal. 473 : A. I. R. (15) 1928 Cal. 772) without any comment. The case of *S. N. Banerjee* v. *H. S. Suhrawardy*, (32 C. W. N. 10 : 55 Cal. 473 : A. I. R. (15) 1928 Cal. 772) was concerned with an application by the defendant and not by the plaintiff but does deal with the question of limitation.

[19] There is, however, another pronouncement of the Court of appeal where a suit on the original side of the High Court was dismissed for default and on an application being made to set aside such dismissal it was held that such application must be moved within the period of limitation prescribed by Art. 163, Limitation Act. That is the well-known decision of *Srichand Daga* v. *Sohanlal Daga*, I. L. R. (1943) 2 Cal. 227 : 47 C. W. N. 450 : (A. I. R. (30) 1943 Cal. 257). From the arguments in that case it will appear at p. 230 of the report that the learned Advocate-General distinguished the decision of the Court of appeal in *S. N. Banerjee*

v. *H. S. Suhrawardy*, (32 C. W. N. 10 : 55 Cal. 473 : A. I. R. (15) 1928 Cal. 772) by stating that that decision did not deal with the question of limitation but was only considering the grounds on which *ex parte* decree could be set aside. At p. 240 of the report Derbyshire C. J. comes to the following conclusion :

"Therefore Art. 163, Limitation Act is part of the general law of land and in my view it applies on the original side of this Court. Article 163 is framed to meet *all cases* where steps are to be taken to aside dismissal of suits for default."

[20] This decision is binding on me. It is also a decision on O. 9, R. 9 and on O. 9, R. 8 of the Code and on Art. 163 Limitation Act. The same argument was made there as will appear from the report of the argument at pp. 229-30. The argument was this :

"Thirdly this is not an application under O. 9, R. 9, Civil P. C. The High Court in its original side can vacate any order before it is drawn up and it is an application to the High Court in the exercise of its inherent jurisdiction to restore the suit by vacating the original order. See *S. N. Banerjee* v. *H. S. Suhrawardy*, 55 Cal 473:(A. I. R. (15) 1928 Cal 772); *Padmabati Dassi* v. *Rasiklal Dhar*, 37 Cal. 259 : (6 I. C. 666) and *Sarupchand Hukumchand* v. *Madhoram*, 28 C. W. N. 755 : (A. I. R. (12) 1925 Cal. 83) which follows the English authority like ex parte *Brown, In re Suffield & Watt*, (1888) 36 W. R. (Eng.) 303 : (29 Q. B. D. 693). There is no time limit to such an application and the Limitation Act does not apply."

[21] That argument did not find favour with the Court of appeal and was overruled. The argument that is made before me is on the same lines and I feel I am bound by the decision of the Court of appeal in *Srichand Daga* v. *Sohanlal Daga reported in* 1943 (2) Cal. 227 : (A. I. R. (30) 1943 Cal. 257) and I am bound to hold that such argument cannot prevail.

[22] The language of Art. 163, Limitation Act is in my opinion such that it covers any application by the plaintiff for an order to set aside any dismissal for default of appearance and I find nothing in the Limitation Act either to exclude from its operation, or to give special privilege to, an application on the original side by the plaintiff to set aside a dismissal for default. I find nothing in the language of the Limitation Act on which to hold that the limitation of 30 days from the date of dismissal which is provided for in Art. 163, Limitation Act does not apply to an application by the plaintiff on the original side of this Court to set aside a dismissal for default of appearance. That in my view is the proper interpretation and construction of Art. 163, Limitation Act.

[23] In my judgment Art. 163, Limitation Act is not confined only to applications made under Civil Procedure Code. Article 163, Limitation Act occurs in the 3rd Division of Sch. 1, Limitation Act. The 3rd Division begins with Art. 158 and ends with Art. 183. Wherever applications under the Civil Procedure Code are intended under the 3rd Division the Legislature has said so expressly as for instance Arts. 159, 165, 166, 171, 172, 174, 176, 177, 178, 179, 181, 182. The 3rd Division refers to many miscellaneous applications not all of which are under Civil Procedure Code as all, e. g., Art. 158 as now amended which provides for application under the Arbitration Act 1940 and Art. 161.

[24] The facts in this case are clear enough. It is clear beyond doubt that from 15th June 1949 until 19th August 1949 although the plaintiff knew that the suit was not on the list neither he nor his attorney took any steps to find out where it was and whether it has been disposed of. If any enquiry had been made then it could have been found out on 15th June 1949 when the Court reopened that the suit had already been dismissed for default. The affidavit of the attorney's court-clerk that he was under the "impression" that the suit had been omitted from the list through mistake or inadvertence is groundless and he had no reason to cherish that impression. Although the suit had appeared in the warning list the plaintiff had taken no steps to make the suit ready for hearing and the clerk now comes forward with an affidavit that he gave requisition for translation of three vernacular documents although that requisition has not been producted before me. I have the gravest suspicion about the *bona fides* of such a statement. If such requisition was given it appears to me it was given to make out a case that there was no knowledge of the dismissal of the suit on 5th May 1949.

[25] Even assuming every fact in favour of the applicant there remains an insuperable difficulty on his way on the applicants own showing the knowledge of the dismissal of the suit dated from 11th August 1949. The application was not "made" to the Court until 16th September 1949, which is more than a month after the date of the knowledge of the dismissal.

[26] It is true that the notice of motion is dated 19th August 1949 and it is also true that by special leave it was made returnable on 22nd August 1949. But the application was not "made to the Court" within the language of the notice of motion until 16th September 1949. The applicant could have this application "noted as made" either on 19th August 1949 when the notice of motion was taken out or on 22nd August 1949, when the notice of motion was made returnable and when being on the list the application was adjourned at the instance of the parties for filing their affidavits or even on 6th September 1949, when it appeared on the list for disposal. If the application was made noted on any one of these

days it might have been argued that at any rate limitation ceased to run as from the day of such noting. After the decision of *Srichand Daga* v. *Sohanlal Daga*, (I. L. R. (1943) 2 Cal. 227 : 47 C. W. N. 450: A. I. R. (30) 1943 Cal. 257 it can no longer be contended that taking out of a notice of motion, *per se*, operates to save limitation. It is now settled law that the application has to be moved and made to the Court. That not having been done, the decision of the Court of appeal in *Daga's case*: (I. L. R. (1943) 2 Cal 227 : 47 C. W. N. 450 : A. I. R (30) 1943 Cal. 257) is clear and I must hold that even if the limitation operated from the date of the knowledge of the dismissal, even then this application is barred by time. I am however of the opinion that it is incontestable that the time from which limitation runs under Art. 163, Limitation Act is not from the date of the knowledge but from the date of the dismissal.

[27] Sale J. who had large experience of the practice and procedure on the original side of this Court took the same view in *Hinga Bibee* v. *Manna Bibee*, 8 C. W. N. 97 : (31 Cal. 150). It is also a decision which holds that an application by the plaintiff on the original side of the Court to set aside a dismissal for default must be made within 30 days (Art. 163, Limitation Act) of the date of dismissal.

[28] Incidentally I must observe that the order of dismissal made on 5th May 1949, has not only been drawn up, completed and filed but was also signed on 14th July 1949, so that I cannot even exercise the jurisdiction that I have as a Judge sitting in the original side to recall or vary any order that I may have passed before such order is drawn up or completed or signed and filed, on the principles laid down in *Sarupchand Hukumchand* v. *Mardhoram*, 28 C. W. N. 755 : (A. I. R. (12) 1925 Cal. 83) and *In re Steel Construction Co. Ltd.*, 39 C. W. N. 1259.

[29] Section 151, Civil P. C., does not formulate any new doctrine but is only a legislative recognition of the well-known principle that every Court has inherent power to act *ex debito justitiæ* and to do that real justice for the administration of which alone it exists. "Ends of justice" are solemn words and no mere polite expression in juristic methodology and here secreted in the solemn words is the aspiration that justice is the pursuit and end of all law. But the words "ends of justice" wide as they are do not, however, mean vague and indeterminate notions of justice, but justice according to the statutes and laws of the land. They cannot mean that express provisions of the statute can be overriden at the dictates of what one might by private emotion or arbitrary preference call or conceive to be justice between the parties. There is a wholesome temptation to which the Courts willingly succumb when a suit is dismissed without being heard for default of appearance of the plaintiff to restore such suit with a view to grant the defaulting party an opportunity to have his case heard and decided on merits and the judicial conscience is set at rest by ordering payment of costs against the defaulting party. Costs are the sovereign palliative for the judicial conscience and I must confess at one stage I felt inclined to apply that palliative and restore this suit. On a closer consideration and reflection, I have however come to this opinion that the words "ends of justice" in S. 151, Civil P. C., do not permit the Court to take a step or a procedure which defeats a statutory provision or the law of the land, when the plaintiff does not appear and the defendant only appears O. 9, R. 8, Civil P. C., makes the clear and mandatory provision that the Court shall dismiss the suit. Where there is such clear provision for such a case it is not open in my judgment to treat the order of dismissal as one under the inherent jurisdiction of the Court. When again O. 9, R. 9 of the Code lays down a particular procedure by which the dismissal could be set aside I am of the opinion it is not open to the Court to say that nevertheless the defaulting party may choose not to adopt that procedure and yet ask the Court to set aside the dismissal by invoking the inherent jurisdiction of this Court. It is well established law that there is no room for the application of the inherent power where there is an express provision in the Civil Procedure Code.

[30] In my judgment O. 9, R. 8 and O. 9, R. 9, Civil P. C., are applicable to the original side of this Court. I am fortified in that view by the decision of the Court of appeal in *Srichand Daga* v. *Sohan Lal Daga*, I. L. R. 1943-2 Cal. 227 : (A. I. R. (30) 1943 Cal. 257) and by the decisions of Sale and Panckridge JJ. two very experienced Judges of the original side of this Court. I do not consider that the words "appear" in O. 9. R. 8 and "his non-appearance" in O. 9, R. 9, are such as would indicate that these rules in terms do not apply to the original side. I consider that the words "appear" and "non-appearance" must be read and construed so as to mean and include not merely appearance by the party himself but also appearance through recognised agents and solicitors on the original side who hold power of attorney. These words in R. 8 and R. 9 of O. 9 of the Code should, in my opinion, be read and interpreted in accordance with the meaning of the word "appearance" as provided by R. 1 and R. 2 of O. 3 of the Code. While saying this I am not unmindful of the observations made by Rankin C. J., in *S. N. Banerjee* v. *H. S. Suhrawardy*,

32 C. W. N. 10 at p. 15: 55 Cal. 473: (A. I. R. (15) 1928 Cal. 772) where the learned Chief Justice discusses the case when the defendant need not "personally" attend in some of the cases on the original side of this High Court and yet his case need not go *ex parte*. That is quite true. It is unfortunate however that the word "personally" creeps into the judgment of the learned Chief Justice. That is a word which does not appear under O. 9, R. 13, which the learned Chief Justice was considering in that case. Appearance of a plaintiff under the provisions of O. 9 of the Code does not necessarily mean appearance "personally" by that party but must include appearance through agents and solicitors within the meaning of Rr. 1 and 2 of O. 3 of the Code. If that view is taken, there is no difficulty in applying the terms of O. 9 of the Code to the original side of this Court. This, in my view, adds fresh reasoning to the conclusion that I have arrived at quite apart from the provisions of O. 49, R. 3, which does not exclude O. 9 of the Code from the original side of this Court. Had the present application been one under O. 9, R. 13, I should have held myself bound by the decision of the Court of appeal in *S. N. Banerjee* v. *H. S. Suhrawardy*, (32 C. W. N. 10) : 55 Cal. 473 : A. I. R. (15) 1928 Cal. 772), notwithstanding my own opinion on the point. As the present case, however, is one under Rr. 8 and 9 of O. 9 of the Code and as this was the point decided also by the Court of Appeal in *Srichand Daga* v. *Sohanlal Daga*, I. L. R. 1943 (2) Cal. 227: (A. I. R. (30) 1943 Cal. 257) I consider it is not only open to me to follow that decision but also that decision is binding on me.

[31] I am also of the view that it is not permissible for this Court to invoke the inherent jurisdiction under S. 151, Civil P. C., to avoid the provisions of the Limitation Act. As I have said before S. 151, Civil P. C., should not be interpreted to mean that the Court has any power in the name of its inherent jurisdiction to suspend or dispense with the statutory provisions or the laws of the land. It is said that no limitation is provided for in an application under S. 151, Civil P. C., But if an application is of the nature which is before me i. e., an application by the plaintiff to set aside the order of dismissal then Art. 163, Limitation Act, must be given effect. to. It will not help the plaintiff applicant in such a case to say that the Court should invoke its inherent jurisdiction. One short answer to that is that even then it has to be regarded as an application under S. 151, Civil P. C. and if it is an application under the Code then there is no escape from Art. 163, Limitation Act. As I have said before however that the language of Art. 163 is not such which says that it must be an application under the Code at all. In that view of the matter whether the present application is treated as one under the Code or not it is in my judgment in any event barred by Art. 163, Limitation Act.

[32] As a last resort Mr. Ghosh for the applicant asked me to treat this application as one for review under O. 47 R. 1 of the Code and Mr. Ghosh submitted that the application can come under the words "any other sufficient reason" occurring therein. In support of this proposition he relies on the judgment of Sir Ashutosh Mukherjee and Chotzner JJ. in *Gopika Raman Roy* v. *Meher Ali*, 39 C. L. J. 247: (A. I. R. (11) 1924 Cal. 872). He has also relied on the case *Rajnarain* v. *Ananga Mohan*, 26 Cal. 598. I do not see how these authorities help the applicant. These decisions do not deal with any question of limitation. There is a shorter period of limitation for review of judgments of the original side of this Court. Article 162, Limitation Act, provides that an application for review of such a judgment of this Court must be made within 20 days from the date of the decree or order and not from the date of the knowledge of the decree or order. Even if it were regarded as an application for review then also it will be barred by limitation on the facts of this case.

[33] In the notice of motion, extension of the period of limitation for making this application has been asked but not pressed in the argument by learned counsel for the applicant. Such extension is asked obviously under S. 5, Limitation Act. In order to obtain such extension, the party asking for such extension must satisfy the Court that there was "sufficient cause" for not making this application within the time prescribed by the Limitation Act. In my opinion the affidavit of the court clerk of the applicant's attorney does not disclose sufficient cause on the facts of the case. He has disclosed no reason or cause why nothing was done from 15th June 1949 till 19th August 1949, when the notice of motion was taken out. No reason or cause is disclosed why he should wait for months under the "impression" that the suit was not appearing in the list through some mistake or inadvertence, I am therefore unable to hold that there was "sufficient cause" on the facts of this case for not making this application within time. So far for the facts on this point. On the law I only observe that Panckridge J. sitting on the original side of this Court and deciding the case of *Madhoram* v. *Mt. Tapoo Rubhani*, 52 C. L. J. 23: (A. I. R. (18) 1931 Cal. 319) held that when an application was made by the plaintiff under the provisions of O. 9, R. 9, Civil P. C., after the expiry of the period of limitation prescribed under Art. 163, Limitation Act, the Court was not

entitled to extend the period of limitation by taking into consideration certain circumstances which appeared to operate harshly against the plaintiff.)

[34] The application, therefore, fails and is dismissed with costs.

V.R.B. *Application dismissed.*

A. I. R. (37) 1950 Calcutta 226 *[C. N. 78.]*

P. B. MUKHARJI J.

Sm. Gangamoyee Dey—Plaintiff v. *Manindra Chandra Nundy—Defendant.*

Suit No. 2008 of 1947, Decided on 10th March 1949.

(a) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), S. 11 (1), Proviso (b) (i)—Oral contract to sub-let—If protects tenant.

The protection of the tenant under S. 11 (1), Proviso (b) (i) can only be claimed in case there is a contract in writing expressly permitting sub-letting. [Para 5]

The words "in writing" do not qualify the word "authority" only but also the word "contract" in S. 11 (1), Proviso (b) (i), Rent Act. [Para 5]

Any contract to sublet is a kind of authority given to the tenant by the landlord and the words "contract" and "authority" are to be read as ejusdem generis in this section. [Para 5]

Under this section, an authority in writing from which it might follow by implication a permission of sub-letting will not protect the tenant. The Legislature intended to exclude cases of implied as opposed to express permission of sub-letting. [Para 5]

A mere oral or verbal contract to sub-let will not protect the tenant. [Para 5]

(b) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), S. 11 (1), Proviso (b) (i)—Six months' sub-letting without landlord's permission commencing prior to Act and continuing thereafter—Six months not elapsing since Act came into force—Tenant is disentitled to protection.

Under proviso (b) (i), S. 11 (1), any period of sub-letting prior to and continuing on or after 1st December 1948 disentitles a tenant from any protection under S. 11 (1) if such sub-letting has been for more than six consecutive months for the whole or a major portion of the premises without a contract in writing expressly permitting such sub-letting. In this view the fact that six months have not elapsed since the commencement of the Act is immaterial : A. I. R. (34) 1947 Cal. 401; A.I.R. (36) 1949 Cal. 61; 52 C.W.N. 693 and Suit No. 733 of 1948 (Cal.), *Ref.* [Para 20]

(Consideration of the principle that a statute should not be given a retrospective effect so as to affect vested right held inappropriate : (1911) 2 Ch. D. 1, *Ref.*) [Para 15]

(c) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), S. 11—Notice to quit—Notice to quit conforming with T. P. Act—Sufficiency—T. P. Act (1882), S. 106.

Section 11 has nothing to do with notice to quit and it is not necessary that the notice to quit should be in any particular form except as required by Transfer of Property Act.

A notice to quit does not need to state any ground at all. [Para 22]

Annotation : ('45-Com.) T. P. Act, S. 106 N 43.

(d) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), S. 11—Offensive sub-letting brought to notice of Court on evidence or otherwise — Jurisdiction to pass decree for recovery of possession.

Section 11, Rent Act does not put a fetter on the passing of any decree or order for recovery of possession if while passing such decree it is brought to the notice of Court on the evidence or otherwise that there has been an offensive sub-letting within the meaning of proviso (b) (i) of S. 11 (1) so as to deprive the tenant of his immunity under that section. [Para 22]

(e) Interpretation of Statutes—Section should be construed as a whole—Section should not be construed without reference to proviso. [Para 14]

Annotation : ('46-Man.) Interpretation of Statutes N. 12.

A. K. Sen and S. Roy — for Plaintiff.

J. C. Gupta and D. K. De—for Defendant.

Judgment.—This is a suit for possession of premises No. 3A, Anukul Mukherjee Road, Calcutta, for arrears of rent for the two months of Jaistha and Aswar 1354 B. S. corresponding to 16th May to 17th July 1947 amounting to Rs. 202 and for mesne profits and other reliefs. The plaintiff's case is that she is the owner of the said premises and that the defendant was a monthly tenant under her at a rent of Rs. 101 per month. The plaintiff gave a notice of ejectment through her Solicitors Messrs. Mitter & Bural on 29th May 1947 calling upon the defendant to quit and vacate on the expiry of the month of Aswar 1354 B. S. corresponding to 17th July 1947. The plaintiff alleged that the defendant sub-let the premises without her consent. This suit was filed on 21st July 1947.

[2] The defendant filed his written statement admitting the receipt of notice to quit. He also admits sub-letting but states in his written statement that it was a condition of the tenancy that he should sub-let portions of the premises. The defendant states also that at the time when he took over the said premises as a tenant there were existing sub-tenants on the premises. He claims protection under the Calcutta Rent Ordinance, 1946, and pleads deposit of all rents with the Rent Controller.

[3] On behalf of the defendant the following Issues were raised: (1) Was there any agreement as alleged in para 2 of the written statement? (2) Has the defendant sublet the major portion of the said premises for more than six consecutive months without the plaintiff's consent? Even if so, if such subletting was not for six months from 1st December 1948, can such subletting be a ground of ejectment? (3) Has the defendant deposited all rents under the Rent Ordinance Act up to date? (4) Is the notice to quit bad in law under the new Rent Act? (5) To what reliefs, if any, is the plaintiff entitled?

[4] *Issue No. I.*—The agreement pleaded in para. 2 of the written statement is that the plaintiff let the premises to the defendant on condi-

tion that the defendant would take it subject to the sub-tenancies then existing and to be entitled to sub-let portion thereof not required for his own purpose. [After discussing the evidence, his Lordship proceeded:] On these facts I have no hesitation in holding that there was no agreement as stated in para 2 of the written statement and answering issue No. 1 in the negative.

[5] *Issue No. 2.*—[After discussing the evidence, his Lordship proceeded:] I hold therefore on the evidence that the defendant sublet the major portion of the said premises for more than six months, without consent in writing of the plaintiff. It will be proper at this stage to deal with a point of law raised by Mr. J. C. Gupta and which is concerned with the interpretation of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948. Mr. Gupta has argued first that the words "in writing" qualify the word "authority" only and not the word "contract" in S. 11. Proviso (b) (i), Rent Act. On an anxious consideration of this argument I find I cannot accept this construction. In my judgment any contract to sub-let is a kind of authority given to the tenant by the landlord and the words "contract" and "authority" are to be read as *ejusdem generis* in this section. That is why the word "other" is used in that part of the statute under consideration. If the words "contract" and "authority" were not to be read *ejusdem generis* then the word "other" would be meaningless. Besides the use of the word "expressly" in my opinion indicates that the Legislature intended that the contract must be expressed. The word "expressly" qualifies also "in writing". In other words an authority in writing from which it might follow by implication a permission of sub-letting will not protect the tenant. The Legislature therefore intended to exclude cases of implied as opposed to express permission of sub-letting. If in the case of even an authority in writing the permission has to be expressly stated and not implied I fail to see why an interpretation should be put upon this section so as to mean that a mere oral or verbal contract to sub-let will protect the tenant. There is no sensible reason in being severe on "authority in writing" as opposed to contract to sub-let. No logical principle of interpretation of statute or common sense can justify such difference being made between a contract and an authority. The absence of the word "authority" in Proviso (b) (ii) of that section does not help Mr. Gupta because in that sub-section a prohibition is dealt with and a prohibition is an interdict and can never be regarded as an authority. If Mr. Gupta's argument were to prevail then it would have meant that while the prohibition on sub-letting has always to be in writing the permission to sub-let by contract could be oral. I see no justification for making such a difference between prohibition and permission. Mr. Gupta has argued on the policy of the Act contending that the Act was indulgent to sub-letting on the ground of dearth of accommodation in Calcutta and therefore the Act required no writing in the contract to sub-let but the Act did not favour prohibition on subletting on the same ground of dearth of accommodation and therefore requires the prohibition to be in writing. The policy of the Act is to be gathered from the language used in the different sections read in the light of the object of the Act as set out in the preamble. On such a consideration, I cannot accept Mr. Gupta's unqualified and sweeping suggestion that such policy was indulgent to sub-letting in any and every case because if that were so proviso (b) (i) need not have been enacted at all. In my opinion therefore the protection of the tenant, can only be claimed in case there is a contract in writing expressly permitting sub-letting. There is in this case no such express contract in writing permitting such subletting. The contracts in this case were recorded by the defendant in writing dated 22nd March 1943 and 29th May 1947 and the defendant has not "expressly" or "in writing" said there that the defendant can sub-let.

[6] The next point argued by Mr. Gupta is that the subletting for six consecutive months which disentitles the tenant to the protection given by S. 11, Rent Act, 1948, must be subletting under Rent Act, 1948, and therefore it must be six months' subletting since 1st December 1948 when the Act came into operation. According to him no matter for how long more than six months' the tenant may have sublet prior to 1st December 1948 all that period of subletting even though for more than six months is of no avail as that was not offensive subletting under the Rent Act, 1948. As six months have not elapsed since 1st December 1948 in this case even now the plaintiff according to Mr. Gupta cannot avail of Proviso (b) (i) of S. 11 of the Act.

[7] This argument requires careful consideration and raises a very important question. There are three decisions on somewhat similar point raised under the Calcutta Rent Ordinance, 1946 (Bengal Ordinance V [5] of 1946). The first decision is of Sen J. on 1st March 1948 in *Atul v. Ganesh* reported in 52 C. W. N. 379. There the learned Judge considered Proviso (b) to S. 12 (1) of the Ordinance 1946 which also disentitles a tenant to the protection under S. 12 of the Ordinance if he sub-let the premises without the consent in writing of the landlord. In that case the learned Judge interpreted Calcutta Rent Ordinance and came to the conclusion that subletting prior to the Ordinance was also affected

with the result that the tenant lost the immunity conferred by S. 12 of the Ordinance even though he sub-let prior to the Ordinance. At p. 381 the learned Judge notices the well-known principle that the Act should not be given retrospective effect unless the words of the Act expressly or impliedly indicate that such effect is to be given and the Court should construe an Act as having effect only from the date on which it comes into force unless by express words or by necessary implications it is given a retrospective operation. The learned Judge followed the decision of *Purushottam* v. *Mt. Hawi Bai* reported in A. I. R. (34) 1947 Cal. 401 : (83 C. L. J. 173).

[8] The second decision is of Biswas J. which came a month later on 9th April 1948 in *Gurupada Haldar* v. *Arjundas* reported in 52 C. W. N. 604 : (A. I. R. (36) 1949 Cal. 61). That was also a decision under the Calcutta Rent Ordinance, 1946 and the learned Judge came to the conclusion that the tenant who sublet the premises without the consent of the landlord lost the protection given by S. 12 (1) of the Ordinance and was hit by Cl. (b) of the proviso of that section even though the subletting was done before the Ordinance came into force. There the subletting continued after the Ordinance came into force. In the other case decided by Sen J. there also the subletting continued after the Ordinance of 1946 had come into force.

[9] The third decision is of Clough J. on 24th June 1947 (earliest in point of time but last to be reported) in *Sk. Mohammed Omer* v. *T. B. Timms* reported in 52 C. W. N. 693. That also was a decision under the Calcutta Rent Ordinance, 1946 and the learned Judge came to the same conclusion as in the other two decisions I have mentioned. In addition to what was stated by Sen and Biswas JJ. the learned Judge in this case decided that the question of construction of that section of the Ordinance was not to be approached as if it was one that deprived person referred to in it i. e., tenants of any right. The learned Judge also construed and emphasised the word "has" in the expression has sublet.

[10] There is one decision under the Rent Act, 1948 of Banerjee J. in Suit No. 733 of 1948 *Sm. Santilata Ghose* v. *Sk. Ibrahim* delivered on 4th January 1949 which is unreported and to which my attention has been drawn. The learned Judge there has held following the two decisions of Clough J. and Biswas J. which I have quoted above and one other unreported decision that the fact of subletting before the Act makes no difference to the tenant. The learned Judge has given no further reasons.

[11] The provisions of the Rent Act are not exactly similar to the provisions of the Calcutta Rent Ordinance 1946 and they are different in two material particulars. First there is no provision in that Ordinance that sub-letting has to be for more than six months as under the Rent Act of 1948. Secondly there was also no provision in Rent Ordinance of 1946 similar to that contained in S. 13, Rent Act. The question, therefore, for determination is whether these two special provisions make any difference and whether the principles laid down in three cases decided by Biswas J., Sen J. and Clough J. under the Calcutta Rent Ordinance 1946 are applicable to the Rent Act of 1948.

[12] Mr. D. K. Dey who followed Mr. Gupta in argument on this point has submitted that these two factors do make a difference. According to him as no period of subletting was specified under the Rent Ordinance 1946, if the subletting continued a day after the Ordinance came into force that was enough to throw out the tenant from the protection of S. 12 of the Ordinance. He has drawn my particular attention to the observation of Biswas J. in *Gurupada Haldar* v. *Arjundas*, 52 C. W. N. 604 at p. 607 : (A. I. R. (36) 1949 Cal. 61) which are in these terms:

"It may be that at the inception of the tenancy there was no question of obtaining the consent of the landlord in writing before the tenant could sublet. All the same the tenancy subsisted at the date of the Ordinance and continued during its currency."

[13] On that ground Mr. Dey distinguished the decision of Biswas, Sen and Clough JJ. who held that subletting prior to the Ordinance was sufficient to disentitle the tenant to the protection offered by S. 12 of the Ordinance.

[14] In my judgment S. 11 (1), Rent Act should be construed as a whole. Sub-section (1) of that section should be construed and read along with the proviso that follows. While sub-s. (1) says that that no order or decree for recovery of possession should be made it also says in the same instance by way of a proviso that this embargo on the making of a decree will not operate in the case where the tenant "has sublet" for more than six consecutive months without landlord's consent. In *Jennings* v. *Kelly*, 1940 A. C. 206 : (109 L. J. P. C. 38) the House of Lords say that there is no rule that the first or enacting part is to be construed without reference to the proviso. The proper course is to apply the broad general rule of construction which is that a section or enactment must be construed as a whole each portion throwing light if need be on the rest. Viscount Maugham in his speech at p. 219 says:

"The principle is equally applicable in the case of different parts of a single section and none the less that the latter part is introduced by the words "provided that" or like words. There can I think be no doubt that the view expressed in Kent's Commentaries on

American Law (Cited with approval in Maxwell 8th Edn. p. 140) is correct. The true principle undoubtedly is, that the sound interpretation and meaning of the Statute on a view of the enacting clause, saving clause and proviso, taken and construed together, is to prevail."

[15] The point of time is the time when the decree is going to be made and at that point of time the words "has sublet" have to be given a meaning. The only consistent possible and natural meaning will be to look to a period anterior to the point of time when the decree is being made and when once that construction is followed any prior period of six months will necessarily come in. No question of disturbing or affecting vested rights is involved by adopting this interpretation. Prior to the Rent Act 1948 the tenant had no vested or any right to resist a suit for ejectment after notice to quit under the general law of the Transfer of Property Act on the ground that he has not sublet for more than six months. Indeed under the law previous to the Rent Act, 1948, even a day's subletting without permission was enough to turn out the tenant of protection under the Ordinance of 1946. Therefore, the consideration of the principle that a statute should not be given a retrospective effect so as to affect vested right (Maxwell, Interpretation of Statutes 9th Edn. pp. 222-23) is inappropriate in such context. In fact the construction which I put on this section and which affects subletting prior to 1st December 1948 does not disturb vested rights and instead of doing violence to the rights of the subject under the general law is in consonance therewith.

[16] In my opinion, the question is as to the ambit and scope of the Rent Act and not as to the date from which the new law as enacted by the Act is to be taken to have been the law. Similar considerations and arguments were considered in *West* v. *Gwynne*, (1911) 2 Ch. D. 1 : (80 L. J. Ch. 578), where the question was if S. 3, Conveyancing and Law of Property Act, 1892 engrafting a proviso on all leases containing a covenant against subletting without consent of the landlord to the effect that no sum of money shall be payable in respect of such consent, was applicable to leases before the Act. The question arose whether such a provision would apply to a lease executed before the Act came into operation but continued during the currency of the Act when the Act did not use any express language of retrospective operation. At pp. 11 and 12 of that Report, Buckley L. J. says:

"During the argument the words "retrospective" and "retroactive" have been repeatedly used and the question has been stated whether S. 3, Conveyancing Act 1892 is retrospective. To my mind the word "retrospective" is inappropriate and the question is not whether the Section is retrospective. Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. *The question is as to the ambit and scope of the Act and not as to the date from which the new Law as enacted by the Act is to be taken to have been the Law.*"

[17] If this were not the construction, then it will mean suspending the operation of this particular statutory provision for six months from 1st December 1948 in respect of the ground of subletting although the Act says it shall come into operation under S. 1 (2) of the Act on such date as the Provincial Government may by notification appoint, and the date so appointed is 1st December 1948. Reading therefore S. 11 (1) of the Rent Act with the provisos that follow and with a view to give effect to the entire section along with the proviso and with a view to avoid suspending operation of the Statute and making it applicable in different parts to different points of time, a result which is always whenever possible to be avoided the proper construction in my opinion is to give a meaning to the words "has sublet" as capable of affecting a period of time anterior to the operation of the Act.

[18] The next consideration is whether S. 13 of the Rent Act makes any difference. It is argued on the basis of this section that the Legislature has made the special provision where a tenant has sublet in whole or in part any premises let to him for a period of not less than seven years and such period expires on or after the 1st day of october 1946 the tenant shall not be entitled to the benefit of S. 11 of the Act date 1st October 1946, was the date on which the Rent Ordinance of 1946 came into operation. The argument therefore is that where the legislature thought fit to affect subletting anterior to the date when the Act came into operation i. e., 1st December 1948, it has said so expressly and the only anterior subletting which is affected by the Act is therefore that class of subtenancy which lasted for at least seven years expiring on or after 1st October 1946, and not any other subletting prior to the Act for a period less than seven years. If a subletting for more than six consecutive months prior to the date of coming into operation of the Act was to come within proviso (b) (i) of S. 11 then it is argued S. 13 of the Act, is redundant.

[18a] On a careful consideration of this argument I am unable to accept it. I do not consider that S. 13 of the Act, will be redundant if by proviso (b) (i) of S. 11 subletting for more than six months prior to 1st December 1948, is hit. The purpose of S. 13 is clear enough from the words

"notwithstanding anything contained in this Act." This according to my interpretation means that even where the tenant has express permission in writing for subletting from his landlord that is no protection for him if he has sublet for a period not less than seven years expiring on or after 1st October 1946. The purpose of S. 13 of the Act, is to make a special provision where the sub-tenancy is for not less than seven years and the legislature has thought fit that in such a case a tenant does not need to retain his tenancy and he is deprived of the protection under S. 11 of the Act. In that case therefore the further provision is made which follows from the words of S. 13 that the subtenants with such long duration of not less than seven years will be deemed to be tenants directly under the landlord.

[19] In my judgment on a proper construction of S. 11 and S. 13 of the Act, I am of the opinion that under proviso (b) (i) of S. 11 of the Rent Act, any period of subletting prior to and continuing on or after 1st December 1948, disentitles a tenant from any protection under S. 11 (1) of the Act, if such subletting has been for more than six consecutive months for the whole or a major portion of the premises without a contract in writing expressly permitting such subletting.

[20] Accordingly I answer the Issue 2 in the affirmative.

[21] *Issue 3* — [After discussing the evidence his Lordship answered Issue 3 in the negative.]

[22] *Issue 4.*—The notice to quit is dated 30th May 1947. A notice to quit in my opinion does not need to state any ground at all. In this case the ground however was stated and that was subletting without the knowledge and consent of the plaintff. Mr. Gupta has argued that under S. 11 of the Rent Act, the notice must state subletting not merely without the consent of the landlord but also for a period for more than six consecutive months and he has submitted that on this ground the notice is bad under the Rent Act. The argument in my opinion is unsound. Section 11 of the Rent Act, has nothing to do with notice to quit and it is not necessary that the notice to quit should be in any particular form except as required by the Transfer of Property Act. Section 11 of the Rent Act, does not put a fetter on the passing of any decree or order for recovery of possession if while passing such decree it is brought to the notice of the Court on the evidence or otherwise that there has been an offensive subletting within the meaning of proviso (b) (i) of S. 11 so as to deprive the tenant of his immunity under that section. That however does not mean that the notice to quit is bad. Besides that notice to quit was given under the Transfer of Propterty Act as it must be and at a time before the Rent Act came into operation.

[23] I therefore hold that the notice is not bad and accordingly answer this Issue in the negative.

[24] *Issue 5.* — It follows from my findings on the other issues that the plaintiff is entitled to the reliefs he has claimed in the plaint.

[25] There will accordingly be judgment for the plaintiff for possession, forarrears of rent amounting to Rs. 202, for mesne profits as claimed in prayers (a), (b) and (c) of the plaint. The defendant will pay the costs of the suit to the plaintiff. Certified for two counsel. No order is asked for and I make no order in respect of the sub-tenants.

V.B.B. *Suit decreed.*

A. I. R. (37) 1950 Calcutta 229 *[C. N. 79.]*

HARRIES C. J. AND BANERJEE J.

Bipin Behari Ray and others—*Petitioners* v. *Rakhal Krishna Hazra and others*—*Opposite Party.*

Application for leave to Appeal to the Federal Court No. 17 of 1949, D/-20-12-1949.

Civil P. C. (1908), O. 45, R. 7—Extension of time—Privy Council Rules, 1920, R. 9—The time for making the deposit required under O. 45, R. 7, cannot be extended. [Paras 4 and 5]

Annotation: ('44-Com.) C. P. C., O. 45, R. 7, N. 7.

Manindra Krishna Ghose—for Petitioners.

Hiralal Chakravarty, Sarat Chandra Janah, Binode Behari Haldar and Basanta Kumar Panda —for Opposite Party.

Harries C. J.— This is an application for extension of time to make the necessary deposit under the provisions of O. 45, R. 7, Civil P. C.

[2] Admittedly the payments were not made in time and the question arises whether this Court has jurisdiction to extend the time.

[3] Other High Courts have held that by reason of the Rules governing Appeals to His Majesty in Council the High Court has jurisdiction to extend the time and I am party to one of those decisions whilst sitting in the High Court at Patna. This Court however has consistently held that the time for making the deposit under O. 45, R. 7, cannot be extended and that the Court has no jurisdiction to grant an application such as the present.

[4] This matter was considered by a Bench of this Court in *Raj Kumar Govind Narain Singh* v. *Shamlal Singh*, 39 C. W. N. 651. There an application was made to cancel a certificate on the ground that the deposit had not been made in time in accordance with the provisions of O. 45, R. 7, Civil P. C. It was urged that the Court had a discretion to extend the time under R 9 of Appendix II of the Privy Council Rules of February 9, 1920. The Court was asked to refuse the application for cancellation on the ground

that in its discretion the Court could extend the time. At p. 652, of the report Rankin, C. J., who delivered the judgment of the Bench observed;

"This is a question of jurisdicition. It does not seem to me possible to maintain that the Court, in its discretion under Rule 9 of the order, made on 9th day of February 1920, could refuse the application made by the respondent.

In my judgment the only order which it is open to us to make is that the certificate for the admission of the appeal dated 2nd August 1926, should be cancelled."

[5] This decision has been consistently followed. For example on 17th June 1940, a Bench of this Court consisting of Derbyshire C. J., and Mukherjea J. held in the case of *Akimuddin* v. *Fateh Chand* (unreported P. C. A. 16 of 1939), that time could not be extended. The same view has been taken by Benches of which I have been a member, an example being a case decided on 29th November 1948 (F. C. A. Nos. 5 to 10 of 1948.) No Bench has taken a contrary view in this Court and that being so we are bound to follow our own decisions and to hold that time cannot be extended for making the deposit required under O. 45. R. 7, Civil P. C.

[6] It has been suggested that the matter should be referred to a Full Bench. But it appears to me that the authorities of this Court are so consistent and are so much at variance with authorities of other Courts that this is a point that must eventually be decided by a superior tribunal. A Full Bench decision affirming a long line of decisions of this Court would only make matters worse.

[7] In the result therefore this application fails and it is dismissed with costs hearing fee being assessed at two gold mohurs.

[8] The certificate granting leave to appeal will be cancelled. The money which was deposited out of time must be returned by the Court to the proposed appellant.

Banerjee J.— I agree.

V.B.B. *Application dismissed.*

A. I. R. (37) 1950 Calcutta 230 *[C. N. 80.]*

P. B. MUKHARJI J.

Murari M. Mukherjee and others — Plaintiffs v. *Prokash Ch. Chatterjee — Defendant.*

Suit No. 2010 of 1947, D/- 10-3-1949.

Tenancy laws—Calcutta Thika Tenancy Act (II [2] of 1949), S. 2 (5)—Thika tenant—Who is—Proof —Person to prove system referred to in S. 2 (5)—It is not matter of legal interpretation but question of fact in every case.

Before a person can be called a thika tenant within the meaning of S. 2 (5) it is essential for him to prove and establish the system referred to in S. 2 (5). It may be the system which has the well-known names mentioned in the section. It may also be a similar system. But the fact of having a system under which a tenant holds has to be established. It is a matter of proof and evidence in every case. It is not a matter of legal interpretation or construction but is a question of fact in every case to be decided on the materials available in such a case: A. I. R. (9) 1922 Cal. 123 and A. I. R (6) 1919 Cal. 482, *Ref.* [Para 7]

Anil Chandra Ganguly— for Plaintiffs.

Gouri Mitter—for Defendant.

Judgment.— This is a suit by the plaintiffs for the recovery of a vacant plot of land being the northern portion of premises No. 235/1, Bowbazar Street, Calcutta, more particularly described in the schedule to the plaint. According to the plaintiffs, the defendant was a tenant in respect of the said plot of land for a term of 15 years ending on 30th June 1947 at a rent of Rs. 20 per month. By a letter dated 25th April 1947, the plaintiffs called upon the defendant to give vacant possession on the expiry of the month of June 1947. It is also alleged in the plaint that a sum of Rs. 60 was due and payable by the defendant on account of rent for three months from April to June 1947.

[2] The defendant filed his written statement and he took a number of points in defence. Mr. Gouri Mitter who appeared for the defendant has abandoned all these points taken in the written statement and has argued only one point before me and that is a point arising under the Calcutta Thika Tenancy Act, 1949, to which I will refer later or in the judgment.

[3] On behalf of the defendant he has admitted the lease dated 1st July 1932, between the plaintiffs and the defendant and the letter, dated 25th April 1947. These two documents are to be found in the admitted brief of correspondence which has been marked by consent as Ex. A in this suit. For purposes of this suit Mr. Gouri Mitter for the defendant has admitted the facts stated in the plaint.

[4] Mr. Mitter contends that the defendant comes within the scope of the Calcutta Thika Tenancy Act, 1949 and this Court has no jurisdiction to determine this suit having regard to S. 29 of that Act. He relies on S. 2 (5) of the Act which defines thika tenant in the following terms:

"Thika tenant" means any person who under the system commonly known as "Thika", "Thika masik uttandi," "Thika masik", "Thika bastu" or under any other like system holds, whether under a written lease or otherwise, or has been recorded in any record-of-rights as holding, under the title "dakhal basalkar" or other like appellation, land under another person and is, or but for a special contract would be liable to pay rent, at a monthly or at any other periodical rate, for that land to such other person and has erected any structure on such land for a residential, manufacturing or business purpose and includes the successors in interest of such person.

[5] Mr. Mitter's argument is based on the two expressions "or under any other like system" and "whether under a written lease or otherwise". It is not his contention that the defendant is a thika tenant in the sense that he could be called as "thika" or "thika masik utbandi" or

"thika masik" or "thika bastu" what he contends is this that having held over after the expiry of the lease which I have mentioned, the defendant should be treated as holding the land within the meaning of the expression "under any other like system." He further points out that the fact of there having been a written lease does not alter the situation because of the words "whether under a written lease or otherwise."

[6] Mr. Mitter contends that so far as the definition of "thika tenant" is concerned the Ordinance and the Act are more or less in similar terms, and that his construction of the definition section should be accepted.

[7] I cannot accept his construction of S. 2 (5), Calcutta Thika Tenancy Act, 1949 or S. 2, Calcutta Thika Tenancy Ordinance 1948. It seems to me that a tenant can only be called a thika tenant under any particular system. It may be the system which has the well-known names mentioned in the statute, namely, "thika", "thika masik utbandi", "thika masik" or "thika bastu." It may also be a similar system. But the fact of having a system under which a tenant holds has to be established. Mr. Mitter has frankly conceded that he has no evidence on the point. In the absence of evidence, I am not prepared to hold that as a matter of fact the defendant is a tenant under any system which can be called the system of a thika tenant. Mr. Mitter contends that it should follow as a matter of legal construction and interpretation of Calcutta Thika Tenancy Act or ordinance and the definition as provided under S. 2 (5), of that Act or S. 2 of the ordinance. In my judgment, it is not a matter of legal interpretation or construction, but is a question of fact in every case to be decided on the materials available in such case. But it is essential in my view for any defendant to prove and establish the system referred to in S. 2 of the ordinance or S. 2 (5) of the Act before he can be called a thika tenant under the Ordinance or the Act. It is a matter of proof and evidence in every case.

[8] In this particular suit the fact is that there was a lease, dated 1st July 1932. That lease was of the northern portion of the plot of land situated at premises No. 235/1, Bowbazar Street, Calcutta. It is not in evidence that the system mentioned in S. 2 of the ordinance or S. 2 (5) of the Act prevails in the Bowbazar Street locality of the town of Calcutta. Then it was a lease for at first a fixed period of 10 years with option thereafter on the part of the lessee to extend the lease for a further period of 5 years. It gave leave to the lessee to construct and erect any structure on the land and under the terms of the lease the lessee was obliged to remove the structures so erected before the expiry of the period mentioned in the lease. Analysing the different clauses in the alleged lease I do not consider that the present defendant can be called a thika tenant within the meaning of the Calcutta Thika Tenancy Ordinance, 1948 or the Calcutta Thika Tenancy Act, 1949.

[9] Mr. Mitter has referred me to two decisions. One is a decision of *Rishikesh Law* v. *Satishchandra*, A. I. R. (9) 1922 Cal. 123: (64 I. C. 774). That was a decision under the Bengal Tenancy Act. It was concerned with the interpretation of a Uriya document where the words "thika mokrar" were used and the nature of the land could be gathered from the fact that the tenant had to pay at so may annas per bigha for jalkar rent. There the learned Judges held that the word "thika" was used to indicate the creation of a tenancy and the word "mokrar" written in Uriya was in reality intended to mean mokrari indicating that the rent was fixed in perpetuity. I do not think that these considerations are germane to the construction now put before me. There are many kinds of tenures described in the Bengal Tenancy Act and current in different parts of the province.

[10] The other decision to which my attention has been drawn by Mr. Mitter is *Manmotha Nath* v. *Anath Bandu*, 23 C. W. N. 201: (A. I. R. (6) 1919 Cal. 482) Mr. Mitter has referred me to p. 213 of that report. That again was a case under the Bengal Tenancy Act and it is not concerned with the question of construction that I have before me in this suit.

[11] In that view of the matter I hold that there is nothing in this case to suggest or to show that the defendant is a thika tenant within the meaning of the Calcutta Thika Tenancy Ordinance, 1948 or the Calcutta Thika Tenancy Act, 1949.

[12] There will accordingly be judgment for the plaintiff in terms of prayers 1, 2, 3 and 5 of the plaint. The mesne profits would be at the rate of Rs. 2 per day until delivery of possession.

[13] Mr. Mitter on behalf of the defendant has asked for some time to vacate on the very good ground that his client has got structures on the land which he had built. I think he is entitled to have some time. Mr. Mitter asks for six months' time which I do not consider to be long having regard to the fact that he has been there for the last 15 years. The execution of this order for vacating possession will be stayed for six months within which time the defendant must vacate. This indulgence of time for six months is given to the defendant on the defendant's undertaking not to prefer an appeal from this judgment.

Suit decreed.

D.H.

A. I. R. (37) 1950 Calcutta 232 *[C. N. 81.]*

P. B. MUKHARJI J.

Benode Behary Roy — Plaintiff v. *The General Assurance Society Ltd.—Defendant.*

Suit No. 1502 of 1942, Decided on 5th July 1949.

Contract Act (1872), S. 62 — Contract of service —Alteration of terms at employee's will—Unilateral alteration of contract — Master and servant.

There is nothing repugnant to the law of contract to have as one of the express terms of the contract itself that it will be alterable at the instance of one party alone. [Para 14]

When an employee of a company, by the very terms of his contract of service, is to act according to the bye-laws of the company, and one of such bye-laws is that the bye-laws can be added to or altered at any time by the company, then the employee is bound by any alteration or addition of the bye-laws that may duly be made by the company even though such addition or alteration is made after the contract of service. This is so even if it means that the employee thereby loses any vested right i. e. any right acquired by him before such alteration or addition. The problem is never met by raising in the abstract the principle of sanctity of contract or the doctrine of vested rights. The problem is always a problem of construction and interpretation of the true meaning and effect of the terms of a particular contract of service or employment and of the scope of the relevant bye-laws in relation thereto. In such a case it is not appropriate to invoke the precedents to show that a company cannot alter its Articles of Association to commit a breach of contract. (1900) 1 Ch. 656 and (1915) 2 Ch. 186, *Expl.* and *Disting.*; (1898) 1 Q. B. D. 71 and 1947-2 All. E. R. 28, *Foll.* (1864) 5 B and S. 840; (1910) 2 Ch. 248 and 1940 A. C. 701, *Discussed.* [Paras 16, 18]

(*Held* on a construction of the contract that the plaintiff had lost his right to claim gratuity by cancellation of this relevant bye-law by the defendant company.)

P. C. Mullick — for Plaintiff.
G. K. Mitter — for Defendant.

Judgment.—The plaintiff sues the defendant company for the recovery of the sum of Rs. 6,134 as being the gratuity alleged to be earned by the plaintiff as an employee of the defendant company. The defendant company resists the plaintiff's claim on the ground that the bye-laws which entitled the plaintiff at one stage of his service to claim the gratuity had been altered before the termination of the plaintiff's services. The vexed question as to how far a company by altering its bye-laws can prejudicially affect an employee's contract of service has been raised in this suit.

[2] The facts may be stated very briefly. The plaintiff was appointed Secretary of the Company in October 1924 at a salary of Rs. 150 per month and it is the pleading of the plaintiff that such appointment was subject to and in terms of the regulations contained in the then bye-laws of the defendant company. He thereafter rose to the position of the Officiating General Manager of the Company in 1932-33. His services were terminated in December 1939 and he was admittedly paid his Provident Fund.

[3] When he joined service of the defendant company as its secretary the bye-laws of the company at the time did not entitle him to any gratuity because his salary was below Rs. 300 per month. Gratuity at that time under the bye-laws was payable only to employees of the superior service of the company drawing a salary of Rs. 300 per month and over (Bye-law 54) and such gratuity was payable in lieu of pension (Bye-law 94 under Chap. 12 which Chapter deals with superior service only). The employees of the subordinate service of the company were given only Provident Fund for which provision was made under Chap. 13 of the bye-laws. The difference between the superior service and the subordinate service will appear under bye-law 54. These bye-laws were published in 1923. The plaintiff reached the grade of Rs. 300 per month on 1st January 1929. Bye-law that governed grant of gratuity at that time is contained in Cl. 94 of the bye-laws published in 1923. That bye-law is in the following terms:

"94. Gratuities at the rate of a month's pay for every year of service rendered are paid to employees on retirement in lieu of pension provided the following conditions are fulfilled:

1. Service must be continuous, good, efficient and faithful.

2. In the event of voluntary retirement before attaining the age of 55 years an employee must have rendered 15 years service.

3. In the event of compulsory retirement by the Society for medical unfitness.

4. No gratuities are granted to members of the Subordinate Staff."

[4] It was clear that when the plaintiff joined the service he did not come under the bye-law granting gratuity but when he reached the grade of Rs. 300 per month on 1st January 1929 he became eligible to come under the bye-law governing gratuity. Before his services were terminated in 1939 by the Board, Resolution No. 3 of the Directors dated 12th October 1935 the bye-law granting gratuity was cancelled.

[5] Mr. G. K. Mitter learned counsel appearing for the defendant company gave up all points of defence taken in the written statement except the defence that the amendment of the bye-laws cancelling provision for gratuity as depriving the plaintiff of his right. He has confined himself to one issue which he has raised and that issue is:

"Does the alteration of the Bye-law by the Board Resolution No. 3 dated 12th October 1935 cancelling provision for gratuity deprive the plaintiff of his right to claim any gratuity"?

[6] On that basis no evidence has been called on either side. It is admitted on both sides that when the plaintiff joined the service as secretary, under the bye-laws published in 1923 the plaintiff had no claim to be eligible to any gratuity. It is also admitted that when from 1st January

1929 the plaintiff reached the grade of Rs. 300 per month Bye-law 94 became operative on him but that such bye-law was cancelled in 1935 before the plaintiff's service was terminated in 1939. It is also admitted that such cancellation was duly made and in accordance with the power given by the bye-laws themselves. What however has been contended on behalf of the plaintiff is that by such cancellation the plaintiff's right has not been lost. There is an admitted brief of correspondence and documents which has been marked as EX. 'A' in this suit. The records of the plaintiff's service as well as all material facts will appear from such exhibit.

[7] Before I notice the arguments in this case it will be necessary to refer to bye-law 4 which remained all the time without amendment and which was continued although bye-laws were amended from time to time. In my judgment the decision in this case will depend on a consideration of the effect of that bye-law on the construction of the contract of service. Bye-law 4 runs in the following terms:

"4. The Board of Directors reserve to themselves the right of altering or adding to at any time, the rules contained in these Bye-laws."

[8] This bye-law 4 was in the bye-laws of 1923 and was there at the time when the Board Resolution of 12th October 1935, was passed. It was an operative bye-law at all material time.

[9] The argument for the defendant company is this. Bye-law 4 gives the Board of Directors of the Company the right of altering or adding to at any time the Rules contained in the bye-laws. The relevant contract of appointment of the plaintiff is contained in letter dated 28th September 1924. The letter provides

"you are to act according to our instructions and orders issued to you from time to time *and the Bye-laws*, a copy thereof is supplied herewith and deductions towards Provident Fund contributions and security deposit shall have to be made out of your monthly dues as usual."

That letter of appointment does not make gratuity an express term in the contract of service. The claim for gratuity therefore can only be based on the bye-laws. The company has a right to alter the bye-laws providing for gratuity at any time by reason of bye-law 4. As the bye-law was cancelled as a result of the Resolution of the Board of Directors dated 12th October 1935 the plaintiff has no claim. That in brief is the contention of the company.

[10] Mr. P. C. Mullick appearing for the plaintiff has ably put forward his case. His first argument is that although bye-law 4 is in very wide terms it does not permit the company to alter the provision for gratuity in such a manner as to deprive the plaintiff from earning the gratuity granted by the previous bye-law of 1929 he having once come under its operation. In support of this submission Mr. Mullick has relied on the observation of Lindley M. R. in *Allen* v. *Gold Reefs of West Africa, Ltd.*, (1900) 1 Ch. 656 at pp. 671 to 674: (69 L. J Ch. 266) and on the judgment of Sargant J. in *British Syndicate Ltd.* v. *Alperton Rubber Co. Ltd.*, (1915) 2 Ch. 186: (84 L. J. Ch. 665) which followed and adopted at p. 193 of that Report the observation of Lindley M. R. Both these cases however are cases concerning the rights of a member and shareholder of a company as against the company. They are not cases as between an employee of the company and the company. It may be observed that they are cases where the statutory right of alteration of Articles of a Company under the Company Law was one of the considerations. No questions of Company Law or of the statutory rights of the Company to alter Articles arise in this case.

[11] Special emphasis was laid by Mr. Mullick on the following passage in the judgment of Lindley M. R. in *Allen* v. *Gold Reefs of West Africa Ltd.*, (1900) 1 Ch. 656 at p. 671: (69 L. J Ch. 266):

"the power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the Company's Memorandum of Association. Wide however as the language of S. 50 is the power conferred by it must like all other powers be exercised subject to those general principles of law and equity which are applicable to all powers conferred on the majority and enabling them to bind minority. It must be exercised *not only* in the *manner required by law* but also *bona fide for the benefit of the company as a whole and it must not be exceeded*. These conditions are always implied and are seldom if ever expressed."

Mr. Mullick invokes that passage in the judgement of the Master of the Rolls and asks me to construe the wide powers of bye-law 4 as "subject to those general principles of law and equity." In my opinion, the general principles of law and equity which the Master of the Rolls considered in that case were, (1) that the power must be exercised in a manner "required by the law" and (2) *bona fide* for the benefit of the company and not in breach of the principle that the majority should not oppress the minority. No scope of the application of the first principle exists in the present case as the amendment is not suggested to have been made illegally or in a manner not justified by law. Indeed Mr. Mullick for the plaintiff has conceded that the cancellation has been duly and lawfully made according to bye-law 4. The second principle that in company law the majority cannot oppress the minority has no concern with the facts of the present case. If that be so I cannot put any fetter on

the unrestricted right of altering or adding to at any time the Rules contained in the Bye-laws and which right is conferred under bye-law 4. Indeed, the Master of the Rolls in the passage that follows the observations on which Mr. Mullick relies says this

"but if they (the two principles I have referred to above) are complied with I can discover no ground for judicilly putting any other restriction on the power."

[12] In my opinion I feel the same way and I consider that I cannot judicially put any restriction on the right conferred under bye-law 4.

[13] In the recent decision of the House of Lords, *Southern Foundries Ltd.* v. *Shirlaw* reported in 1940 A. C. 701 : (1940-2 ALL E. R. 445) a very great divergence of judicial opinion is expressed. In that case the contract of appointment of the Managing Directors was "for ten years from 1st December 1933." Article 91 of the Company whose Managing Director the plaintiff was, provided that the Managing Director

"shall be *subject* to the provisions of *any contract* between him and the company but subject to the same provision as to resignation or removal as the other Directors of the company and if he ceased to hold the office of the Director he shall ipso facto and immediately "cease to be a Director."

By an amendment of the article, the plaintiff was removed under the amended article before the period of ten years expired. The plaintiff claimed damages for wrongful repudiation of the contract and before the trial Judge succeeded in obtaining a decree for damages. The Court of appeal affirmed the decree for damages although Sir Wilfred Greene M. R. dissented. The company appealed to the House of Lords and the appeal was dismissed by the majority of the members although here again both Viscount Maugham and Lord Romer dissented. That case does not assist the plaintiff here. There the contract was expressly for ten years and the articles relating to the removal of the Managing Director were expressly "subject" to the contract. Here the letter of appointment does not expressly include any term in the contract regarding payment of gratuity to the plaintiff, and the Bye-laws were not made subject to the contract of appointment. On the contrary it expressly incorporates the bye-laws in the terms of the contract. It is only in the bye-laws that the provision for gratuity had been made and such bye-laws also provided expressly that they could be altered or added to at any time by the Board of Directors. The question therefore resolves to a question of construction of the particular contract of service.

[14] The principle laid down by Cockburn C. J., in *William Stirling* v. *Maitland* (1864) 5 B. & S. 840 at p. 852 : (34 L. J. Q. B. 1) that if a party enters into an arrangement which can only take effect by the continuance of such an existing state of circumstances there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstance under which alone the arrangement can be operative and the principle laid down by Kennedy L. J. in *Measures Bros. L'd.* v. *Measures*, (1910) 2 Ch. 248 at p. 258 : (79 L. J. Ch. 707), that it is elementary justice that one of the parties to a contract shall not get rid of his responsibilities thereunder by disabling the other contractor from fulfilling his part of the bargain are well established. But before these principles can be applied, the more fundamental question is what is the contract between the parties. If the contract is that the very Bye-laws under which gratuity can be claimed and paid are subject to alterations or additions at any time then such a question resolves itself in my opinion into one of true construction of the agreement or contract of service. There is in my judgment nothing repugnant to the law of contract to have as one of the express terms of the contract itself that it will be alterable at the instance of one party alone. If one contracting party gives to the other contracting party the right to alter the terms of the contract between them the Court is not justified in my view to apply the principles of Cockburn C. J. and Kennedy L. J. which were approved by the House of Lords in *Southern Foundries Ltd.* v. *Shirlaw*, 1940 A. C. 701 : (1940-2 ALL E. R. 445). In the majority opinion of the House of Lords the reference to these principles are made by Lord Atkin and Lord Porter. But the speech of neither of these two learned Lords discusses the context in which the principles are to be applied. It is only in the dissenting speech of Viscount Maugham that a reference is made to such a consideration. Indeed at p. 712 of that Report, Viscount Maugham observes on the principle laid down in the statement of Cockburn C. J. :

"This is not a rigid rule. It is capable of qualification in any particular case. And it is a rule the application of which depends on the *true construction of the agreement*."

There is nothing in the majority opinion which can be said to dissent from this statement of Viscount Maugham on this particular point. The principle that Courts should uphold the sanctity of a contract makes it all the more necessary in my opinion for the Courts to examine with care the terms and true construction of such contract or else there is the risk or danger of misdirected righteousness in the name of sanctity of contract.

[15] From the point of view of construction the contract in the particular case before the

House of Lords was different from the contract that is before me. As Lord Atkin pointed out at p. 721 of that Report:

"Article 91 was thus expressly subject to the provision of the agreement so far or rather if in any event it should conflict with the provisions of the agreement such as the ten years' term of engagement."

Secondly, Lord Atkin also observed at p. 723 of that Report that the articles in that case gave the Directors "power to dismiss but the power to dismiss is to be distinguished from the right to dismiss." Neither of these considerations is applicable to the present case before me. Bye-law 4 in expressed terms gives "the right" to alter or add to the Rules contained in the Bye-laws. Secondly, the letter of appointment does not make it any express term of the contract of service that the plaintiff should receive any gratuity or that the Bye-laws are to be subject to the contract of service. Nor indeed the plaintiff could come under that provision as at the time of appointment his salary was not of the grade which could come under the operation of the Bye-law providing gratuity.

[16] In my judgment the true construction of the plaintiff's contract of service with the defendant company is that the contract of the plaintiff was "to act according to the instructions and orders issued from time to time and the Bye-laws." The result is that the contract of service incorporated the Bye laws. Consequently, one of the terms of the contract is that the plaintiff gave to the Board of Directors the right to alter or add to at any time the Rules contained in the Bye-laws by virtue of bye-law 4. As gratuity could only be claimed under bye-law 94 it was a term of the contract according to my construction that bye-law 94 providing for gratuity could be altered at any time. If, therefore, it has been cancelled as a result of the Board Resolution No. 3 dated 12th October 1935 that was by virtue of the terms of the contract and was not in breach thereof. It is therefore not appropriate in my view to invoke the precedents to show that a Company cannot alter its Articles of Association to commit a breach of contract.

[17] The next argument of Mr. Mullick for the plaintiff is that even if bye-law 4 justifies alteration, no alteration could be made which affects a vested right and the plaintiff according to him had acquired a vested right. I do not consider that on 12th October 1935 when the Resolution of the Board of Directors cancelled bye-law 94 providing for gratuity the plaintiff had any vested right in fact or in law to the gratuity. The right to claim gratuity is by terms of bye-law 94 could only arise "on retirement". But the plaintiff was in service on that date and had not retired he being retired four years thereafter in 1939. There is therefore no question of vested right. Again whether a vested right in particular circumstances can be altered is in my view a question of construction of the contract with reference to the Bye-laws in a particular case. A somewhat similar argument was advanced in *Smith* v. *Galloway*, (1898) 1 Q. B. D. 71 at p. 75 by the learned counsel for the plaintiff and I can do no better than quote the observation of Wright J. in that case at p. 77 of the Report and which observations I respectfully follow:

"Then the second point made by the plaintiff was that if the plaintiff did by joining the Society assent to a subsequent alteration of the Rules he did so subject to this limitation, that the alteration should not affect a vested interest and should not deprive him of any benefit to which he has already become entitled at the time of alteration made. But I can see no ground for introducing any such limitation into his contract. It is a matter of every day occurrence for the Society such as this to make alterations in the Rules. Where the only contract between the Society and the member in the original contract under which he became a member and that as is the case here, provides for alterations of the Rules he is bound by any subsequent alterations that may be made within the power of alteration, *whatever the extent of that alteration* may be."

Kennedy J. agreed with the observations of Wright J. in that case. In that view of the matter the second argument of the learned counsel for the plaintiff cannot also in my opinion succeed. I also find support for the conclusion to which I have arrived from the judgment of Sellers J. in *Yeo* v. *Stewart*, reported in (1947) 2 ALL E. R. 28 : (177 L. T. 428) and particularly the observations of that learned Judge at pp. 33 and 34 of that Report. As the learned Judge there says at p. 33 of that report relying on the observations of Rowlatt J. in *Page* v. *Liverpool Victoria Friendly Society*, (1926) 42 T. L. R. 712:

"the rules here incorporated into this contract do provide their own terms of amendment and alteration and therefore the plaintiff fail on his contention with regard to the contract, assuming of course, that the Rules have been properly amended as required by the Rules themselves."

[18] I have come to the conclusion that when an employee of a company, by the very terms of his contract of service is to act according to the Bye-laws of the Company, and one of such Bye-laws is that the Bye-laws can be added to or altered at any time by the Company, then the employee is bound by any alteration or addition of the Bye-laws that may duly be made by the Company even though such addition or alteration was made after the contract of service. This is so even if it means that the employee thereby loses any vested right i. e. any right acquired by him before such alteration or addition. The problem is never met by raising in the abstract the principle of sanctity of contract

or the doctrine of vested rights. The problem in my opinion is always a problem of construction and interpretation of the true meaning and effect of the terms of a particular contract of service or employment and of the scope of the relevant Bye-laws in relation thereto. Accordingly I answer the issue in the affirmative.

[19] This disposes of all the arguments of Mr. Mullick advanced on behalf of the plaintiff. Mr. Mullick has not contended that the alteration of the Rules by cancelling the provision for gratuity has not been lawfully made. It is necessary here to observe further that Mr. G. K. Mitter for the Company makes it quite clear that if any argument was going to be made on behalf of the plaintiff that the Bye-law relating to gratuity has not been properly or lawfully cancelled under bye-law 4 then Mr. Mitter will raise the plea of estoppel as raised in para. 11 of the written statement. It is not necessary for me to deal with this point as Mr. Mullick has accepted the position that he does not contest the proposition that bye-law 94 has been properly and duly cancelled under bye-law 4 and it is on that basis that Mr. Mitter's concession on the point of estoppel has been made. It is therefore not necessary for me to decide whether bye-law 94 was duly and properly cancelled by virtue of bye-law 4. I need observe that the plea of estoppel which Mr. Mitter gave up was based on the contention that the service of the plaintiff was non-pensionable and was such that it did not attract any pension or gratuity at all. In fact as the plaintiff admits in para. 12 of the plaint he was duly paid the Provident Fund which is admitted at the bar to be a sum of Rs. 12,911-1-0 when he was retired in the year 1939. The defendant's contention on the ground of estoppel is that having taken benefit of payment of Provident Fund which according to the defendant the plaintiff was entitled to by nature of his service the plaintiff could not claim the double benefit of both the Provident Fund and the gratuity. Indeed under Ch. XII of the Bye laws the distinction was clearly made between the superior service which alone was pensionable and entitled to gratuity, and the upper and lower subordinate staff which was non-pensionable under Ch. XIII of the Bye-laws and entitled only to Provident Fund. I need therefore only record the fact in the judgment that Mr. G. K. Mitter learned counsel for the defendant has given up the point of estoppel only on the basis that Mr. Mullick on behalf of the plaintiff concedes that bye-laws 85 and 94 could be lawfully cancelled under bye-law 4.

[20] In the circumstances the suit fails and is dismissed. The defendant would have been entitled to costs. But Mr. Mullick submits that the plaintiff may be relieved from costs. Mr. G. K. Mitter consents to give up costs. Having regard to such consent I make no order as to costs in this suit.

[21] I direct the two printed books containing the bye-laws one published in 1923 and the other published in 1929 with amendment slips be made exhibits in this suit, as both the learned counsel on either side have relied on them in their argument.

K.S. *Suit dismissed.*

A. I. R. (87) 1950 Calcutta 236 *[C. N. 82.]*

HARRIES C. J. AND CHATTERJEE J.

Rameswarlal Bagla and others—Plaintiffs — Appellants v. *Bezonji Barjorji Nadadwalla and another—Defendants—Respondents.*

A. F. O. D. No. 101 of 1948, D/- 7-4-1949, from judgment and decree of Clough J., D/- 14-7-1948.

(a) Limitation Act (1908), S. 22 — Partners of firm on record either as plaintiff or defendant — Civil P. C. (1908), O. 1, O. 30, R. 9.

Where *A*, one of the two partners *A* and *B* of firm X, sues *B* and *C* who are partners of firm *Z*, the suit is properly constituted and the addition of firm X as plaintiff is not necessary as all the partners of the firm X are on record either as plaintiff or as defendant and the Court will adjust the rights of the partners by giving a declaration that *A* and *B* as partners of firm X will be entitled to the relief in proportion to their shares in the firm. Order 30, R. 9, Civil P. C. does not prevent the Court from making an order so as to give appropriate relief when all the necessary parties are before it. [Paras 19, 26, 28]

Annotation : ('44-Com.) C. P. C., O. 1 (Gen.) N. 2, Pts. 5, 6 ; O. 30, R. 9, N. 1; Lim. Act, S. 22, N. 6.

(b) Contract Act (1872), Ss. 39, 64, 72 — Money received under contract subsequently varied.

Where under the original contract one party has advanced some money to the other and the contract is subsequently varied by consent of parties the latter must, in the absence of any agreement to that effect, return the sum to the former, call it money had and received or money held by one to the use of the other or money due on failure of consideration. To such a case S. 39 or S. 64 is not applicable. [Para 15]

Annotation : ('46-Man.) Contract Act, S. 72, N. 2.

G. P. Kar — for Appellant.

F. S. Sunita — for Respondent.

Chatterji J.—This is an appeal from a judgment and decree of Clough J. dated 14th July 1948, whereby he dismissed the plaintiffs' suit with costs.

[2] Three persons, *viz.*, Radhakissen Bagla, Ramniwas Bagla and B. B. Nadodwala, carried on business under the name and style of "Bagla Minerals Company". The said Mr. Nadodwala and one Mr. Haq carried on business in partnership under the name and style of "Behar Mining Company." They were also owners of a colliery known as East Chasnalla Colliery.

[3] According to the plaintiffs on 12th December 1942, the Bagla Minerals Company (hereinafter called the plaintiff firm) agreed to buy

and the defendants in their firm of Behar Mining Company (hereinafter called the defendant firm) agreed to sell 2,600 tons of coal on the following terms: (a) 600 tons of coal lying at East Chasnalla Colliery at Rs. 12 per ton f. o. r., Jharia; (b) 2,000 tons Golukhadih Steam Coal which had been bought from another concern of Nadadwala called the Bengal Transmarine Company at Rs. 11 per ton f. o. r., Jharia; (c) Delivery of 2,600 tons was to be given by 31st March 1943 and the goods were to be loaded in wagons provided by the East Chasnalla Colliery out of their own allotment to the extent of 60 wagons per month; (d) The plaintiff firm was to pay to the defendant firm the full value of 600 tons in advance. They were also to deposit Rs. 4,000 with the defendant firm against the value of 2,000 tons of coal as and by way of an advance.

[4] The plaintiff firm in pursuance of the contract paid a sum of Rs. 7,200 to the defendant firm for the total value of 600 tons in advance and on the next day they paid a further sum of Rs. 4,000 to the defendant firm being the advance against the said 2,000 tons.

[5] According to the plaintiff firm there was subsequent variation of the terms of the contract and it was agreed that (a) the defendant firm would sell only 600 tons of steam coal lying at East Chasnalla Colliery for and on account of the plaintiff firm, (b) the defendant firm would supply soft coke in place of steam coal and (c) the defendant firm would pay the sale proceeds of 600 tons to the plaintiff firm after deducting loading charges and other expenses.

[6] The plaintiff firm were supplied from time to time only 130 tons of soft coke out of 600 tons of steam coal. The plaintiff firm were paid altogether Rs. 2571.10.9. The defendant firm failed and neglected to sell the remaining quantity. Alternatively, there was a claim for damages for conversion of that coal. The defendant firm failed and neglected to give delivery of the 2,000 tons or any portion thereof.

[7] The suit was instituted originally by only two plaintiffs, *viz.*, Radhakissen Bagla and Ramniwas Bagla against Nadadwala and Huq who were described as carrying on business in partnership under the name and style of Behar Mining Company. There was a claim for account in respect of the sale of 600 tons of steam coal and for delivery of the coal still un delivered or the value thereof and for damages. There was also a claim for the refund of the sum of Rs. 4,000 which had been advanced as aforesaid by the plaintiff firm to the defendant firm.

[8] The defence was principally directed against the subsequent agreement as pleaded by the Baglas. The defendants, however, admitted that there was some kind of variation in 1943 but according to the defendants the terms settled were different and the terms as arranged were set out in para. 10 of the written statement.

[9] On the main issue of this case, namely, issue 6, as to the variation of the original contract of 12th December 1942, my learned brother Clough J. did not accept the evidence adduced by the plaintiffs. His finding is that the plaintiffs failed to prove that there was any agreement of the kind alleged by them. He also held that what really happened was that the original contract was varied by consent. The total quantity was reduced to 500 tons and the price was also reduced to Rs. 11.8.0 per ton. But the learned Judge did not accept the evidence of Nadawala that it was agreed between the parties that the plaintiffs would not be entitled to refund of Rs. 11,200 which had been already paid by them. In his careful judgment, the learned Judge pointed out, and in our opinion correctly, that no such term was mentioned in the correspondence and was inconsistent with the bill dated 24th May 1943 which had been submitted by the defendant firm to the plaintiff firm and that it was not referred to at all in the written statement.

[10] The learned Judge also held that Behar Mining Company was ready and willing to perform their part of the new agreement but it was the Bagla Minerals Company which failed to perform the contract either in its original form so long as it existed, or, as it was subsequently varied.

[11] The plaintiffs failed to establish the case made by them in the plaint that the defendants had sold some of the coal and misappropriated the sale proceeds and the relevant issues were answered by the learned Judge in favour of the defendants. The defendants raised a plea of limitation which was negatived by the learned Judge. On his findings on the relevant issues the learned Judge dismissed the suit with costs, and refused to grant any relief to the plaintiffs.

[12] The suit as originally framed was instituted on 19th May 1945 by the two Baglas mentioned above. It was contended that they were not competent to maintain the suit in the absence of Nadadwala who was the third partner of the firm of Bagla Minerals Co. More than three years later, the plaint was amended on the application of the plaintiffs and the firm of Bagla Minerals Co., was added as a plaintiff 3. During the pendency of the suit, Radhakissen Bagla died and in his place Rameshwarlal Bagla

was substituted. The plaint was actually amended and re-verified on 12th July 1948.

[13] Learned counsel for the plaintiffs appellants, Mr. G. P. Kar, accepted the findings of the learned Judge and contended with considerable force that in any event his clients were entitled to the refund of Rs. 8628-5-3 being the difference between Rs. 11,200 which had been paid or advanced by the plaintiff firm and Rs. 2571-10-9 which is the total price of the coke supplied by the defendant firm. We are inclined to accept the contentions of Mr. Kar on this point, although the plaintiffs did not claim specifically in the plaint the refund of both the sums of Rs. 4000 and Rs. 7200. Mr. Arun Sen for the respondents urged that in view of the absence of a specific prayer in the plaint no refund should be allowed. We cannot accede to this submission as it would mean pushing technicality to absurd limits. The learned Judge, Clough J. was referred to Ss. 39, 64 and 75, Contract Act and also to a judgment of the Judicial Committee in *Muralidhar Chatterjee* v. *International Film Co. Ltd.*, 70 I. A. 35: 47 C. W. N. 497: (A. I. R. (30) 1943 P. C. 34).

[14] That case is an authority for the proposition that a contract which may be "put an end to" under S. 39, Contract Act, is voidable and S. 64 of the Act applies to cases of rescission under S. 39. The right to recover damages in cases where the contract has been rendered 'voidable' by the wrongful act of a party thereto and has been rescinded by the other party is a right expressly conferred by the statute. In *Muralidhar's case*, (70 I. A. 35: 47 C. W. N. 497: A. I. R. (30) 1943 P. C. 34), the appellant had wrongfully refused to perform his part of a contract entered into with the respondents, and the latter had rightfully put an end to the contract under S. 39 and they were held to be liable under S. 64 to restore to the appellant the benefit received from him under the contract. The learned Judge was right when he observed that *Muralidhar's case*, (70 I. A. 35: 47 C. W. N. 497: A.I.R. (30) 1943 P. C. 34), had no application to the facts of the present case. Clough J. pointed out that "the plaintiff's pleading does not justify the making of a decree on the basis of a contract which has been rescinded resulting in right to a refund." All that the Judicial Committee decided in that case was that where a party to a contract had elected to put an end to the contract under S. 39, he is bound to return or restore any benefit or advantage that he had received under the contract although he can claim damages for the breach of the contract. A liability to make restitution attaches to the party who rescinds or puts an end to a contract under S. 39.

[15] In this case there is no room for the invocation of S. 39 or S. 64, Contract Act. This is not a case where one party had become entitled by reason of the other party's default to put an end to the contract, nor is it a case where a contract has become voidable at the option of one party, under S. 64. But that is no reason why the plaintiff firm should not get back the moneys which they had advanced when according to the learned Judge's finding a variation was agreed upon between the parties as aforesaid. There was no agreement that the defendant firm would be entitled to retain or to forfeit any part of Rs. 11,200 which had been advanced or paid by the plaintiff firm. In this state of things it would be contrary to equity and justice to refuse any relief to the plaintiff firm. Clearly they would be entitled to get back Rs. 11,200 less the price of coal or coke which had been supplied to them. Call it money had and received or money held by the defendant firm to the use of the plaintiff firm or money due on failure of consideration, the defendant firm must repay the difference, viz. Rs. 8628-5-3 to the plaintiff firm, unless the suit is barred by the law of limitation. But the equities between the members of the plaintiff firm have got to be worked out in any event as described hereinafter.

[16] Mr. Arun Sen contended that the learned Judge's judgment was not correct on the question of limitation. In our opinion, Clough J. took the correct view on this question and the suit was not barred by limitation under S. 22, Limitation Act. That section reads as follows :

"*22* (1) Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

(2) Nothing in sub-s. (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff."

[17] All persons who have a joint cause of action must be impleaded before the period of limitation prescribed by the Act. When a suit is instituted within time by some of the persons who have a joint cause of action and other persons are added as plaintiffs after the period of limitation, then the whole suit is barred as the original plaintiffs could only enforce their claims in conjunction with the added plaintiffs. *Ramsebuk* v. *Ram Lal Koondoo*, 6 Cal. 815: (8 C. L. R. 457). *Mir Tapurah* v. *Gopi Narayan*, 7 C. L. J. 251.

[18] It sometimes happens that a suit is instituted by some persons and later on it appears that other persons who were necessary parties must be joined. In such a case additional parties may be impleaded but with regard to the parties

subsequently added the suit is to be treated as if it was instituted on the day when they were actually made parties. It is a just rule, because a person who may have a clear right against another by lapse of time should not be made to lose such rights for no fault of his. Section 22 was enacted with a view to safeguard such a right.

[19] Here the suit had been properly constituted at the date of its institution, because all the necessary parties had been impleaded. Really the addition of the plaintiff firm was not necessary as all the members of that firm were on the record either as plaintiffs or as defendants.

[20] In our opinion this case is covered by *Rustomji Aspandyarji Sethna* v. *Sheth Purshottamdas Chaturdas*, 25 Bom. 606 : (3 Bom. L. R. 227), where Jenkins C. J. passed a decree in somewhat similar circumstances. A Division Bench of this High Court has held that the rule that the same man cannot be the plaintiff and the defendant in the same suit loses much of its force in India where the Courts are Courts of Equity and when all the parties are before the Court and their rights can be determined and adjusted: *Mahomed Faiz Chowdhury* v. *Upendra Lal Singh Roy*, 2 I. C. 597 (Cal.).

[21] In the Bombay case the plaintiff, one Purshottamdas Chaturdas, describing himself as the owner of the firm of Gordhandas Bhagwandas, instituted a suit against his son Nagindas and his co-partners who carried on business in partnership in the name of Pathak Shanghavi & Co. Nagindas along with his father Purshottamdas were members of a joint Hindu family and were equally interested in the firm of Gordhandas Bhagwandas. The trial Court passed a decree for the amount claimed by Purshottamdas against the defendants in respect of advances made by the firm of Gordhandas Bhagwandas to the firm of Pathak Shanghavi & Co. Two of the defendants appealed. Pending the appeal the plaintiff died and his son the defendant Nagindas was substituted in his place. Thus, Nagindas was interested both as a creditor and debtor. Jenkins C. J. held that as all the parties interested were before the Court either as plaintiffs or as defendants, the Court should adjust and determine their rights in accordance with justice, equity and good conscience.

[22] Purshottamdas and Nagindas had equal shares in the firm of Gordhandas Bhagwandas and the learned Chief Justice held that the trial Court should have made a declaration that they were entitled to the amount advanced in equal shares and that it ought to have passed a decree that one moiety thereof should be paid to Purshottamdas and the other moiety treated as an item to the credit of Nagindas in the accounts of the partnership of Pathak Shanghavi & Co.

[23] The situation became complicated because on Purshottamdas' death pending the appeal Nagindas as his heir had become the sole plaintiff. The Court of appeal did not pass a decree in his favour even in respect of the half share of Purshottamdas, but only declared that for this amount also Nagindas was entitled to credit in the partnership accounts aforesaid.

[24] Jenkins C. J. followed *Bosanquet* v. *Wray*, (1816) 6 Tauntan 597 : (16 R. R. 677) and pointed out that where an individual is a common partner in two houses of trade, no action can be brought by one house against the other house upon any transaction between them while such individual is a common partner. The learned Chief Justice observed as follows:

"This doctrine is founded on the elementary rule of procedure, too often disregarded in this country, that the same individual, even in different capacities, can not be both a plaintiff and a defendant to one and the same action. While, however, at Common Law this rule led to the result we have indicated, the Courts of Equity surmounted this difficulty. Though they observed strictly the rule that a man cannot be both plaintiff and defendant, they did not allow it to stand in the way of doing justice between the parties; for, provided all interested were before the Court either as plaintiffs or as defendants, they adjusted and determined their rights. This is aptly exemplified in *Luke* v. *South Kensington Hotel Company*, (1879) 11 Ch. D. 121 : (48 L. J. Ch. 361).

"Similarly, we think the fact that Nagindas was interested both as creditor and debtor cannot stand in the way of our adjusting the rights of the parties in accordance with the enjoined rule of justice, equity and good conscience. To learn the goal to which that guiding principle should direct our steps it will be well to consider separately what the rights first of Purshottamdas, and then of Nagindas, would have been had the money advanced been in each case his alone. Now if Purshottamdas had been the sole creditor, he clearly could have recovered the amounts in a suit properly framed for that purpose : had the advance been out of Nagindas' separate moneys, a suit to recover that money would not have lain; for one partner cannot sue for money lent by him to a firm of which he is a member, as the advance would be but an item in the partnership account.

"This we think gives a clue to the proper equitable principle to be applied here. First, we must determine the shares in which Purshottamdas and Nagindas were interested in the firm of Gordhandas Bhagwandas. In some cases this might be a matter of considerable difficulty, but not in the present instance; for it is not questioned that the two were equally interested in this firm, and we think we are entitled to take that as the basis of adjustment.

"That it is within the power of the Court to administer equity on these lines is, we think, to be inferred from *Piercy* v. *Fynney*, (1871) 12 Eq. 69 : (40 L. J. Ch. 404). Therefore, we think there should in the lower Court have been a declaration that Purshottamdas and Nagindas were entitled to the amount advanced in equal shares and a decree, that one moiety thereof should be paid to Purshottamdas, and the other moiety treated as an item to the credit of Nagindas in the partnership accounts."

[25] In our view it is within thepower of this Court to administer equity between the parties on the lines suggested by Jenkins C. J. in the above case. There is a recent judgment of the Judicial Committee in *Monghibai* v. *Cooverji*, 66 I. A. 210 : (43 C. W. N. 869 : A. I. R. (26) 1939 P. C. 170), where some of the partners sued as plaintiffs and others were joined as defendants. As all the parties interested were before the Court, judgment was given in favour of all the partners.

[26] The two Bagla plaintiffs have each 4 as. 3 pies share in the plaintiff firm and Nadadwala has 7 as. 6 pies share therein. These shares are undisputed. There would be a declaration that the two plaintiffs and Nadadwala as partners of the firm of Bagla Minerals Co. are entitled to Rs. 8,628-5 3 in the above shares. Out of this amount Rs. 4,582-12-9 being eight annas six pies' share thereof, should be paid by the defendants to the Bagla plaintiffs and the balance being Rs. 4045-8-6 should be treated as an item to the credit of Nadadwala in the partnership account of the defendant firm of Behar Mining Co.

[27] It was contended by Mr. Sen that the judgment of Jenkins C. J. in the Bombay case is no longer good law in view of O. 30, R. 9, in the Civil P. C. of 1908. That rule reads as follows :

"This order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just."

[28] In our view, this Rule does not in any way affect the soundness of the judgment of the learned Chief Justice in the Bombay case. Rule 9 of O. 30 reproduces R. 10 of O. 48-A of the Rules of the Supreme Court in England. It simply provides that suits between a firm and one of its members or suits between two firms with common partners can be instituted in the firm name provided the firms carry on business in British India. But no execution will be levied in such a suit except by leave of the Court. In our opinion, the safeguard introduced against execution of decree in a suit coming within the scope of R. 9 is meant to secure an equitable adjustment of the rights and liabilities of the partners *inter se* as indicated by Jenkins C. J. in the above case. In the "Yearly Practice" it is pointed out that this rule did not alter the substantive law as it existed before the enactment of the rule. We agree with this view and in our opinion nothing in R. 9 prevents the Court from making an order so as to give appropriate relief when all the necessary parties are before it.

[29] One of the original plaintiffs Radhakissen Bagla is dead and it is conceded that his son Rameshwarlal who has been substituted in his place is not entitled to his share of the decretal amount except on the production of a Succession Certificate. The appeal is allowed and the decree of Clough J. is set aside. There will be a decree for Rs. 2291-6-4½ in favour of Ramnivas Bagla. There will be a further decree for the said sum in favour of Rameshwar Lal Bagla, but he must produce a Succession Certificate before the decree is finally completed. The defendant Nadadwala will be entitled to credit for the sum of Rs. 4045-8-6 in the partnership accounts of Behar Mining Co.

[30] It is conceded by Mr. Kar that Bagla Minerals Co. which was added as plaintiff 3 in the year 1948 need not have been made a party as all the persons interested in that firm were already impleaded in this suit and were before the Court. If that firm was a necessary party on the date of the institution of the suit, then the suit would have been barred under S. 22, Limitation Act. But Mr. Kar concedes that the addition of the firm was superfluous and he has proceeded on the footing that the firm need not have been made a party. Therefore, there will be no decree in favour of that firm.

[31] The appellants will be entitled to one half of the costs of the lower Court and one half of the costs of this appeal. Certified for two counsel.

Harries C. J.— I agree.

D.H. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 240 *[C. N. 83.]*

HARRIES C. J. AND CHATTERJEE J.

In the matter of Tripura Modern Bank Ltd.; *Her Highness Maharani Regent Mohadebi of Tripura and others*—*Appellants.*

A. F. O. O. No. 42 of 1949, D/- 26th April 1949, from judgment of Sarkar J., D/- 1st March 1949.

(a) Interpretation of Statutes — Restrictions in heading.

The natural meaning of the clear words of an enactment should not be cut down by reading into the same any restrictions derived from the heading. [Para 6]

Annotation : ('44-Com.) Civil P. C., Pre. N. 10.

(b) Interpretation of Statutes — Retrospective effect — Vested rights should not be affected by giving such effect — Enactment dealing with procedure applies to pending actions — Appellate Court can give effect to remedies introduced by statutes pending appeals.

It is a well settled rule of construction that a restrospective operation is not to be given to a statute so as to impair an existing right or obligation. But the law is different with regard to matters of procedure and enactments dealing with procedure apply to pending actions unless a contrary intention is expressed or clearly implied. [Para 14]

Therefore an appellate Court is entitled to give effect to remedies introduced by enactments passed pending appeal. But it must give effect to the same law regarding vested rights as that which was in force at the time the Court of first instance dealt with the matter. [Para 11]

Annotation : ('44-Com.) Civil P. C., Pre. N. 3.

(c) Banking Companies Act (1949), S. 45 — Banking Companies (Control) Ordinance (1948), Cl. 12 — Scope and applicability — Section 45 of Banking Companies Act, 1949, is retrospective.

Either S 45, Banking Companies Act, 1949 or Cl. 12, Banking Companies (Control) Ordinance, 1948 does not affect vested rights or substantive law, but deal with the mode and method in which persons who want a scheme to be approved by the Court have to approach the company Judge in order to obtain the appropriate order. Therefore provisions either with regard to certificate or report from a bank or any other authority are merely auxiliary to the substantive right which had been conferred by S. 153, Companies Act and in that view S. 45, Banking Companies Act, 1949 would be restrospective. [Para 13a]

Therefore where a creditors' application under S. 153, Companies Act for the consideration of a scheme for a banking company was dismissed on the ground that it was not accompanied by a certificate of the Reserve Bank as required under Cl. 19, Banking Companies (Control) Ordinance of 1948, the appellate Court before which the appeal against that order was pending, when the Banking Companies Act, 1949, which dispensed with the necessity for such a certificate as a condition precedent to the application came into force, can give effect to it and hold that the application was properly instituted: *Case law referred.* [Paras 13a, 15]

Sarat C. Bose and R. Choudhury — for Appellants.

H. N. Sanyal — for Respondents.

Chatterjee J. — This is an appeal from a judgment of Sarkar J., dated 1st March 1949, whereby he dismissed an application presented by a number of creditors of the Tripura Modern Bank Ltd., under S. 153, Companies Act.

[2] This Bank had a subscribed capital of Rs. 22,50,000 and a paid up capital of Rs. 15,54,000. It was made a scheduled bank in the year 1945, but it got into difficulties thereafter. In the petition it was stated that by reason of various difficulties and the change in the political situation the business of the company was affected and it had to meet liabilities to the extent of over two crores of rupees. Owing to the suspension of business of a number of banks in Calcutta which were also scheduled banks, the company was unable to meet heavy demands and it was not possible for the bank to make further payments without realising its investments.

[3] The petition discloses that the situation is really serious. The liability of the Bank on the date of the presentation of the petition was over two crores and three lacs of rupees and it says that it has assets valued over two crores and fifteen lacs of rupees. But these facts have got to be ascertained on proper materials. Its cash balance is practically exhausted and it had therefore to approach the Court with an application for a moratorium under S. 277 (n), Companies Act. The Court admitted the petition and adjourned the same till 24th January when a petition for winding up of the bank was fixed for hearing.

[4] On 24th January the Court made an order for winding up and appointed a member of the Bar as liquidator. Thereafter the present petition under S. 153 was put forward for the consideration of a scheme by Her Highness Maharani Regent of Tripura and sixty-seven other creditors whose total claims amounted to over ten lacs of rupees.

[5] The main difficulty in the way of the petitioner was Cl. 12 Banking Companies (Control) Ordinance, 1948 (Ordinance No. XXV [25] of 1948). Under Cl. 12 :

"Notwithstanding anything contained in any law for the time being in force — (a) no Court shall entertain an application for sanctioning a compromise or arrangement between a banking company and its creditors .... unless the application made in respect thereof is accompanied by a report of the Reserve Bank certifying that such compromise or arrangement is not detrimental to the interests of the depositors of such company."

Sarkar J. in a very careful judgment dealt with the arguments put forward by Mr. S. C. Bose in support of the application. Mr. Bose contended that on a proper construction Cl. 12 was restricted to an application for sanctioning a scheme or compromise resulting in an amalgamation and to amalgamations by banking companies outside Court. There was some justification for putting forward this argument on the part of Mr. Bose, because Cl. 12 had a heading which was in the following terms : "Restrictions on amalgamation."

[6] After considering the relevant authorities cited before him Sarkar J. held, and in my opinion rightly, that the heading was somewhat misleading and he refused to cut down the natural meaning of the clear words of the enactment by reading into the same any restrictions derived from the heading. The learned Judge pointed out with considerable force that if the Court was to accede to Mr. Bose's contention, it would make Cl. 12 practically nugatory. In our opinion Sarkar J. was justified in refusing the application as he did, in view of the Ordinance then in force.

[7] On appeal, it was contended by Mr. S. C. Bose on behalf of the appellants that in view of the change in the law the Court of appeal is entitled to take into consideration the legislative changes effected after the decision given by Sarkar J. Pending appeal the law on the point has been changed and now an application under S 153 can be entertained by the Court without any report or certificate of the Reserve Bank of India. The alteration in the law was effected by the Banking Companies Act, 1949 (Act X [10] of

1949) which received the assent of the Governor-General on 10th March 1949. According to its preamble it is an Act to consolidate and amend the law relating to banking companies. Under S. 45 of this Act

"Notwithstanding anything contained in any law for the time being in force — (a) no Court shall sanction a compromise or arrangement between a banking company and its creditors, ... unless the compromise or arrangement is certified by the Reserve Bank as not being detrimental to the interests of the depositor of such company."

[8] In support of his contention Mr. Bose referred to a judgment of the Federal Court in *Lachmeshwar Prasad* v. *Keshwar Lal* 1940 F. C. R. 84 : A. I. R. (28) 1941 F. C. 5. In that case the Patna High Court had declared S. 11, Bihar Money-lenders Act (Act III [3] of 1938) to be *ultra vires*. An appeal was preferred to the Federal Court. During the pendency of the appeal in the Federal Court, the Bihar Money-lenders Act (III [3] of 1938) was repealed and re-enacted as Act VII [7] of 1939. The appellants before the Federal Court sought to claim the benefit of the change in the legislation, that is, S. 7 of the Act of 1939. The learned Advocate-General of India, Sir Brojendra Mitter, urged that the Federal Court ought not to take any notice of the legislative changes which had supervened since the decision on appeal was given; but the Federal Court declined to accede to his argument and took into consideration the subsequent legislative alteration. The learned Judges pointed out that the hearing of an appeal under the procedural law of India is in the nature of a re-hearing and therefore in moulding the relief to be granted in a case on appeal the appellate Court is entitled to take into account facts and events which have come into existence after the decree appealed against. An appellate Court is competent therefore to take into account legislative changes since the decision in appeal and its powers are not confined only to see whether the lower Court's decision was correct according to the law as it stood when its decision was given Accordingly the Federal Court gave effect to S. 7 of the Act of 1939 and the appellants were given the benefit of that section. It is to be observed, however, that the latter Bihar Act had in terms been made retrospective and therefore the Federal Court was in a position to give effect to the law as enacted by the later statute.

[9] Mr. H. N. Sanyal, learned counsel for the liquidator, has pointed out with considerable force that the position is different when the later enactment is not made retrospective. He referred us to a judgment of Lord Wright in *In re a Debtor* (NO. 490 of 1935), (1936) : Ch. 237 : (105 L. J. Ch. 129). In that case the argument rested upon a construction of the Bankruptcy statutes. Under S. 125, sub-s. (1), Bankruptcy Act of 1914 :

'Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a *feme sole*."

A married woman entered into a large number of speculative Stock Exchange transactions with the petitioning creditors and was indebted to a very large extent. The creditors obtained judgment against her. The creditors then petitioned for a receiving order. The debtor disputed the petition on the ground that she was a married woman who was not carrying on a trade or business within the meaning of S. 125 of the Act of 1914. The Registrartion held that the transactions in which the debtor had been engaged constituted the carrying on by her of a business within the meaning of S 125 and made a receiving order against her. Then an appeal was preferred. During the pendency of the appeal, the Law Reform (Married Women and Tortfeasors) Act, 1935 was passed. It was provided by S. 1 (d) of the Act of 1935 that a married woman shall be "subject to the law relating to bankruptcy in all respects as if she were a *feme sole*". By Sch. II of that Act S. 125, Bankruptcy Act of 1914 was repealed and by S. 4, sub.s. (1) it was provided as follows :

"Nothing in this Part of this Act shall . . . . enable any judgment or order against a married woman in respect of a contract entered into or debt or obligation incurred before the passing of this Act, to be enforced in bankruptcy . . ."

[10] The Court of Appeal held that the Registrar was right in holding that the transactions in question constituted the carrying on by the debtor of a business within S. 125 (1) of the Act of 1914. An argument was advanced before the Court of Appeal on the basis of the new legislation which altered the law. Lord Wright in negativing that argument observed as follows :

"The same reasoning would, I think, justify the Court in proceeding under S. 125, Bankruptcy Act, 1914, even though the bankruptcy proceedings were not commenced until after the Act of 1935 came into operation so long as the act of bankruptcy was anterior to that Act. Counsel for the debtor relied on *Quilter* v. *Mapleson*. (1882) 9 Q. B D. 672 : (52 L. J. Q B. 44). That. however, was a case merely dealing with matters of procedure or remedies to which a different rule applies. It is not necessary to quote any authority for that distinction save what was said by Jessel M R. in *In re Joseph Suche & Co.*, (1875) 1 Ch D. 48 : (45 L. J. Ch. 12) : 'It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unles in express terms they apply to pending actions do not affect them. It is said that there is one exception to that rule, namely, that where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights, and it is suggested here that the alteration made by this section (i. e., S. 10, Judicature Act, 1875) is within that exception. I am of opinion that it is not. This is an alteration not

merely in procedure, but in the right to prove for a debt which is not distinguishable in substance from a right of action before winding up, being simply a legal proceeding to recover a debt against a company in liquidation. . . .'

"Thus while an Appellate Court is able, and bound, to give effect to new remedies which have been introduced by enactments passed after the order appealed from was made by the Court of First Instance, yet with regard to substantive rights it is well established that the Appellate Court must give effect to the same law as that which was in force at the date of the earlier proceeding."

[11] With great respect we agree with what Lord Wright said in the above case. An appellate Court is entitled to give effect to remedies introduced by enactments passed pending appeal, but it must give effect to the same law regarding vested rights as that which was in force at the time the Court of first instance dealt with the matter.

[12] Mr. Bose conceded that the views expressed by Lord Wright were applicable to the interpretation of Indian statutes. The real question we have got to decide is whether this is a matter of procedure or remedy or a matter affecting the substantive rights of parties. Learned counsel for the Liquidator, Mr. Sanyal, urged that on a proper construction of Cl. 12 of the Ordinance of 1948, the jurisdiction of the Court was taken away and this Court had no power or authority to entertain any application for sanctioning a compromise and that the certificate of the Reserve Bank was a condition precedent to the accrual of the right on the part of the company or the creditors concerned to approach the Court with an application for sanctioning a scheme or an arrangement. Mr. Bose on the other hand argues that it is really a question of procedure or remedies and the appellate Court is able and bound, in the words of Lord Wright, to give effect to the new remedies which have been introduced by the later legislation passed in 1949 which really removed the fetter whereby a certificate of the Reserve Bank was made a condition precedent to the Court's entertaining a petition for sanctioning a compromise or an arrangement.

[13] In my view, the correct law was laid down in a judgment of the Judge ordinary in *Watton* v. *Watton*, (1866) L. R. 1 P. 227:(85 L. J. Mat. 95). There the learned Judge observed as follows :

"And although a suitor may have a vested right to a decree, the mode and method in which he is to approach the Court in order to obtain it, and the time within which that or any other step in the cause is to be taken, are merely auxiliary to that right, and may be changed, either by the legislature or by the rules and orders of the Court, without any infringement of the right itself."

[13a] In that case the learned Judge observed that the later statute applied to pending actions as it really dealt with the mode and method in which a litigant was to approach the Court. In my view the relevant sections of the above statutes do not affect vested rights or substantive law, but deal with the mode and method in which persons who wanted a scheme to be approved by the Court had to approach the company Judge in order to obtain the appropriate order. Therefore provisions either with regard to certificate or report from a bank or any other authority were merely auxiliary to the substantive right which had been conferred by S. 153, Companies Act. In that view the later legislation would be retrospective.

[14] The rule of construction is well settled. Retrospective operation is not to be given to a statute so as to impair an existing right or obligation. But the law is different with regard to matters of procedure. *In re Athlumney*, (1898) 2 Q. B. 547 : (67 L. J. Q. B. 935). No person has a vested right in procedure and if the Legislature alters the mode of procedure a litigant has to proceed according to the altered mode. Enactments dealing with procedure apply to pending actions unless a contrary intention is expressed or clearly implied.

[15] In this case no existing rights or obligations are being impaired. With a view to meeting the emergency caused by a series of bank crises the Ordinance was enacted so as to help the Court with some prima facie evidence in the form of a certificate recommending the favourable consideration of a scheme. But that report or certificate was not binding on the Court. In my opinion the later statute which dispenses with such certificate at the initial stage does not impair or abrogate any substantive right but deals with the method or manner of invoking the Court's jurisdiction under S. 153, Companies Act. Braund J. in the case of *Benares Bank Ltd.* v. *Shri Sri Prakasha Bhagawan Das*, A. I. R. (33) 1946 ALL 269 : (I.L.R. (1946) ALL. 461) had to consider the effect of the amendment of S. 235 (1), Companies Act by Act XXII [22] of 1936. The learned Judge observed that the real question was whether there was an alteration of substantive law as opposed to a mere law of procedure, that is, whether there was an intention adversely to affect the subject in the sense of depriving him of some accrued right or interest. If it is a mere alteration of procedure, then the statute is retrospective. But if it is a question of taking away the accrued right or interest of the subject, then the statute should not be given retrospective effect.

[16] In my view the later statute of 1949 has not abrogated or taken away any vested or accrued right. It has only regulated procedure

and there is no alteration of the substantive law on the subject affecting the rights of parties.

[17] I would refer to a judgment of Sir Charles Sargent C J. and Candy J. in *Balkrishna Pandharinath* v. *Bapu Yesaji*, 19 Bom. 204 Under S. 254, Civil P. C. of 1882 uncertified adjustments could not be recognised by any Court. That section was altered by S. 27, Amending Act of 1888 by which uncertified adjustments could be recognised by Courts other than the Court executing the decree. The question was whether the later statute was applicable to adjustments previous to the Amending Act. The learned Chief Justice held that the effect of that section was to alter the practice or procedure of the Code. The ordinary rule is that changes in matters of procedure are retrospective. The same principle is applicable here and as the rights of parties are not being taken away or impaired, it is our duty to give effect to the subsequent change in the law relating to procedure and the appellants should be given the benefit of S. 45 of Act X [10] of 1949.

[18] The order of Sarkar J. is set aside and this case will go back to the learned company Judge, Sinha J., who will give the appropriate directions with regard to the necessary advertisements and the summoning of the requisite meetings.

[19] The Official Liquidator will be entitled to the costs of this appeal as between attorney and client. Mr. Bose's clients will bear their own costs of this appeal. Certified for two counsel.

[20] An order for stay was granted by this Court which only asked the liquidator not to distribute the assets nor to sell any furniture. But otherwise the liquidator was to function as such. There is a question as to whether advertisements with regard to winding up should be forthwith published or not. Necessary directions will be obtained from Sinha J. in that behalf.

Harries C. J. — I agree.

M.K.S. *Order accordingly.*

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* A. I. R. (37) 1950 Calcutta 244 *[C. N. 84.]*

ROXBURGH J.

Rajani Kanto Das — Petitioner v. *Dayal Chand De and others—Opposite Party.*

Civil Rule No. 1260 of 1949, D/- 13-1-1950, from order of Sm. C. C. J., Calcutta, (Before the Registrar's Bench) D/- 4-8-1949.

(a) Presidency Small Cause Courts Act (1882), S. 41 — Proceedings under Chap. VII, are not a suit. [Para 5]

Annotation : ('46 Man.) Pres. Sm. Cause Courts Act, S. 41 N. 1.

*(b) Presidency Small Cause Courts Act ('1882), S. 48 — Decree for ejectment against tenant — Remedy of sub-tenant claiming under S. 11 (3), West Bengal Act XXXVIII [38] of 1948 —Procedure —Civil P. C (1908), S. 141—Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), S. 11 (3).

Where, in a proceeding under Chap. VII, for recovery of possession, a decree for ejectment is passed against a tenant a sub tenant, who considers that by virtue of S. 11 (3), West Bengal Premises Rent Control (Temporary Provisions) Act (1948). he is in no way bound by the order, cannot apply for rescinding or varying the decree under S 11 (3) and S 8, West Bengal Act and for staying of the execution. The correct procedure for the sub tenant to follow is to come to the Court under the appropriate provisions of O 21, Civil P. C., which provisions are automatically brought into operation by S. 48. [Para 10]

Annotation : ('44-Com) Civil P. C., S. 141 N. 2. ("46-Man.) Pres. Small Causes Court's Act, S. 48 N. 1.

Sarat Chandra Jana and Binodlal Ghosh — for Petitioner.

Apurbhadhan Mukherjee Narendra Nath Banerjee and Sushil Kumar Banerjee—for Opposite Party.

Order.—This is a Rule obtained against an order of the Registrar of the Court of Small Causes, Calcutta, rejecting an application before him by a sub-tenant. There was a proceeding by Dayal Chand Dey and Murari Mohan Dey under Chap. VII, Presidency Small Cause Courts Act, 1882, against Baidynath Seal, in which an order was passed on 13th July 1949, thus : "By consent the suit is decreed with costs."

[2] The petitioner claims to be the sub-tenant of Baidyanath Seal and considers that in effect he cannot be removed from the part of the premises which he holds as a sub-tenant under Baidyanath Seal in view of the provisions of S. 11 (3), West Bengal Premises Rent Control Act, 1948. He also in his application made some reference to S. 18 of that Act (which appears to me to have no bearing on the present question at all) and made a number of somewhat strange prayers which it is not necessary to set out; but his principal prayer was that a notice be issued on the opposite party, namely, the plaintiffs and defendant in the proceeding under Chap. VII "to show cause why the applicant, the lawful sub tenant under the defendant, should not be deemed to be a tenant direct under the plaintiffs and the decree passed without the knowledge of the applicant be rescinded or varied under S. 11, cl (3) and S. 8, West Bengal Premises Rent Control Act, 1948 and in the meantime all further proceedings and execution be stayed in the meantime."

[3] The learnd Registrar has remarked in his order :

"As there is no special provision that the substantive right granted to a sub-tenant under S. 11 (3), West Bengal Premises Rent Control Act, 1948 can be enforced by an application in this Court, the Small Cause Court cannot entertain the matter."

[4] He has stated further that "the applicant has, therefore, to bring a regular suit in the Hon'ble High Court and obtain an order staying delivery of possession . . ." He granted a short stay to give the applicant time to file his suit.

[5] It would seem that perhaps through some misunderstanding of the effect of the provisions of S. 16, West Bengal Premises Rent Control Act, the Registrar has come to believe that some alteration has been made in the provisions of the Act so that the Court now has a power to try a a suit for ejectment; otherwise it is not easy to understand why the order is passed in the form quoted above that the suit was decreed by consent. The position has been discussed in the case of *Amulya Ratan* v. *Meghmala Dutt*, 53 C. W. N. 474. The proceedings under Chap. VII, are not a suit and indeed, S 14 of the Act, under whose provisions power can be conferred on the Registrar to deal with such proceedings, especially provides that for the purpose of that section only that shall be deemed to be a suit. The point is of some importance in considering whether the learned Registrar is correct in saying that there is no provision that rights of the sub-tenant under S. 11 (3), West Bengal Premises Rent Control Act can be enforced by an application in the Court of Small Causes.

[6] In my opinion, the matter is provided for in S. 48, Presidency Small Cause Courts Act, which lays down that in all proceedings under Chap. VII, the Small Cause Court shall

"as far as may be and except as herein otherwise provided follow the procedure prescribed for a Court of first instance by the Code of Civil Procedure."

Ordinarily, the Small Cause Court by virtue of the provisions of S. 19 (d) of the Act, which bars the Court's jurisdiction in suits for recovery of immovable property, has nothing to do with immovable property either in suits or in execution. But there are some special provisions in the Act which do result in the Court having some jurisdiction in respect of immovable property. One provision is S. 28 dealing with a matter of structures attached to immoveable property and other provisions are in Chap. VII. Chapter VIII also relating to distresses gives special procedure for the recovery of rent due which, at any rate, brings the Court in its proceeding in the same relation with immovable property. It seems to be a fundamental necessity of natural justice that the party who is not bound by the proceeding in a Court should not be deprived of his possession of property by any act of that Court As a corollary it is natural to find provision that any person who considers that he is not so bound will have an opportunity, if he finds he is affected by the orders of the Court, to come before the Court and at least to air his objection.

[7] If the order of the learned Registrar, as given in the present form, is correct, then the provisions of the law relating to the procedure of the Presidency Small Cause Court are such that the sub-tenant, although he contends that he is in no way bound by the order of the Court, cannot be heard by the Court. In my opinion, the view of the Registrar is not correct.

[8] The provisions of the Presidency Small Cause Courts Act as regards the procedure are unfortunately in a somewhat jumbled condition. Some attempt has been made to clarify matters by the issue in January last year by this Court of Rules of practice and procedure and the like made under the appropriate provisions of the Presidency Small Cause Courts Act and the Code of Civil Procedure. In the case of the ordinary Courts, a person in the position of the present applicant would come before the Court with an application under O 21 R 97 or rather 98, or R. 100 and his objection would be heard. It is probable, as Mr. Mukherjee points out, that ordinarily in the case of sub-tenants the result would be that his application would fail on the ground that it would be held that he was bound in any case by the decree against his lessor, but at any rate there is a procedure provided by which he at least can have his objection heard by the Court to the order which, if enforced, will dispossess him. In the rules framed under S. 9, Presidency Small Cause Courts Act, there is provision for such a procedure in the specific case of a claimant to structures dealt with under S. 28. I refer to the rules in Chap. XXI under the heading 'Resistance to delivery to purchaser"— Rule 69 under the heading specifically referring to property mentioned in S. 28 of the Act, and Rr 71 and 73 giving power to the Court to pass an order either in favour of or against the objector.

[9] In the case of distresses under Chap. VIII, the Act itself provides a procedure in S. 61 for adjudication of claim cases in such matters by a Judge of the Small Cause Court. Incidentally, the Act itself in that section makes provision that the procedure of the Small Cause Court in cases under S. 61 is to conform so far as may be to the procedure in an ordinary suit in such Courts.

[10] Are we then to say that in the case of a proceeding for recovery of possession under Chap. VII of the Act the person claiming to be in no way bound by the Court's order has no remedy because there is no procedure providing for him to be heard? In my opinion, the answer is clearly, no, and the reason why no specific rules have been framed under S. 9 of the Act for such a procedure are that such rules could not be framed because of the provisions of S. 48 in Chap. VII itself which I have already referred to. The Act itself provides that the procedure in the Small Causes Court in these matters under Chap. VII is to be the same as that prescribed in

what may be called a mofussil Court by the Civil Procedure Code. In my opinion, this automatically brings into operation the provisions of Chap. (Order?) XXI and in particular the rules relating to the procedure for hearing claims. This is recognised in the form of S. 141, Civil P. C., as applied to the Calcutta Courts of Small Causes by this Court in exercise of its powers under S. 8, Civil P. C., itself. The section as adapted for those Courts is as follows:

"The procedure provided in this Code *and in the Presidency Small Cause Courts Act, 1882*, in regard to suits shall, as far as it can be made applicable *and except as therein otherwise provided* be followed in all proceedings . . . . . *in the Court of Small Causes of Calcutta.*"

The words "and except as therein otherwise provided" have reference to provisions in the Small Causes Court Act such as those of S. 48.

[11] Apart from the provisions of S. 48, this would make applicable, to all proceedings other than suits, in the Courts, the procedure ordinarily applicable to suits, as is done in S. 141, Civil P. C., itself. But the adapted section recognises that as a special provision with regard to procedure for matters under Chap. VII has been laid down in S. 48 of the Act itself, this Court by adaptation of S. 141 under S. 8, Civil P. C., could not alter that provision. I may add as my own opinion that matters could be much simplified if the Presidency Small Cause Courts Act were amended so that all the procedure could be provided for in one place as it were instead of being scattered about as it is, partly in the Act by reference in sections like Ss. 48 and 61 and partly by adaptation of the Code and partly by rules made under S. 9. That is, however, purely a personal opinion. I merely mention it because it seems that owing to those difficulties the actual provision applicable in the present case seems to have been lost sight of. In my opinion, therefore, the appropriate order that the learned Registrar should have made was merely to point out that the application in the form in which it stood could not be dealt with, but that the applicant, if he considered he had a grievance and a right, and if and when the order of the Court was sought to be enforced so as to affect his right, could come to the Court under the appropriate provision under O. 21 of the Code and he would be heard.

[12] I wish to make it clear that in what I am saying I am not in any way suggesting anything as to what would be the actual result of such an application, or what exactly are the rights of the sub-tenant under S. 11 (3), West Bengal Premises Rent Control Act, or what would be proper order for the Court to pass in view of the alteration in the law made by those provisions. The point in this matter arises mainly from the fact that the learned Registrar's order, as it stands, is based on a wrong view of the position with regard to procedure and partly from the fact that my attention has been drawn to several cases in which various applications of various kinds to enforce the right under S. 11 (3), West Bengal Premises Rent Control Act had been made and the parties have simply been told that that particular method of applying is a wrong one. I have not seen in any case anywhere any suggestion as to what is the correct procedure for the sub-tenant to follow.

[13] The result in any case is that the rule is discharged. I make no order as to costs.

V.B.B. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 246 *[C. N. 85.]*

HARRIES C. J.

Pacha alias Naran Naskar and others — Accused—Petitioners v. *The King.*

Criminal Revn. No. 635 of 1949, D/-7-11-1949.

Criminal P. C. (1898), Ss. 156 (3), 190 — Complaint to Magistrate—Magistrate forwarding complaint to police.

If a Magistrate, on a complaint being made to him, does not take cognizance but merely forwards the complaint to the police for investigation and for taking cognizance he acts under S. 156 (3) and proceedings based on a charge sheet submitted by the police are valid. [Para 5]

Annotation : ('49-Com.) Criminal P. C., S. 156, N. 5 ; S. 190, N. 22.

Binod Behari Haldar—for Petitioners.
S. S. Mukherjee—for Opposite Party.
Sambhu Nath Banerjee (Sr.)—for the Crown.

Harries C. J.—This is a petition for revision of an order of a learned Magistrate whereby he declined to hold that certain proceedings were void *ab initio*.

[2] A complaint was made to a learned Magistrate by one Khagendra Nath Haldar alleging that the present petitioner had set fire to a stack of straw on 18th December 1948, and that they were guilty of offences under the Penal Code. It is clear from the order sheet that the Magistrate took no action at all except to send the complaint to the Officer-in-charge of the Mandirbazar Police Station for taking cognizance. In fact that is the allegation made in para. 2 of the petition.

[3] The Police investigated and eventually framed a charge sheet and the case proceeded in Court based on the charge sheet. Later it was suggested that the whole of the proceedings were void *ab initio* because the Magistrate had acted wrongly and reliance was placed on a number of authorities including a very recent authority of this Court to which I am a party.

[4] It is quite clear that a Magistrate may order an investigation by the police and it appears to me that that was all the Magistrate did in this case. Section 156 (3) expressly provides that any Magistrate empowered under S. 190 may order such an investigation as mentioned in the preceding sub-sections of that section.

[5] The Magistrate of course can also take cognizance of the offence, examine the complainant and if necessary send the complaint to the police for investigation and report. If as a result of such an order the police submit a charge sheet and proceedings are based thereon, such proceedings, according to the recent authorities, would be wholly without jurisdiction. However, if the Magistrate does not take cognizance, but merely forwards the complaint to the police for investigation and for taking cognizance he acts under S. 156 (3), Criminal P. C, and a charge-sheet can be submitted by the police and proceedings based thereon.

[6] The view of the learned Magistrate in this case cannot possibly be assailed and accordingly the petition fails and is dismissed. The Rule is discharged.

D.H. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 247 *[C. N. 86.]*

HARRIES C. J. AND SARKAR J.

Dominion of India—Petitioner v. *Gosto Behary Kundu — Decree-holder — Opposite Party.*

Civil Rule No. 1125 of 1949, D/- 19-1-1950, from order of Sm. C. C. J., Calcutta, D/- 28-4-1949.

Civil P. C. (1908), S. 82 — Non-compliance with section — Effect.

The words "such act as aforesaid" in S. 82 refer to the acts mentioned in the earlier sections and the section governs a decree against the Dominion of India for breach of contract or negligence of a railway. Consequently, where no time is stated in the decree within which it is to be satisfied it cannot be executed. Further even if there is on the face of the decree a time limit for its satisfaction the decree cannot be executed until a report of its non-satisfaction within the time specified has been sent to the Provincial Government. [Para 15]

Annotation : ('44-Com.) Civil P. C., S. 82, N. 1.

Bhabesh Narayan Bose — for Petitioner.
Bhabesh Chandra Mitter — for Opposite Party.

Harries C. J.— This is a petition for revision of an order of a learned Judge of the Presidency Small Cause Court, Calcutta, disallowing the objection of the Dominion of India to a certain execution.

[2] On 12th August 1947, the opposite party instituted a suit in the Small Cause Court at Barisal against the Indian General Navigation Company, River Steamship Navigation Company, Bengal and Assam Railway and the Governor-General in Council representing Bengal and Assam Railway. The claim was for short delivery of certain chillies which had been booked from the steamer station of Ibrahimpur in East Bengal for delivery at Forbesganj in Bihar.

[3] The first two defendants entered appearance, but it appears that the Bengal and Assam Railway and the Governor-General in Council did not enter appearance. However on 6th February 1948, the plaintiff obtained a decree in the Small Cause Court at Barisal against defendants 3 and 4, that is, the Bengal and Assam Railway and the Governer-General as representing that railway.

[4] Later application was made to the Barisal Court for a certificate of non-satisfaction of the decree. The Court gave the certificate in June 1948 and it is said that written on the certificate were the words that the decree is executable against the East Indian Railway as it had undertaken to pay the liabilities of the Bengal and Assam Railway and therefore had become liable to pay the decretal amount.

[5] The Barisal Court sent the certificate of non satisfaction and the decree at the instance of the plaintiff to the Presidency Small Cause Court at Calcutta for execution.

[6] On 28th July 1948, the Presidency Small Cause Court wrote to the East Indian Railway informing them that the plaintiff-decree-holder had prayed for attachment of certain movable properties belonging to the railway. Objection was immediately filed on behalf of the Dominion of India objecting to this execution as it was the execution of a decree of a foreign Court. Eventually the Small Cause Court overruled the objection and allowed execution to proceed. It is for revision of that order that the present petition has been preferred to this Court.

[7] It is common ground that the Court of Barisal is now a Court in Eastern Pakistan and is not within the jurisdiction of this Court and is not within the Dominion of India. It is now a Court in a foreign country and it seems to have been suggested earlier in these proceedings that a foreign Court could not possibly transfer a decree to a Court in the Dominion of India for execution. Quite clearly the Code of Civil Procedure does not govern any decrees made by a foreign Court and would not allow that foreign Court to transfer such decrees to a Court in the Dominion of India for execution.

[8] On behalf of the opposite party, however, reliance is placed on certain orders which were made in August 1947 when the Dominions of India and Pakistan were created. These orders were intended to deal with the rights and liabilities of the two new Dominions and with pending legal proceedings.

[9] As this suit was instituted on 12th August 1947, it was pending in the Court of Barisal when the two Dominions became independent and were partitioned on 15th August 1947. It has been urged on behalf of the opposite party that after partition the Barisal Court has jurisdiction to proceed with this case as if the partition had never occurred. Reliance is placed on the Indian Independence (Legal Proceedings) Order, 1947, Art. 4 (1) and (3) That Article provides:

"Notwithstanding the creation of certain new Provinces and the transfer of certain territories from the Province of Assam to the Province of East Bengal by the Indian Independence Act, 1947,

(1) all proceedings pending immediately before the appointed day in any civil or criminal Court (other than a High Court) in the Province of Bengal, the Punjab or Assam shall be continued in that Court as if the said Act had not been passed, and that Court shall continue to have for the purpose of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day;

* * * * *

(3) effect shall be given within the territories of either of the two Dominions to any judgment, decree, order or sentence of any such Court in the said proceedings, as if it had been passed by a Court of competent jurisdiction within that Dominion."

[10] The argument is that as this suit was pending at Barisal the Court at Barisal had the same jurisdiction over it as if no partition had ever taken place and further that the decree which it passed could be given effect to in either Dominion, as if it had been passed by a Court of competent jurisdiction in either of the two Dominions. What is said is that this decree though made by a Court at Barisal must be treated as a decree made by a Court of competent jurisdiction in India and therefore the provisions as to the transfer of decrees apply and the decree could be transferred to the Small Cause Court at Calcutta.

[11] It was urged on behalf of the petitioner that these proceedings could not possibly be continued against the Governor General of India or the Dominion of India in Barisal. But it is pointed out by the learned Advocate for the opposite party that the case is expressly covered by Art. 12 (1), Indian Independence (Rights, Property and Liabilities) Order, 1947 which deals with the question of Governor General in Council or the Dominion of India being party to legal proceedings in respect of any property, rights or liabilities transferred by that Order. It seems to me that by reason of arts. 8 and 9 of this Order it is immaterial whether the cause of action in this case was contractual or tortious as in either case the Governor General of India did not cease to be liable by reason of the partition. That being so proceedings could be carried on against him in the Barisal Court.

[12] It is unnecessary to come to any definite conclusion upon these contentions because even assuming that the Barisal Court can be treated as a Court in the Dominion of India and can transfer the decree to any other Court in the Dominion of India for execution, nevertheless Small Cause Court in Calcutta could not execute this decree.

[13] If the Barisal Court could transfer the decree for execution it could only do so under the provisions of these various orders and the Civil Procedure Code. If the Civil Procedure Code applied to the transfer of this decree for execution the Code would apply to the decree itself, and it is pointed out that the decree as it stands is inexecutable by reason of S. 82 of the Code.

[14] That section reads as follows:

"(1) Where the decree is against the Dominion of India or a Province or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Provincial Government.

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report."

[15] The words "such act as aforesaid" refer to the acts mentioned in the earlier sections and there can be no doubt that this section would govern a decree against the Dominion of India for breach of a contract or negligence of a railway. That being so, the section requires that the decree should have on the face of it a time limit for its satisfaction. Learned Advocate for the opposite party contended that we must presume that the Court at Barisal did everything properly; but no presumption can be made in this case because the decree is actually on the record and no time is stated in the decree within which it was to be satisfied. That being so this decree as it stands cannot be executed. Further even if there was on the face of the decree a time limit for its satisfaction the decree could not be executed until a report of its non-satisfaction within the time specified had been sent to the Provincial Government. Before execution could proceed three months must elapse from the date of the report. No report of course was made in this case because no time was fixed in the decree for satisfaction and therefore the Court could not execute the decree.

[16] It was contended that even if the decree did not comply with S. 82 it was not void. It is unnecessary to decide whether the decree is void or not. But one thing is quite clear that it is not executable in its present form and that is enough to dispose of this case. That is quite clear from the case of *Governor General in Council* v. *Piramal*, A.I.R (35) 1948 Pat. 179. Whether this decree can be made executable is not a matter upon which this Court can offer any opin-

ion. All that this Court is asked to hold in this petition is that the decree as it stands is not executable and therefore the order of the the learned Judge of the Small Cause Court was erroneous.

[17] In my view the learned Judge of the Small Cause Court, Calcutta, should not have ordered execution of this decree and his order permitting execution must be set aside.

[18] The Rule is therefore made absolute with costs.

Sarkar J.—I agree.

D.R. *Rule made absolute.*

A. I. R (37) 1950 Calcutta 249 *[C. N. 87.]*

P. B. MUKHARJI J.

Basant Lal Saha — Plaintiff v. *P. C. Chakarvarty—Defendant.*

Suit No. 2278 of 1948, D/- 10th August 1949.

(a) Houses and Rents – West Bengal Premises Rent Control (Temporary Provision) Act (XXXVIII [38] of 1948). S. 11 (1) Proviso (f) — Ejection of tenant—Conditions to be satisfied by landlord stated.

A landlord who files an application under S. 11 (1), Proviso (f) should satisfy the Court on three points : (1) that he "requires" the premises, (2) that such requirement is for his "own occupation" and (3) that this requirement is "bona fide." [Para 23]

The word "requires" involves something more than a mere wish and it involves an element of need to some extent at least : 26 C. W. N. 499, *Rel. on.* [Para 14]

Therefore the landlord in order to show that he requires the premises must also show certain circumstances or facts proving some need or some necessity, though it need not be an absolute need or an absolute requirement in the sense that the landlord will not have any accommodation of any description and that he must actually be in the streets before he can demand his own house for his own occupation. [Para 14]

What is "*bona fide*" under the statute is always a question of fact and the Court with a view to find out whether the requirement of the landlord is *bona fide* is entitled to look to every relevant fact or circumstance affecting the landlord and his position, such as the nature and character of the landlord's temporary accommodation at the time when he is asking for the decree for possession, the insecurity or otherwise of the tenure that he might be holding at the time, the fact that he himself is under a notice to quit and the scope, size and character of his requirement. But the hardship which might be caused to the tenant by granting the decree for possession or the fact that tenant on the facts of the case does not need the premises is not a proper or relevant consideration for deciding the question of *bona fide.* [Paras 18, 19 & 20]

Gross unreasonableness of the landlord may in proper circumstances lead the Court to the conclusion that the landlord's requirement is not *bona fide*. How much unreasonableness will be regarded by the Court as evidence of *mala fides* on the part of the landlord will depend on the facts and circumstances of each case : A. I. R. (8) 1921 Bom 34 ; A. I. R. (11) 1924 Cal. 57 and 1921-1 Ch. 404, *Ref.* [Para 17]

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provision) Act (XXXVIII [38] of 1948), S. 11 (1) Proviso (f) –Object.

A Statute like the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, is designed to meet the fugitive exigencies of the hour and in doing so the Legislature in its wisdom has still left the landlord with that remnant of his right which is an incident of ownership, to be able to evict a tenant, when he *bona fide* requires his property for his own occupation which the Court will be loath to confiscate without express statutory provision. [Para 20]

S. Dutt –for Plaintiff.

D K. Sen –for Defendant.

Judgment — This is a suit by the plaintiff for the recovery of possession of premises NO. 26C Amherst Row, Calcutta and for a decree for the sum of Rs. 705 alleged to be due in respect of arrears of rent from April 1947 to June 1948 and for mesne profits and costs.

[2] The case of the plaintiff is that the defendant was a monthly tenant under the plaintiff in respect of premises No. 26C Amherst Row at the rent of Rs 47 per month. A notice to quit was given on 26th May 1948 calling upon the defendant to vacate the premises by the end of June 1948. The plaintiff also pleads that he requires this house for his own occupation. He obtained permission from the Rent Controller on 17th December 1947. The suit was instituted on 12th July 1948.

[3] The defendant filed his written statement. The default in the payment of rents is denied. The defendant also denies the validity of the notice to quit. The defendant denies that there is any bona fide requirement by the plaintiff.

[4] In the written statement the defendant has gone further to say that the plaintiff owns and possesses many other properties in Calcutta and does not require the premises in suit for his own occupation. The defendant has imputed a motive to the plaintiff for filing this suit by the plea in para. 7 of the written statement that the plaintiff wanted to increase the rent and because the defendant did not accept the proposal for increase of rent set out in that paragraph the plaintiff wants to turn out and evict the defendant.

[5] Mr Dilip Kumar Sen who appears for the defendant confined himself only to the issue to bona fide requirement. The only issue he raises is "Does the plaintiff bona fide require the house for his own occupation" ?

[6] Mr. Sen does not raise any issue with regard to the notice to quit. Nor does Mr. S. Dutt who appears for the plaintiff raise any with regard to the arrears of rent. The position with regard to the arrears of rent is this that the defendant has gone on depositing all the rents with the Rent Controller up to the date when an order was made on an application under Ch 13A in this suit; since that order the payments are being made to the plaintiff's solicitors. Mr. Dutt admits that payments up to date have been made in this way.

[7-11] The plaintiff has given evidence in this suit. [After going through the evidence of the plaintiff, his Lordship continued.]

[12] In the circumstances, the point for decision is, does the plaintiff *bona fide* require the house for his own occupation, within the meaning of proviso (f) of S. 11 (1), Rent Control Act, 1948? On the facts I have no hesitation in holding that the plaintiff *bona fide* requires premises NO. 26C, Amherst Row for his own occupation.

[13] In my opinion a landlord under the West Bengal Premises (Temporary Provision) Rent Control Act, 1948 is to satisfy the Court on three points, (1) that he "requires" the premises, (2) that such requirement is for his "own occupation" and (3) that his requirement is "*bona fide*."

[14] The word "require" was construed by Buckland J. in *Rekhab Chand* v. *D'Cruz*, 26 C. W. N. 499 : (A. I. R. (10) 1923 Cal. 223), while dealing with a similar provision in the Calcutta Rent Act, 1920, and the construction that the learned Judge put upon the word "require" is this :

"The word in the Act is not 'desire' but 'require.' This in my opinion involves something more than a mere wish and it involves an element of need to some extent at least."

I respectfully follow the same meaning and construction of the word "require" in construing that word in the West Bengal Premises Rent Control Act, 1948. Mere wish or convenience or whim or fancy of the landlord will not in my view be enough to show that the landlord "requires" the premises. The landlord must show certain circumstances or facts proving some need or some necessity for the landlord. At the same time the Statute does not say that it must be an absolute need or an absolute requirement in the sense that the landlord will not have any accommodation of any description and that he must actually be in the streets before he can demand his own house for his own occupation. This in my opinion will be taking the most unreasonable and impossible view of the Statute and I do not consider such was its intention.

[15] Counsel for the defendant has argued that the plaintiff and his wife have already got an accommodation where they are living with their family. Therefore, he submits that the plaintiff cannot be said to "require" NO. 26C, Amherst Row. In my judgment the landlord is not bound to continue his residence at rented premises with all the uncertainties of that tenure. Although he may have a rented and tenanted accommodation, such accommodation in my view of the construction of the Statute, does not prevent the owner of a house from requiring his own house for his own occupation. The fact that the landlord owing to the refusal of the tenant to give up possession has to live in other premises temporarily or in a precarious condition of tenure at some place at the time of hearing is no reason in my view for holding that the landlord does not require the dwelling house for himself.

[16] Sir Norman Macleod, the learned Chief Justice of the Bombay High Court observed in *Rustomji Dinshaw* v. *Dosibai Rustomji*, 45 Bom. 1236 at p. 1240 : (A. I. R. (8) 1921 Bom. 34) that the landlord was not bound to accept such precarious existence and the fact that he had such precarious accommodation does not mean that he cannot require his own house for his own occupation. Mr. Sen tried to distinguish the Bombay case by his argument that the words of the Bombay Act are both '*bona fide*' and 'reasonably.' The word 'reasonably' does not appear in proviso (f) of S. 11 (1), West Bengal Premises Rent Control Act, 1948. But I do not think that this argument helps Mr. Sen at all. On the contrary, it goes very much against his contention. With both the words '*bona fide*' and 'reasonably' in the Statute, the Chief Justice of the Bombay High Court came to the decision that the landlord was not bound to continue residing in the rented premises and his demand of his own house for his own occupation where he can live will be considered to be 'reasonable' within the meaning of the Statute. Even in such a case and under such a Statute the landlord's demand or requirement was not held to be unreasonable. The word 'reasonably' finds expression also in the English Statute although word '*bona fide*' is not there. Even under the English Statute, Peterson J. in *Neville* v. *Hardy*, (1921) 1 Ch. 404 : (90 L. J. Ch. 158), holds that the temporary residence of a landlord because the tenant refused to deliver him possession of his own house is never a reason for holding that the landlord cannot require his own dwelling house for his own occupation.

[17] It is not necessary for me to decide if there is any difference and if so what between our Act and the English and the Bombay Acts. It is also not necessary for me to decide whether the meaning of S. 11 (1) proviso (f), Rent Control Act, 1948 would be different and, if so, to what extent, if the word 'reasonably' occurred in the Statute? That will be dealing with a hypothetical statute and a hypothetical case. It is common learning that in construing a statute no extra word should ordinarily be imported. As I understand, the word 'require' I am content to accept the view and the construction of that word which Buckland J. expressed on the point. This construction came up before

the Court of Appeal in *Saleh Abraham* v. *Manekji Gowasji*, 50 Cal. 491 : (A. I. R. (11) 1924 Cal. 57) for consideration but neither Sanderson C. J. nor Richardson J. decided the point. Although the word 'reasonably' does not appear in the Statute questions of reasonableness may come in for consideration in deciding the '*bona fides*' of the landlord. Gross unreasonableness of the landlord may in proper circumstances lead the Court to the conclusion that the landlord's requirement is not *bona fide*. How much unreasonableness will be regarded by the Court as evidence of *mala fides* on the part of the landlord will depend on the facts and circumstances of each case. Richardson J. in the Court of Appeal in the decision to which I have just referred expressed at p. 505 of 50 Cal. 491 : (A. I. R. (11) 1924 Cal. 57) the same view dealing with almost similar expression used in the Calcutta Rent Act, 1920 when he observes :

"I agree that a landlord is not acting *bona fide* under the Act unless he *reasonably* requires the house for his own occupation although there also the Statute did not use the word 'reasonably.' "

[18] As to what is "*bona fide*" under the Statute, it is always in my opinion a question of fact. The Court in this context and with a view to find out whether the requirement of the landlord is *bona fide*, is entitled to look to every relevant fact or circumstance affecting the landlord and his position. The nature and character of the landlord's temporary accommodation at the time when he is asking for the decree for possession, the insecurity or otherwise of the tenure that he might be holding at the time, the fact that he himself is under a notice to quit, the scope, size and character of his requirement are all relevant factors that the Court might consider in this context.

[19] Mr. Sen with considerable force had argued about the hardship of the tenant that may arise in this case. In considering the question as to whether the landlord *bona fide* requires the house for his own occupation, my view is that the hardship which might be caused to the tenant by granting the decree for possession is not a proper or relevant consideration under proviso (f) of S. 11 (1), Rent Act, 1948. The tenant is always entitled to draw the attention of the Court to any factor bearing on the question of *bona fide* requirement or on the need of the landlord. But any possible hardship of the tenant that might be entailed by the passing of the decree for ejectment is not in my judgment a proper or a relevant consideration under proviso (f) of S. 11 (1), Rent Act, 1948.

[20] Mr. Sen has argued that the defendant is a lawyer Magistrate who has been in Government service and still is and whose family members reside in this house. The defendant is a Sub-divisional Relief and Rehabilitation Officer of the Government of West Bengal. At present he says he is at Siliguri and he will remain there until October this year. He has his wife and two children, one is aged 9 years and the other is 13 years who live at 26C, Amherst Row, Calcutta and from where they attend Scottish Churches Collegiate School. In 1943 he was practising in the Bankshall Police Court as a pleader and was residing at 26C, Amherst Row. He joined Government service in 1945. In January 1945 he was posted at Barisal for 2 years and 8 months and he left his family to live in that house in Calcutta. Then from Barisal he was posted to Contai for 6 months. Mr. Dutt has on these facts argued that the tenant really does not need the house. On the same facts Mr. Sen argues that it will be a very great hardship on the defendant if he is to leave the house. In my view both such arguments are misconceived. The test that is to be satisfied and considered under the statute is whether the landlord *bona fide* requires the house for his own occupation and not whether the tenant needs the house or that a decree for ejectment will cause hardship to the tenant. Proviso (f) of S. 11 (1) of the Act engrafts an exception where a decree for recovery of possession can still be made in favour of a landlord who *bona fide* requires the premises for his own occupation. The Statute thereby recognises a wholesome principle that a man should not be deprived of his own house if he *bona fide* requires it for his own occupation. Under the Common law or the Transfer of Property Act, the landlord has considerable rights to evict a tenant from his property. A good many of these rights have been taken away by the Act in order to meet the prevailing and acute shortage of housing accommodation for the citizens of this province. A statute like the West Bengal Premises (Temporary Provisions) Rent Control Act, 1948 is designed to meet the fugitive exigencies of the hour and in doing so the Legislature in its wisdom has still left the landlord with that remnant of his right, which is an incident of ownership to be able to evict a tenant, when he *bona fide* requires his property for his own occupation. This Court will be loath to confiscate that valuable right of the landlord without express statutory provision.

[21] In this case in the written statement as I have said before the plaintiff challenged the plaintiff's case of *bona fide* requirement on two grounds. The first ground was that the plaintiff had many other properties and houses in Calcutta ; and the second ground was as pleaded in Para. 7 of the written statement, namely, that this was a *mala fide* suit and was instituted because

the defendant did not agree to the plaintiff's demand for increment of rent. I find nothing from the evidence of the defendant in support of either of these allegations made in the written statement and nothing in my opinion has been proved in support of any one of such allegations. Both the grounds, therefore, on which the defendant has challenged the *bona fide* requirement of the landlord plaintiff fail.

[22] But nevertheless the plaintiff has to satisfy this Court that he *bona fide* requires the premises for his own occupation. On the facts as I have found above, I have no hesitation in holding that the plaintiff has satisfied the three tests required under proviso (f) of S. 11 (1) of the Act, namely, (1) that he 'requires' the house, (2) that the requirement is for his 'own' occupation, and (3) that such requirement is '*bona fide*' I, therefore, hold that the plaintiff requires No 260, Amherst Row, Calcutta, for his own occupation and accordingly answer the issue in this suit in the affirmative.

[23] Therefore, there will be judgment for the plaintiff for possession of Premises No. 260, Amherst Row and for costs. Mr. Sen asks for some time to vacate the premises Time is granted till 3rd November 1949 to the defendant to vacate. The defendant will continue to pay to the plaintiff's solicitors mesne profit at the rate of rent until the delivery of possession within 7th of each succeeding month for which the same will be due. As the counsel for the defendant says that the defendant has paid all arrears of rent the plaintiff does not ask for a decree for such arrears of rent. The plaintiff, however, will have this direction that he has the liberty to withdraw the deposit of rents with the Rent Controller, if not withdrawn already.

M.K. *Suit decreed.*

A. I. R (37) 1950 Calcutta 252 *[C. N. 88.]*

R. P MOOKERJEE AND LAHIRI JJ.

Sashi Bhusan Singha — Petitioner v. *Sankar Mahato — Opposite Party.*

Civil Rule No. 1 60 of 1949, D/- 5th January 1950, from order of District Judge, Midnapore, D/- 29th June 1949.

Tenancy laws—Bengal Tenancy Act (VIII [8] of 1885), S. 26F – Involuntary transfer.

Transfer referred to in S. 26F (1) includes an involuntary transfer. Hence where a sale takes place under S. 28, Bengal Agricultural Debtors Act (VII [7] of 1936), a co-sharer is entitled to pre-empt under S. 26F. [Paras 3 & 18]

Rajendra Bhusan Bakshi and Ashutosh Ganguli — for Petitioner.

Purna Chandra Basu — for Opposite Party.

R. P. Mookerjee J. — This is an application in revision against the orders passed by the lower Courts allowing an application under S. 26F, Bengal Tenancy Act.

[2] The opposite party made an application on 17th September 1948 under S. 26F, Bengal Tenancy Act on the allegation that he was a cosharer with one Kshirode Das in respect of an occupancy holding which had been sold on 22nd March 1947 under the provisions of the Public Demands Recovery Act. Sasi Bhusan Singha, the petitioner before this Court, was a creditor of Kshirode Das and had obtained an award under the provisions of the Bengal Agricultural Debtors Act. The payments directed to be made under the award not having been made within the due dates steps were taken by the creditor under S. 28, Bengal Agricultural Debtors Act. The certificate sale which followed was confirmed on 23rd May 1947 but the opposite party alleged that he had no knowledge of the sale before 9th September 1948. The application for pre-emption under S. 26-F, Bengal Tenancy Act was filed on 17th September 1948.

[3] Various objections were raised by the decree-holder auction purchaser, Sasi Bhusan Singha. It is not necessary for our present purpose to refer to all the different objections as only one of those has been urged before us. It is argued that the sale had taken place under S. 28, Bengal Agricultural Debtors Act, and the provisions of S. 26 F, Bengal Tenancy Act are not attracted in the case of involuntary sales. This objection had been disallowed by the Courts below.

[4] Section 26 F, Bengal Tenancy Act provides that subject to exceptions mentioned in sub-s. (1) of that section

"One or more cosharer tenants of the holding, a portion of share of which is transferred, may, within four months of the service of the notice under S. 26-C, apply to the Court for the said portion or share to be transferred to himself or themselves."

It is contended that all the exceptions as appearing in clauses (a) to (e) refer to voluntary transfers. There is no indication that the transfer referred to in this sub-section includes an involuntary transfer. It is further contended that the reference to S. 26-C in sub-s. (1) is only for the purpose of attracting such cases where a notice is to be given under S. 26-C of the Act. Section 26C does not control S. 26.F.

[5] In our view, such a restricted interpretation of S. 26F is not warranted. Reference may be made in this connection to the other parts of S. 26F and also to the provisions contained in S. 26C of the Act. Before we refer to the provisions contained in S. 26-C it may be noticed that in sub-S. (11) of S. 26F, it is provided:

"In this section 'transfer' does not include simple or usufructuary mortgage or mortgage by conditional sale until a decree or order absolute for foreclosure is made."

If it were the intention of the Legislature to restrict the term 'transfer' only to cases of voluntary sales, there would have been no necessity of excluding simple or usufructuary mortgage or mortgage by conditional sale *until a decree or order absolute for foreclosure is made*. Let us take the case of a mortgage by conditional sale. Title passes on the final decree for foreclosure being passed. If the passing of such a decree for foreclosure is deemed to be a transfer under S. 26F, it is difficult to support the contention that only voluntary transfers were taken into consideration in this section. If a transfer which takes place on the passing of a decree absolute for foreclosure is not saved under sub-s. (11) of S. 26F, it cannot be contended that transfers by involving sales were not provided for in this section.

[5] This interpretation is, however, further supported if reference is made to the provisions contained in S. 26-C of the Act. In sub-s. (1) of S. 26-F, reference is made to S. 26-C, no doubt, for the purpose of determining the period within which an application for the exercise of the right of pre-emption is to be filed. But if reference is made to some of the provisions contained in S. 26-C of the Act, it will be patent that this latter section has to be read along with S. 26-F.

[6] The opening words in sub-s. (1) of S. 26C refer to "every transfer" and the exceptions made to such transfers as

"in the case of a bequest or a sale in execution of a decree or of a certificate signed under the Bengal Public Demands Recovery Act, 1913"

unmistakably indicate that the term 'transfer' as used in this sub-section is in the widest sense. The transfer referred to includes not only a sale effected by acts of parties, but also those effected through Court.

[7] The service of notice is made incumbent in the case of all transfers as provided for in the different sub-sections following sub-s. (1). Sub-s. (1) provides for the service of the notice of the transfer at the time when the document is registered under the Registration Act. Sub s. (2) provides for cases where title passes by a bequest, and no probate is to be granted or letters of administration issued until steps are taken for the service of notice of such a transfer. The notice in this case, however, is limited to a notice to the landlord and not to the other co-sharers.

[8] Sub-section (3) provides that a Court or Revenue Officer shall not confirm a sale of either the entire or portion of a holding until the purchaser or the mortgagee files copy of a notice to be served and takes other steps as required under sub-s. (1).

[9] Sub-section (4) specifically provides in respect of cases where a portion or a share of an occupancy holding is transferred and is in the following terms:

"If the transfer of a portion or share of such a holding be one to which the provisions of sub-s. (1) of S. 26F apply, there shall be filed notices giving particulars of the transfer in the prescribed form together with process fees prescribed for the service thereof on all the co sharer tenants of the said holding who are not parties to the transfer."

It will be noticed that sub-s (4) is made applicable only in such cases where the provisions of sub-s. (1) of S. 26F are attracted. Notices to the co-sharers must be given under sub s. (4) Taken along with sub-s. (5) the duty is cast upon the Court or the Revenue Officer or the Registering authority, as the case may be; and the duty of the landlord is to register the names of all the transferees.

[10] Further, in sub-s. (6) the word 'transfer' is interpreted; and for S 26C 'transfer' does not include partition or a lease, or, until a decree or order absolute for the foreclosure is made, simple or usufructuary mortgage or mortgage by conditional sale. This limitation taken along with the very wide use of the term 'transfer' as appearing in sub s. (1) of S. 26C indicates the purpose for which notice is to be issued, and the right of preemption given under S. 26F is to be exercised.

[11] It is, no doubt, true that a particular word may be used in different senses over the different parts of the Act, but the ordinary rule is that unless something specially appears from the section itself, the same meaning is implied by the use of the same expression in every part of an Act. In ascertaining the meaning to be attached to a particular word in a section of an Act, the proper course would be, in the first instance, to ascertain what meaning is possible from a consideration of the section itself. If a particular section unmistakably shows a special meaning to be attached to a particular word, it is not open to refer to other portions of the Act to interpret that word in a different meaning. If, however, a clear meaning cannot be ascertained from the section itself, other sections may be looked at to fix the sense in which the word is there used. See the observations of Jessel M. R in *Spencer* v. *Metropolitan Board of Works*, (1882) 22 Ch. D. 142 : (52 L J. Ch. 249).

[12] It is not, however, overlooked that the same word may be used in different senses in the same statute, and care has to be taken to find out whether any special meaning is to be given to any particular word in any particular section.

[13] As indicated already in S. 26F of the Act, there is no indication that the word 'transfer' is used in any restricted sense. It is used in

the general and ordinary sense, and if any assistance can be obtained from sub-s. (11) the only conclusion that can be drawn is that the intention of the Legislature was not to limit the scope of the word 'transfer' in any particular manner. If without reference to any other section in the Act the interpretation of the word 'transfer' is to be based, we think that it is the wider meaning and not any restricted one which can be put upon the word 'transfer.'

[14] If there had been any doubt about the scope of the word 'transfer' in S. 26F such doubt is dispelled if we refer to the provisions contained in S. 26C. Although it cannot be strictly stated that S. 26C controls S. 26F, the two sections have to be read together at least for certain purposes as the service of notice provided for in S. 26C gives the cause of action for making an application under S. 26F. We do not overlook the fact that even when a notice has not been served, it is open to a co-sharer to take advantage of the transfer and to make an application for enforcement of the right as laid down in S. 26F within three years from the date of sale. Article 181, Limitation Act has been held to be attracted in such a case. See *Asmat Ali* v. *Mujahar Ali*, 52 C. W. N. 64: (A. I. R. (35) 1948 Cal. 48 F. B.). The cause of action, therefore, which gives rise to the exercise of the right under S. 26F, Bengal Tenancy Act is not merely the service of notice, but the transfer of a portion of the occupancy holding. The different kinds of transfer which are referred to in S. 26C subject to the exceptions as contained in S. 26F have to be taken note of.

[15] There is no doubt in our mind that S. 26C as it now stands, includes all kinds of transfer. Further, when in sub-s. (1) of S. 26F certain exceptions are being indicated in cls. (a) to (e), such exceptions must be taken to be exceptions to the general connotation of the term 'transfer.'

[16] The word 'transfer' means the passage of a right from one individual to another. Such transfer may take place in one of three different ways. It may be by virtue of an act done by a transferor with an intention, as in the case of a conveyance or a gift, or, secondly, it may be by operation of law, as in the case of forfeiture, bankruptcy, intestacy, etc. Or thirdly, it may be an involuntary transfer effected through Court, as in execution of a decree for either enforcing a mortgage, or for recovery of money due under a simple money decree. The word 'transfer' in its ordinary sense would include all these different kinds of transfer. Reference may in this connection be made to the ordinary dictionary meaning as appearing in Murray's Oxford Dictionary, Vol. II, p. 257 : "to convey or make over title, right or property by deed or legal process." Reliance, however, was placed by the learned Advocate for the petitioner on the meaning of the word 'transfer' as appearing elsewhere in the same dictionary—"conveyance from one person to another of property." In the latter place, there is no indication as to how the transfer takes place; there is change of title from one to another but the method adopted is not indicated. Making over or transferring the right which is in one to another may take place as indicated already in one of the three different ways.

[17] In the absence of any words of limitation, a word is to be interpreted in the ordinary dictionary meaning. Even if there was any doubt about the ordinary meaning, from such indications as have been noticed and as appear in sub-s. (11) of S. 26F, and the connotation of the term as appearing in S. 26C we would have held that the limited interpretation attempted to be put on that word 'transfer' in S. 26F is not justified.

[18] In this connection, reference may also be made to the observations made by the Full Bench in *Dayamayi* v. *Ananda Mohan*, 42 Cal. 172 : (A. I. R. (2) 1915 Cal. 242) and the decision of the Special Bench in *Chandra Binode Kundu* v. *Ala Bux*, 48 Cal. 184:(A I. R. (8) 1921 Cal. 15). It will be remembered that while formulating the different propositions of law, the Full Bench laid down certain principles when dealing with the question of the transferability of an occupancy holding. Transfers, whether voluntary or involuntary, were both taken into consideration. Particularly in the judgment of Mookerjee A. C. J., in the Special Bench case referred to above the first proposition, as stated by the Full Bench, was modified and the difference between voluntary and involuntary sales was fully considered; it was laid down that involuntary alienation stood on the same footing as the question of voluntary alienation, and that no differentiation had been made, as detailed in the historical analysis of the case law on the point, between voluntary and involuntary sales. The Bengal Tenancy Act does not provide in the sections referred to any difference between voluntary and involuntary sales. It will not be proper to introduce such a differentiation in S. 26F of the Act unless such differentiation is clearly indicated in the section itself, and there is no such indication.

[19] This Rule is accordingly discharged. There will be no order for costs in this Court.

Lahiri J. — I agree.

D.H. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 255 *[C. N. 89.]*

R. P. MOOKERJEE AND LAHIRI JJ.

Sm. Sushama Roy Choudhurani — Petitioner v. *A. S. M. Osman—Opposite Party.*

Civil Rule No. 1030 of 1949, D/-25th January 1950, from order of Munsif, 2nd Court, Alipore, D/-4th April 1949.

Civil P. C. (1908), S. 45 — Execution in foreign Court.

A Court in India cannot issue a writ of attachment of the salary of the judgment-debtor residing within the jurisdiction of a Court in Pakistan. [Para 6]

Annotation: ('44-Com.) C. P. C., S. 45, N. 1.

Chandra Sekhar Sen and Radha Kanta Bhattacharjya—for Petitioner.

R. P. Mookerjee J.—This is an application for revision of an order passed by the Munsif refusing to issue an order for attachment in respect of moneys payable by a person now resident in East Pakistan.

[2] The present petitioner obtained a decree from the Court at Alipore against the opposite party who was at that time a resident within the jurisdiction of that Court and was serving as an Inspector under the Calcutta Police. The opposite party having opted for Pakistan as from after 15th August 1947, he is now stated to be acting as an Inspector of Police at Dacca. The decree of the Alipore Court was put into execution in that Court. The decree-holder prayed for the realisation of the balance of her decretal dues by attachment of the salary of the opposite party payable at Dacca. The petitioner accordingly prayed for the issue of a writ of attachment of the salary of the opposite party under the provisions contained in R. 28 of O. 21, Civil P. C. The writ of attachment was returned unexecuted from the Court in East Pakistan with the endorsement that the writ should be sent through the proper diplomatic channel. The Deputy High Commissioner for India in East Pakistan was approached and he intimated to the Munsif at Alipore that the Government of India had not laid down any procedure for levying attachment through the Deputy High Commissioner. The decree-holder petitioner then applied to the Alipore Court for requesting the Central Government for the realisation of the balance of the decretal dues. By an order, dated 4th April 1949, the learned Munsif dismissed the execution case on the ground that the attachment process was not capable of execution in view of the fact that the judgment-debtor was living in another Dominion. It is against this order that the present rule has been obtained.

[3] It is now incontestable that the Dominions of India and Pakistan are now two separate sovereign and foreign states. A Court in India has no authority on any Court or Officer resident in the other Dominion. An order may be passed by a Court only if such an order can be enforced though the person or party refuses to carry out that order.

[4] Further, the provisions contained in S. 60, Civil P. C., read with S. 136 and O. 21, R. 48 of the Code *prima facie* apply only to Courts in India. This Code is not attracted or is applicable outside India. It is permissible for the Court, as is made clear in the sections themselves, to issue a writ of attachment outside the jurisdiction of that particular Court, but that Court must be situated within India where the Code of Civil Procedure is in force. Reference may in this connection be made to the decision in *Mela Mal* v. *Bishen Das*, 13 Lah. 206 : (A. I. R. (18) 1931 Lah. 723), where cognate provisions as in R. 5 of O. 38, Civil P. C., relating to attachment before judgment by civil Courts came up for consideration. Even a Court which was situated at Khasgar which was admittedly a foreign territory, but where a Court had been established under Foreign Jurisdiction Act, 1890, by His Majesty in Council was not even considered to be within the category of Courts established by the Governor-General in Council. A Court situated in British India at that date was held to be incompetent to attach property situated in Khasgar. The rules contained in the Code of Civil Procedure are obviously restricted to Courts in India.

[5] Reference may also be made to the recent decision of this Court in *Dominion of India* v. *Hiralal Bothra*, 53 C. W. N. 817 : (A. I. R. (37) 1950 Cal. 12), where the relation between the two States, and the position and jurisdiction of the Courts situated in the two Dominions fell to be considered. The Court at Dacca comes within the definition of a foreign Court, as defined in S. 2 (5), Civil P. C. The order for attachment is to be sent to the relevant District Court under S. 136, Civil P. C. The District Court as referred to in S. 156 will be, in the present case, if this section be applicable and enforceable in East Pakistan though part of the law of India, the District Court at Dacca. The District Court at Dacca is a foreign Court as being situate beyond the limits of all the provinces of India and is neither established nor continued by the Governor-General. It is not competent for a Court in India to direct a foreign Court, situated at Dacca, to take necessary steps for the execution of a decree. As held by this Court in *Dominion of India* v. *Hiralal Bothra*, 53 C. W. N. 817 : (A. I. R. (37) 1950 Cal. 12), a decree passed by a

Court which is now in one Dominion cannot be executed by another Court in the other Dominion. The two Dominions are not reciprocating countries as envisaged in S. 44A of the Code and there has not been any intestate arrangement between the two States.

[6] The learned Munsif was correct in his decision that he had no jurisdiction to issue a writ of attachment to Pakistan.

[7] This Rule is accordingly discharged. As there is no appearance on behalf of the opposite party in this Court, there will be no order for costs in this Court.

D.H. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 256 *[C. N. 90.]*

SINHA J.

Amulya Charan De—Appellant v. *Corporation of Calcutta and others—Respondents.*

A. F. A D. No. 351 of 1944, D/- 14th May 1948, against decree of Sub-Judge, 2nd Court, Zillah 24 Parganas, D/- 28th September 1943.

(a) T. P. Act (1882), S. 112 — Covenant not to erect structure—Breach of — Continuing breach—Waiver of forfeiture.

The breach of a covenant in a lease not to erect any structure on the land is not a continuing but a single breach. If it is waived by subsequent acceptance of rent, it cannot be availed of thereafter. [Para 17]

Annotation : ('45 Com.) T. P. Act, S. 112 N. 6.

(b) Evidence Act (1872), S. 114 — Notice — Service of.

The presumption is that the notice was served at the time when it would be delivered in the ordinary course of post. The presumption is however rebuttable. [Para 22]

Annotation : ('46-Man.) Evidence Act, S. 114 N. 25.

Baidya Nath Banerjee—for Appellant.

Krishnalal Banerjee and Sunil Kumar Basu —for Respondents.

Judgment. — This is an appeal against a decision of the second Subordinate Judge, Alipur, dated 28th September 1943 reversing a decision of the Third Munsif, Alipur, dated 8th April 1943 in T. S. NO. 102 of 1942 decreeing the suit filed by the plaintiff, the Corporation of Calcutta, against the defendants.

[2] The facts out of which this appeal arises are as follows : On 6th October 1931, the Corporation of Calcutta (hereinafter referred to as "the Corporation") leased out a piece of land measuring 10 cottahs 5 chittacks and 14 sq. ft. being portion of premises NO. 58/1, Kansaripara Road and Nos. 9 & 10 Kundu Road in favour of one Dulal Chandra Nandan, Secretary of the Bhowanipur Youngmen's Association. An indenture dated 6th October 1931 was executed by the parties. The indenture recites that on 27th March 1928, the Corporation for the monthly rent of Rs. 6 agreed to permit the said Association to occupy and use the premises NO. 58/1, Kansaripara Road as play-ground and that the lessee as Secretary applied to the Corporation for lease of a further plot of land being portion of premises Nos 9 and 10 Kundu Road. The indenture further recites that the Corporation on 26th March 1930 resolved to lease the remaining portion of premises Nos. 9 and 10 Kundu Road and 58/1, Kansaripara Road to the lessee at an annual rent of Rs. 10 for playing outdoor games subject to the conditions that (a) no structure was erected, (b) the lessee would vacate the premises whenever called upon to do so by the Corporation.

[3] The terms of the lease so far as they are material for this appeal may be set out as follows : Clause 1—The lessee hereby agrees to occupy the piece or parcel of land described in the schedule to the lease as a monthly tenant, it being hereby agreed that such occupation may be determined at any time by the Corporation by one month's written notice being given to the lessee. Cl. 3—The lessee shall not be at liberty to erect any structure on the land without the previous permission of the Chief Executive Officer of the Corporation had and obtained in that behalf. Clause 5—The lessee shall, whenever the said premises be required by the Corporation, on a month's notice deliver peaceful possession of the same to the District Engineer or any other Officer of the Corporation appointed in that behalf provided always and it is hereby agreed that if there be any breach of any of the covenants herein contained it shall be competent for the Chief Executive Officer to cancel and determine the agreement and to take over peaceful possession of the said premises as if these presents had not been done.

[4] Out of the area which is the subject-matter of the said indenture a portion of land measuring 3 cottahs 7 chittaks and 8 sq. ft. was disposed of by the Corporation and possession of the same was made over by the defendants on 19th July 1940.

[5] On 22nd October 1940, a notice was served upon the defendants by the Corporation by registered post requiring the defendants to vacate and give up possession of the portion of the land then in the possession of the defendants on the expiry of 30th November 1940.

[6] As the defendants inspite of demands did not vacate the land a suit was instituted in the Third Court of the Munsif at Alipur being T. S. NO. 114 of 1941 for ejectment and for other reliefs.

[7] On 17th November 1941, the said suit was withdrawn with liberty to bring a fresh suit.

[8] On 27th November 1941 a notice was sent by registered post on behalf of the Corporation requiring the defendants to vacate the premises

on or before 31st December 1941 as the Corporation urgently required the land in the occupation of the defendants for the purpose of extending the roadway and *as the defendants had forfeited their interest in the land by the construction of structures thereon in direct contravention of the terms* of the said indenture. The notice was returned with the endorsement "left." Thereafter, on 15th December 1941 the said notice was again sent by registered post. The registered cover came back with the endorsement by the peon "Refused." The said two covers have been marked as Exs. 2 and 2 (a).

[9] On 24th April 1942, this suit was filed for recovery of possession of the portion of the land then in the possession of the defendants and for damages commencing from the date of filing of the suit.

[10] The defendants were sued under O. 1, R. 8, Civil P. C., as representing all members of the Bhowanipur Youngmen's Association. The suit was contested by defendants 1, 3 and 4 who filed a joint written statement. In the written statement, they denied the service of the notice of ejectment as alleged in the plaint and the validity of the notice and of the service thereof. The defendants also alleged that the covenants in the lease had not been broken by them inasmuch *as they did not erect the structure existing on the land the same having been erected prior to the date of the said indenture.*

[11] The learned Munsif held on the evidence that the structure had been raised after the date of the said indenture and without the permission of the Corporation and that the defendants had incurred forfeiture under S. 111 (g), T. P. Act. The learned Munsif however held that the forfeiture had been waived by the Corporation by acceptance of and of demanding payment of rent which became due since the forfeiture. The learned Munsif further held that the breach complained of namely, the erection of the structure, was not of a continuing nature and the continuance of the structure after the waiver of the forfeiture was not a fresh breach giving the plaintiff a fresh cause for a fresh forfeiture. The learned Munsif also held on the evidence that the notice to quit had been duly served upon the defendants but inasmuch as no notice had been served under S. 114A, T. P. Act, the suit for ejectment was not maintainable. In the view he held that the tenancy of the defendants had not been validly determined. He therefore dismissed the suit.

[12] Against the decision of the Munsif there was an appeal which was heard by the Second Subordinate Judge at Alipur. The Appellate Court agreed with the Munsif that the forfeiture incurred by the erection of the structure had been waived but held that as the breach of the covenant not to erect structure was a continuing one, the service of the notice dated 27th November 1941 determined the tenancy by forfeiture. He also held that it was not necessary to serve a separate notice under S. 114A, T. P. Act, and that a combined notice under Ss. 111 (g) and 114A was enough and that such notice had been served. The combined notice had not been waived and therefore the plaintiff was entitled to recovery of possession of the land and damages from 1st January 1942 to the date of delivery of possession at the rate of Rs. 10 per annum.

[13] This appeal has been filed by defendant 1 and is directed against the said appellate decision.

[14] Before me it has been argued by the learned advocate for the appellant that the breach of covenant not to erect a struture was not a continuing breach. The breach was a single breach and was complete on the date of the erection of the structure. That breach having been waived by acceptance of rent after the forfeiture was complete, the plaintiff was not entitled to eject the defendants in reliance on that forfeiture. There had been no other breach after the date of the notice dated 22nd October 1940 which entitled the Corporation to determine the tenancy by forfeiture. The Corporation was not entitled therefore to eject the defendants by a fresh notice based on forfeiture.

[15] It has been held that where there is an express covenant to build within a fixed period and the tenant does not do so, there is a single breach which may be waived by subsequent acceptance of rent. *See* Hillon Landlord and Tenant p. 187, Art. 142. Reliance was placed by the learned advocate for the respondent Corporation on the case of *Doe de Ambler* v. *Woodbridge*, reported in (1829) 9 B and C. 376 : (33 R. R. 203). In that case the covenant was not to alter or use certain rooms then used as bedroom into, or for any other purposes than, bed or sitting rooms without the license of the lessor in writing and the lease contained a clause of forfeiture for breach of any of the covenants. It was held per curiam that the conversion of a house into a shop is a breach complete at once and the forfeiture thereby incurred is waived by subsequent acceptance of rent. There was however a new breach of covenant every day during the time the rooms were used contrary to the covenant, of which the landlord could take advantage. That case is an authority for the proposition that if the breach of the covenant is a continuing breach, the lessor can avail himself of a new breach after a previous one had been waived but if the breach was complete at once, it was waived by subsequent acceptance of rent and could not be availed of thereafter.

[16] In *Powell* v. *Hemsley*, (1909) 1 Ch. 680, the lessees built a house in contravention of the covenants contained in the lease. The question arose whether the breach was a continuing one. Eve J. said as follows at p. 688;

"It has been argued on the part of the plaintiff that the breach is a continuing breach that there is a new breach of covenant every day the house is left standing. I cannot adopt this view. In my opinion the covenant was broken once and for all when the house was erected contrary to it was a breach complete at once and not continuous: See per curiam in *Doe de Ambler* v. *Woodbridge*: (1829-9 B. & C. 376: 33 R. R. 203) The defendant therefore cannot be liable on the footing of a continuing breach."

[17] This case went up on appeal and the judgment on appeal is reported in *Powell* v. *Hemsley*, (1909) 2 Ch. 252: (78 L. J. Ch. 741). Lord Justice Farwell says as follows:

"It was said that this is a continuing breach. I agree with Eve J. that the case of *Doe de Ambler* v. *Woodbridge* : (1829-9 B. & C. 376 : 33 R. R. 203) illustrates the distinction very well. The covenant there was that the tenant should not alter or convert certain rooms into bed rooms. The Court held the conversion was a breach complete at once. I entirely agree with Eve J. and I think that this appeal should be dismissed with costs."

I therefore hold that the breach of covenant not to erect any structure on the land was not a continuing but a single breach. The breach and the forfeiture incurred therefor having been waived, the Corporation was not entitled to rely on the breach by reason of the erection of the structure for determining the tenancy.

[18] The other ground on which the notice to quit was based was that the land was required by the Corporation for its own purposes. Clause 5 of the lease provided that if at any time the Corporation required the land, the lessee would deliver peaceful possession of the same on a month's notice. (After discussing the evidence His Lordship proceeded:) Further, Cl. 1 of the lease entitled the Corporation to recover possession of the land by determination of the tenancy at any time by one month's written notice being given. It is contended that even if there was no forfeiture, the Corporation was entitled to recover possession by giving one month's notice. Such a notice was given on 27th November 1941 and the tenancy determined on the expiry of the pericd of the notice.

[19] The learned advocate for the appellant contends that the suit has proceeded on the basis of forfeiture and the judgments of the lower Courts have also proceeded on that footing. No issue was raised as to whether the plaintiff was entitled to possession on any ground other than that of forfeiture.

[20] In the plaint recovery of possession is asked for on the footing of the notice to quit dated 27th November 1941. The notice dated 27th November 1941 expressly mentioned that the Corporation urgently required the land for extending the roadway. Clause 5 of the lease required the lessee to give up possession on a month's notice whenever the premises were required by the Corporation. Clause 1 of the lease entitled the Corporation to determine the tenancy on a month's written notice. It is therefore contended that the Corporation was entitled to a decree for possession if one month's notice was given.

[21] One of the issues framed at the trial was "Was any notice of ejectment served on the defendant Association? If so, is it valued and sufficient?" The learned Munsif found that notice under S. 111 (g), T. P. Act had been duly served on the defendants. He did not go into the question as to whether the defendants had got one month's notice, as it was not necessary for his purposes, he having proceeded on the ground of forfeiture only. In the grounds of appeal filed in the lower appellate Court, it was complained that the learned Munsif omitted to consider the other condition mentioned in the notice which was itself a good ground for ejectment, namely, that the land was required by the Corporation. The lower appellate Court having come to the conclusion that the breach of covenant was a continuing one held that there had been a forfeiture, and did not go into the other question, namely, whether the Corporation was entitled to a decree, on the ground that they had served a notice giving the defendants one month's time to vacate.

[22] If the evidence on the record was sufficient to enable me to determine the issue, I would have decided the issue here. But it seems to me the evidence is not sufficient. It is true that there is evidence that the letter dated 27th November 1941 was sent by registered post on the said date. The presumption is that the notice was served at the time when it would be delivered in the ordinary course of post. The presumption is however rebuttable. It is pointed out that the registered cover containing the notice dated 27th November 1941 was returned with the endorsement "Left" which is dated 2nd December 1941. As the lower Court did not consider the question as to whether one month's notice had been given, it was not necessary for the defendants to adduce any evidence for rebutting the presumption.

[23] I think therefore it is necessary that the following issues should be referred for trial to the lower appellate Court. (a) Was the premises now in the occupation of the defendants required by the Corporation? (b) Was the notice dated 27th November 1941 duly served on the defendants? If so, on what date?

[24] The lower appellate Court would take additional evidence on the issues referred to above and return the evidence to this Court with its findings thereon.

[25] Costs of this hearing, will abide the result.

V.B.B. *Case remanded.*

A. I. R. (37) 1950 Calcutta 259 *[C. N. 91.]*

G. N. Das J.

Ramesh Chandra Basu Majumdar—Defendant—Appellant v. *Brojendra Nath Paul—Plaintiff—Respondent.*

A. F. A. D. No. 673 of 1945, D/- 28-1-1949, against decree of the Sub-J. 2nd Court, Hooghly, D/- 21-12-1944.

(a) Tort — Malicious prosecution — Infructuous criminal process.

If, in fact, the processes of the Criminal Court are set in motion and the Criminal Court takes cognisance of the matter, the bare fact that the processes may be void on some ground or other does not disentitle the plaintiff from claiming damages for malicious prosecution. [Para 6]

(b) Tort—Malicious prosecution—Prosecution—Test—Mere filing of false complaint.

The question whether in a particular case there has been a prosecution or not depends on the facts of that particular case. The test is not whether the criminal proceedings have reached a stage at which they may be certainly described as a prosecution, but the test is whether the criminal proceedings have reached a stage at which damages to the plaintiff may result. The mere filing of a false complaint which may fail is not *per se* such a prosecution. [Para 9]

(c) Tort—Malicious prosecution — Damages—Grounds.

In an action for malicious prosecution, the plaintiff can claim damages, either on the ground of loss of reputation or damage to person and property. [Para 10]

Binoy Bihari Sen—for Appellant.

Panchanan Pal—for Respondent.

Judgment.—This appeal is on behalf of the defendant in a suit for recovery of damages for malicious prosecution. The plaintiff's allegation is that he acted as the defendant's pleader in Money Execution Case No. 101 of 1942 and withdrew certain sums of money from Court and paid to the defendant his share of the moneys so withdrawn, on a receipt given by the defendant. The defendant however lodged a complaint before the Magistrate at Serampore alleging that the plaintiff and two other persons had forged a *vakalatnama*, and on the strength of the forged *vakalatnama* had withdrawn moneys from Court and had misappropriated the same. The Magistrate thereupon took cognizance of the matter and sent the matter for enquiry to the munsif at Serampore. The munsif issued a notice on the plaintiff, and after an enquiry made by him, submitted a report. On perusal of the report, the Magistrate dismissed the complaint under S. 203, Criminal P. C. The plaintiff claimed damages for a sum of Rs. 503.11.6 for loss of reputation and expenses incurred by the plaintiff in defending the criminal proceedings started by the defendant. The plaintiff alleged that there was no reasonable and probable cause for initiation of the criminal proceedings, and that these proceedings were actuated by malice. The defence was a denial of the material allegations made in the plaint. It was stated that there was no malice or want of reasonable and probable cause. The defendant alleged that he had a *bona fide* belief that he had not been paid his proper share in the money withdrawn in the aforesaid money execution case; before initiating the proceedings before the Magistrate, he had sent a pleader's letter to the plaintiff enquiring as to who was responsible for the forged *vakalatnama* and withdrawing moneys and not paying him his proper share.

[2] The trial Court found that there was prosecution of the plaintiff, that there was want of reasonable and probable cause for filing the complaint before the Magistrate; that these proceedings were actuated by malice; and that the plaintiff was a leading practitioner and had suffered loss in reputation and had incurred certain costs. The trial Court, therefore, passed a decree for Rs. 503.11.6 with full costs.

[3] An appeal was taken by the defendant. The lower appellate Court has varied the decree of the trial Court by reducing the amount decreed, by Rs. 200. The lower appellate Court has maintained the decree of costs passed by the trial Court; it has directed that the parties should bear their costs in the appellate Court. Against the decision of the lower appellate Court, the defendant has preferred this appeal.

[4] Mr. Sen appearing for the defendant has contended that, (1) there was no prosecution of the plaintiff; and (2) the order for costs made by the lower appellate Court awarding full costs of the trial Court was not justified.

[5] Mr. Sen develops the first point on two grounds. In the first place, he contends that the complaint was filed against the plaintiff and two other persons alleging a conspiracy on the part of the persons named in the petition of complaint. The offence alleged included an offence under S. 463 and S. 408, Penal Code, but no sanction was taken as required under S. 196 (A) (2), Criminal P. C., to the initiation of the proceedings; the complaint, therefore, would not have resulted in any event in a conviction of the plaintiff and his alleged associates; there was thus no valid complaint in the eye of the law, and as such, there was no prosecution.

[6] In my opinion, the fact that the prosecution, if any, of the plaintiff by the defendant may

fail does not absolve the defendant of his liability for damages in a suit for malicious prosecution if the other requisite elements are found to be present. In my opinion, the defendant cannot escape liability merely on the ground that the step taken by him was erroneous in law. If, in fact, the processes of the criminal Court are set in motion, and the criminal Court takes cognisance of the matter, the bare fact that the processes may be void on some ground or other does not disentitle the plaintiff from claiming damages for malicious prosecution. In my opinion, in such a case as the present the conduct of the complainant (defendant in the civil action) is more reprehensible than the conduct of one who initiates criminal proceeding which is not void in law. In this connection, reference may be made to *Parli* v. *Read*, 30 Kamsas 534 where it was pointed out that the plaintiff can succeed whether the indictment is good or bad, because, in either case, the plaintiff is equally subject to the disgrace of the initiation of the criminal proceedings and is put to expenses for clearing up his character in the criminal proceedings.

[7] There is another answer to this part of the appellant's contention. It is true that the petition of complaint disclosed a charge of conspiracy and sanction under S. 196 (A) (2), Criminal P. C. was necessary to the initiation of the proceedings. In the present case, however, the Court did take cognisance of the matter. It may be that the criminal Court might have issued process not on a charge of conspiracy, but on other charges which the petition of complaint disclosed. It cannot, therefore, be said that the entire proceedings before the criminal Court were void and of no legal effect. This branch of the appellant's contention must, therefore, be overruled.

[8] The second branch of the appellant's contention is based on the ground that in point of fact, no process was issued by the criminal Court. The petition of complaint was dismissed under S. 203, Criminal P. C. It is, therefore, suggested that criminal Court prosecution, did not commence in the facts of this case. In support of this proposition, reliance is placed upon the decision in *Golapjan* v. *Bholanath*, 38 Cal. 880: (11 I. C. 311) as also on the case of *Mohammed Amin* v. *Jogendra Kumar*, 49 C. W. N. 282. It is true that these cases support the wide proposition contended for on behalf of the appellant that if the complaint is dismissed under S. 203, Criminal P. C. and no process is issued, the proceedings must be deemed not to have commenced at all and an action for malicious prosecution cannot be sustained. The decision in *Mohamed Amin's case*, (49 C. W. N. 282) went on appeal to the Judicial Committee of the Privy Council, and the decision of this Court was reversed: the decision of the Privy Council is reported in 51 C. W. N. 723: (A. I. R. (34) 1947 P. C. 108). The decision of this Court in *Golapjan's case*, (38 Cal. 880: 11 I. C. 311) was expressly overruled by the Judicial Committee in the case last cited.

[9] The question whether a prosecution which can found an action for damages for malicious prosecution commences with the mere filing of a petition of complaint before the criminal Court has been considered in a number of cases both in this country and abroad. In the case of *Rex* v. *Wallace*, (1797) 1 East P. C. 136, it was broadly laid down that the lodging of information before the Magistrate commences a prosecution which may, if unsuccessful, give rise to a suit for damages for malicious prosecution. It may be noted that the action for malicious prosecution is not founded on statute. The word "prosecution" which is said to be one of the elements for sustaining an action for malicious prosecution has not the same technical meaning which is to be found in the Criminal Procedure Code. The question whether in a particular case there has been a prosecution or not depends on the facts of that particular case. In the case of *Mohamad Amin* v. *Jogendra Kumar Banerjee*, 51 C. W. N. 723 : (A. I. R. (34) 1947 P. C. 108), the Judicial Committee stated that the test is not whether the criminal proceedings have reached a stage at which they may be certainly described as a prosecution, but the test is whether the criminal proceedings have reached a stage at which damages to the plaintiff may result. The mere filing of a false complaint which may fail is not *per se* such a prosecution.

[10] In the case before the Judicial Committee in *Mohamad Amim* v. *Jogendra Kumar Banerjee*, 51 C. W. N. 723 : (A. I. R. (34) 1947, P. C. 108) the facts were that on a petition of complaint filed by the defendant, the Magistrate directed an enquiry to be made. The enquiry was made not by a police officer, but by a Magistrate, and thereupon the petition of complaint was dismissed. Gentle, J. delivering the judgment of the trial Court felt himself bound by the decision in *Golapjan's case*, (38 Cal. 880: 11 I. C. 311) which was a decision of a Judge sitting singly on the Original Side of this Court. On appeal from that decision, Derbyshire, C. J. and Lodge, J. dissented from the view taken by Mookerjee and Beachcroft, JJ. in *Bishun Pergash* v. *Phulman Singh*, 19 C. W. N. 935: (A. I. R. (2) 1915 Cal. 79), and affirmed the view taken in *Golapjan's case*: (38 Cal 880: 11 I. C. 311). The learned Chief Justice points out that when the matter is at enquiry stage, either before a police officer or

a Magistrate, ordinarily, the person complained against has no *locus standi* to appear, and to lead evidence with a view to exculpate himself. Their Lordships, therefore, observed that when proceedings were at that stage, no prosecution could be deemed to have taken place. This view was overruled by the Judicial Committee on appeal from the judgment of this Court. I may point out that in an action for malicious prosecution, the plaintiff can claim damages, either on the ground of loss of reputation, or damage to person and property. Vide *Savile* v. *Roberts*, (1898) 1 Ld. Raym 374.

[11] Unquestionably in the facts of the present case, the effect of the initiation of the criminal proceedings by the defendant against the plaintiff on whom a notice was served to appear at the enquiry stage before the munsif resulted in such damages. The Courts below were, therefore, right in holding that there was a prosecution which entitled the plaintiff to recover damages in the suit. The first contention raised by Mr. Sen must, therefore, be overruled.

[12] The second contention refers to the order for costs made by the lower appellate Court. In my opinion, though the proper order for costs would have been to direct the defendant to pay proportionate costs both in the trial Court and in the lower appellate Court, it is not suggested that the order for costs actually made exceeds the amount of costs which would have been payable if an order of proportionate costs in both the Courts had been passed. The second contention must also fail.

[13] In the result, this appeal fails and must be dismissed with costs.

V. R. B. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 261 *[C. N. 92]*

HARRIES C. J. AND SARKAR J.

Panchanan Ghose—Appellant v. *Bhaggu Bari—Respondent.*

A. F. O. O. No. 28 of 1949, D/ 17-1-1950, against order of Commissioner for Workmen's Compensation, West Bengal, D/ 20-1-1949.

(a) Workmen's Compensation Act (1923), S. 2 (n) and Sch. II, Cl. (XXVI)—Person employed to load and unload bricks in a lorry—No evidence that loading and unloading took place in a place as required by Sch. II, Cl. (XXVI)—Person is not a workman and cannot claim compensation.

[Para 9]

Annotation.—('46-Man) Workmen's Compensation Act, S. 2 (n) N. 6.

(b) Workmen's Compensation Act (1923), S. 10—Notice of accident—Absence of—Effect.

S. 10 requires notice of the accident and such notice is only rendered unnecessary if the Court is satisfied on evidence that the employer knew from other sources, of the accident at or about the time it took place, or if there were sufficient grounds for failure to give notice. The employer's knowledge of the accident requires to be proved like any other fact and further it must be proved that he had knowledge of the accident at or about the time when it occurred. The Court cannot treat notice of an accident as unnecessary, for example, when the employer had obtained knowledge of the accident many days or weeks later. Where the absence of notice cannot be condoned under S. 10, the workman will not be entitled to any compensation.

[Paras 11, 12, and 13]

Annotation.—('46-Man) Workmen's Compensation Act, S. 10, N. 2.

(c) Workmen's Compensation Act (1923), S. 25—Evidence as to disablement—Medical certificates. —Evidence Act (1872), S. 45.

A finding as to incapacity or the extent of incapacity cannot be founded upon mere medical certificates which are the worst form of hearsay evidence. They merely record what somebody who is not a witness has written. Similarly, it is not proper for the Commissioner to base such finding upon his own observation of the injured workman. [Para 14]

Annotation.—('46-Man) Workmen's Compensation Act, S. 25 N. 1.

Phanindra Kumar Sanyal.—for Appellant.

Jitendra Mohan Sen Gupta and Jnan Chandra Ray — for Respondent.

Harries C. J. —This is an appeal by the employer from an order of the Commissioner for workmen's compensation awarding the respondent a sum of Rs. 441 together with certain costs as compensation in respect of an accident.

[2] The workman's case was that he was employed by the appellant to load certain bricks into a lorry, to travel with the lorry and unload the bricks on arriving at the lorry's destination. It is said that whilst the respondent was travelling in this lorry on some day about seven months before the hearing before the Commissioner, the lorry travelling along a narrow path overturned. The workman who was travelling on the lorry, it is said, was thrown into a tank along side this narrow path and was injured by bricks from the overturned lorry falling upon him. The workman's case was that he sustained injuries in the chest and on left hand, left knee and waist.

[3] The appellant denied that the respondent was a workman within the meaning of the Act and he denied that there was any accident or that he had notice of any accident.

[4] Evidence was called before the Commissioner upon which he held that the respondent had been injured by accident arising out of and in the course of his employment and assessed the compensation at the sum of Rs. 441 for partial disablement.

[5] A number of grounds have been taken in this appeal and it appears to me that the judgment of the Commissioner for workmen's compensation cannot possibly be maintained on any ground whatsoever. The learned Commissioner has proceeded to decide this case without any

reference whatsoever to the provisions of the Act.

[6] In the first place, the Commissioner has decided that the respondent is a workman. In ordinary parlance, the respondent was clearly a workman; but for the purposes of workmen's compensation he must be a workman as defined in the Act. Section 2 (n) defines "workman" as follows:

" 'Workman' means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is

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(ii) employed on monthly wages not exceeding four hundred rupees, in any such capacity as is specified in Schedule II".

[7] Schedule II specifies a large number of capacities in which the persons who are employed are workmen within the meaning of the term as used in the Workmen's Compensation Act.

[8] The learned Commissioner appears to have thought that the case of the respondent fell within cl. (XXVI) of Sch. II of the Act. That clause provides that a person

"employed in the handling of transport or goods in or within the precincts of,

(a) any warehouse or other place in which goods, are stored and in which on any one day of the preceding twelve months ten or more persons have been so employed; or

(b) any market in which on any one day of the preceding twelve months one hundred or more persons have been so employed."

[9] All the evidence amounted to was that this man was employed to load bricks into a lorry and to unload them. Where this loading took place was not stated, and there was no evidence at all that the handling of these bricks or the transport of these bricks took place in or within the precincts of any warehouse or market or in any place, in any warehouse or other place where on any one day of the preceding twelve months ten or more persons had been employed, or in or within the precincts of any market in which one hundred or more persons had been employed on any day within the preceding twelve months. How the learned Commissioner could have held that this man was a workman within the meaning of cl. (XXVI) of Sch. II upon the evidence I am wholly unable to say. It is quite clear that there was no evidence at all upon which it could be held that the respondent-applicant was a workman and therefore he could not have obtained any compensation under the Act.

[10] A point was also taken by the appellant by way of defence that no notice of the accident had been given by the respondent and an issue was framed giving rise to this question. The respondent gave no evidence at all that he had given his employer any notice of the accident, and it is to be observed that the employer so far from admitting any notice of the accident denied that there ever had been an accident or that he ever had notice of such an accident. Upon that state of the evidence, the learned Commissioner found that there was an accident as stated and that the matter was known to the opposite party in due course; but clearly that is a finding upon no evidence whatsoever. The Commissioner is not entitled to find that the appellant before us must have become aware of this accident in due course unless there is evidence upon which he can so find. According to the appellant he hired this lorry every day and there is nothing to suggest in the evidence that the appellant was ever told about any accident, if an accident did in fact take place. The Commissioner for workmen's compensation is not allowed to guess. He is an officer exercising judicial functions and he can only find facts upon evidence. As I have said there is no evidence at all that any notice of this accident was ever given by the workman or on his behalf.

[11] It is true that by reason of S. 10 (1) (b) notice need not be proved, if it is established that the employer had knowledge of the accident from any other source at or about the time when it occurred. But that the employer had knowledge of the accident requires to be proved like any other fact and further it must be proved that he had knowledge of the accident at or about the time when it occurred. The Court cannot treat notice of an accident as unnecessary, for example, when the employer had obtained knowledge of the accident many days or weeks later. In the present case, however, there is no evidence that the employer ever knew of this accident until this claim was made and admittedly a claim for compensation is not notice of an accident. The Workmen's Compensation Act requires a claim for compensation to be made within twelve months and also notice of the accident unless such notice can be dispensed with for the reasons given in S. 10.

[12] The learned Commissioner could have held in this case that the failure to give notice was not fatal to the claim, if he was satisfied that there was sufficient cause for failing to give the notice. The learned Commissioner has not dealt with the matter at all and has not considered whether there was sufficient or any cause for not giving the notice. He seems to have found that no notice was given but as he appears to have thought that as the employer must have got to know of this accident such (*sic*) was sufficient. The law however requires notice of the accident and such notice is only rendered unnecessary if

the Court is satisfied on evidence that the employer knew from other sources of the accident at or about the time it took place, or if there were sufficient grounds for failure to give notice.

[13] As the respondent failed to give the notice of accident in this case and his failure cannot be condoned his claim was bound to fail upon this ground also.

[14] Learned advocate for the appellant has also urged that there was really no evidence of incapacity or disablement. Admittedly, no doctors were called and the learned Commissioner has acted upon medical certificates. Medical certificates are the worst form of hearsay evidence. They merely record what somebody who is not a witness has written. There is nothing to suggest that the parties agreed to be bound by these certificates and I cannot see that any order finding incapacity and the extent of incapacity can ever be founded upon a mere medical certificate. The Commissioner also noted that he had seen the workman. The Commissioner is not a medical man and in this class of litigation malingering and false claims are notorious and I am sure that the Commissioner would find it very difficult to say whether an alleged injury to a joint was real or not. However, all the Commissioner had in this case were medical certificates together with his own observation. However, it is not necessary to consider this question further because it is puite clear that this order cannot possibly be sustained and must be set aside.

[15] In the result therefore I would allow this appeal, set aside the order of the Commissiner for workmen's compensation and dismiss the workman's claim.

[16] No order is made for costs.

Sarkar J.—I agree.

K.S. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 263 *[C. N. 93.]*

G. N. DAS AND DAS GUPTA JJ.

Indian Homeopathic Medical Association, Calcutta and others—*Petitioners* v. *Kanai Lal Pal and another*—*Opposite Party.*

Civil Rules Nos. 740, 1582 and 1583 of 1949, D/- 16-12-1949.

Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), S. 32 (6) and (7) — Effect of — High Court's power of revision except in cases mentioned in S. 32 (6) has been taken away — Civil P. C. (1908), S. 115.

The words 'subject to the provisions of sub-s. (6)' in S. 32 (7), necessarily exclude whatever other powers of revision the High Court may possess including its powers under S. 115, Civil P. C. [Para 14]

The power of the High Court to revise an order passed by the Rent Controller or the Chief Judge, the District Judge or the appointed Judge except in the specific cases mentioned in S. 32 (6) of the Act has been taken away by necessary implication. [Para 16]

Hence, an order of a Chief Judge of the Court of Small Causes modifying on appeal an order of the Rent Controller fixing the standard rent for certain premises not being one mentioned in S. 32 (6) is not open to revision by the High Court under S. 115, Civil P. C. : 49 C. W. N. 10, *Rel. on* ; A. I. R. (9) 1922 Cal. 427 and A.I.R. (10) 1923 Cal. 169, *Disting*; *Case law discussed.* [Para 18]

Annotation : ('44-Com.) Civil P. C., S. 115, N. 6, Pt. 40.

Paresh Nath Mukherjee and Gouranga Sundar Chatterjee (in No. 740) and Binayak Banerjee (in Nos. 1582 and 1583)—for Petitioners.

Sitaram Banerjee, Anil Chandra Dutt and Pravash Chandra Chatterjee (in No. 740) Hiran Kumar Roy and Kanti Basu (in Nos. 1582 and 1583) and Hem Chandra Dhar (in No. 1583)—for Opposite Party.

G. N. Das J.—The above cases were heard together. They arise out of applications under S. 115, Civil P. C., hereinafter called the Code. The Orders complained of in these Rules were passed by the Chief Judge of the Court of Small Causes, Calcutta hereinafter called the Chief Judge, modifying on appeal the orders made by the Additional Rent Controller fixing the standard rent of certain premises under the provisions of the West Bengal Rent Control (Temporary Provisions) Act, 1948, hereinafter called the Act.

[2] Mr. Banerjee appearing for the opposite party has raised a preliminary objection that this Court has no power to interfere with the orders complained of under S. 115 of the Code. His contention is that exercise of this power under S. 115 of the Code has been excluded by S. 37 (6) and (7) of the Act.

[3] It has not been disputed by Mr. Mukherjee appearing on behalf of the petitioner that the Provincial Legislature may, by appropriate legislation, take away the powers of this Court to interfere under S. 115 of the Code with an order passed by a Judicial Tribunal of Civil Jurisdiction.

[4] In order to deal with this matter, it is necessary to refer to certain provisions of the Act.

[5] Section 32 (1) of the Act impliedly provides for an appeal from an order of the Rent Controller, and requires it to be presented either to the Chief Judge or to the District Judge.

[6] Section 32 (2) empowers the Provincial Government to appoint a person who has exercised the powers of a District Judge to hear appeals, presented to the Chief Judge and a Judicial Officer not below the rank of a Subordinate Judge to hear appeals presented to the District Judge.

[7] For the sake of brevity, I shall hereinafter call the person appointed by the Provincial Government as the appointed Judge.

[8] Section 32 (3) confers on the Chief Judge or the District Judge the powers to transfer and withdraw cases to or from the appointed Judge.

[9] Section 32 (4) lays down the procedure to be followed in hearing an appeal.

[10] Section 32 (5) provides for review.

[11] Section 32 (6) empowers the High Court to revise an order imposing or confirming an order passed by the Controller imposing a fine under S. 20, S. 33 or S. 34 when the amount of fine is not less than five hundred rupees. The period of limitation is fixed at 30 days.

[12] Section 32 (7) then provides that "all decisions of the Chief Judge, or the District Judge, or a person appointed under sub-s. (2), as the case may be, shall, subject to the provisions of sub-s. (6), be final."

[13] According to the large majority of decisions, the word 'final' means not appelable but open to revision or review. *Partha Saradhi Naidu* v. *Koteswara Rao*, 47 Mad. 369 : (A.I.R. (11) 1924 Mad 561 F.B.) *Phani Bhusan* v. *Sarat Kumar*, 40 C. W. N. 124 : (A. I. R. (22) 1935 Cal. 773) and *Manager, Spring Mills Ltd.* v. *C. D. Ambekar*, 51 Bom. L. R. 148 : (A. I. R. (36) 1949 Bom. 188).

[14] In my opinion the words "subject to the provisions of sub-s. (6)" necessarily exclude whatever other powers of revision the High Court may possess.

[15] Mr. Mukherjee appearing for the petitioner submitted that the insertion of sub-s. (6) was made *ex abudanti cautela* with a view to provide against a possible contention that as the orders referred to were of a *quasi* criminal nature, revision was barred. This contention cannot be accepted. The High Court has ample powers of revision even in regard to orders of *quasi* criminal nature in appropriate cases.

[16] Mr. Mukherjee next contended that the word 'revise' has been used in a wide sense and includes an appeal. This contention cannot also be accepted because in S. 32 itself, the Act used the words, "appeal, review & revision."

[17] It was lastly contended that sub-s. (6) is wider in scope than S. 115 of the Code and was inserted with a view to confer on the High Court wider powers of revision in cases of a *quasi* criminal nature. This contention cannot also be accepted because the words "subject to the provisions of sub-s. (6)" clearly imply a limitation and not an extension of the powers of the High Court.

[18] In my opinion, the conclusion is irresistible that the power of the High Court to revise an order passed by the Rent Controller or the Chief Judge, the District Judge or the appointed Judge except in the specific cases mentioned in S. 32 (6) of the Act has been taken away by necessary implication. It is not disputed that the orders now in question do not come within the purview of S. 32 (6) of the Act. This Court has therefore no jurisdiction to interfere with the orders complained of.

[19] Mr. Mukherjee was at considerable pains to show that the Chief Judge or the District Judge or the appointed Judge acts as a Court and not as a *persona designata*. He referred us to a long catena of cases in support of his submission. In the view I have taken, it is not necessary to express a final opinion on this question. Conceding that the Chief Judge or the District Judge or the appointed Judge is a Court when hearing an appeal from the order of the Rent Controller, before this Court can interfere with an order passed in appeal the appellate tribunal must be subject to the revisional jurisdiction of this Court under S. 115 of the Code. It cannot be disputed that the appellate tribunal constituted under the Act is a a Court of special jurisdiction on the well settled principle that where a statute confers on a judicial tribunal the power to determine a right or liability which is the creation of the statute but which, but for that statute it would have had no jurisdiction to try, such jurisdiction is said to be special jurisdiction.

[20] The question, therefore, arises whether an order passed by a Court of special jurisdiction is revisable by this Court under the provision of S. 115 of the Code. Mr. Mukherjee relied on the principle enunciated by Viscount Haldane, L. C. in *National Telephone Co. Ltd* v. *Post Master General* (No. 2), (1913) A. C. 546 : (82 L. J. K. B. 1197), namely, where a special jurisdiction is conferred on an existing or established Court without more, it will attract all the ordinary incidents of the ordinary jurisdiction of such Court. The rule thus enunciated refers to an existing or established Court. This is also emphasised by Lord Atkinson in the same case at p. 555 where the rule is said to imply simply the question of extending the jurisdiction of an existing Court of Law. Lord Parker of Waddington at p. 562 (ibid) speaks of the principle as applicable to cases "where by statute matters are referred to the arbitration of a Court of record." Mr. Mukherjee also relied on the decision in *Hem Singh* v. *Basant Das*, 63 I. A. 180: (A. I. R. (23) 1936 P. C. 93) where the principle was applied in cases where the right of appeal was given to "one of the *ordinary Courts* of the country" and it was observed that in such cases "the procedure, orders and decrees of that Court will be governed by the ordinary rules of the Code of Civil Procedure.

[21] It is fairly clear from the above discussion that the above principle only applies where

the order complained of is an order passed either by the ordinary Court of the land or by a Court of record. The position was clarified by Rankin J. in the case of *Allen Bros & Co.* v. *Bando & Co.*, 26 C. W. N. 845: (A. I. R. (10) 1923 Cal. 169).

[22] The relevant observations run as follows:

"From the Act of 1861, from the Letters Patent and from the decisions I draw the conclusion that it is not enough for the purposes of the Code or the Letters Patent which deal on definite principles with a regular order of Courts; that from the limited nature of the powers conferred or from a mere comparison with other Courts, or from possible relationship thereto *not yet* subsisting, a new Court may be styled an inferior Court. An actual relationship to this Court must be established; an existing thread of connecting authority must be disclosed".

[23] If this view is accepted, then an order made by the appointed Judge which *ex concessis* must be regarded as a new tribunal will not be subject to revision by this Court.

[24] In later cases, however, the principle has been extended to all Courts exercising special jurisdiction. Thus in the case of *Md. Abdulla* v. *Giridharilal*, 42 C. W. N. 507 : (A. I. R. (25) 1938 Cal. 448), it was held that an appellate officer appointed under the Bengal Agricultural Debtors Act is not subject to revisional jurisdiction of the High Court on the ground that the civil Courts contemplated by cl. 16 of the Letters Patent do not cover Courts *which are created by a special statute* for a special purpose. In the later case of *Ram Krishna* v. *Ali Newaj*, 42 C. W. N. 892 : (A. I. R. (25) 1938 Cal. 688), the fact that the appellate officer was the Munsif ex officio was held to be immaterial.

[25] All the cases cited at the bar were reviewed by Mitter J., in the case of *Nur Mahammad* v. *S. M. Solaiman*, 49 C. W. N. 10 at p. 16, the learned Judge lays down the following general rules :

"(1) The general rule is that when a matter reaches a civil Court, the procedure of civil Courts, would be attracted including the provisions regarding appeal from its judgments decrees and orders, but

(2) The general rule is applicable only where the matter comes to that Court as part of its ordinary jurisdiction and not by reason of a special jurisdiction having been conferred upon it."

[26] If this extended view is taken then this Court would have no power of revision under S. 115 of the Code in regard to orders passed either by the Rent Controller, the Chief Judge, the District Judge or the appointed Judge.

[27] Reliance was placed on behalf of the petitioner on the case of *H. D. Chatterjee* v. *L. B. Trivedi*, 26 C.W.N. 78 : (A.I.R. (9) 1922 Cal. 427), as also on the case of *Allen Bros & Co.* v. *Bando & Co.*, 26 C. W. N. 845 : (A.I.R. (10) 1923 Cal. 169). It is significant to note that in both these cases this Court interfered in revision with orders passed by the Rent Controller under the earlier Rent Act not under S. 115 of the Code but under S. 107, Government of India Act (since repealed). Section 107 empowered the High Court to exercise powers of superintendence over *all Courts* subject to its appellate jurisdiction. As Rankin J., pointed out in the latter case of *Allen Bros & Co.* v. *Bando & Co.*, 26 C. W. N. 845 : (A.I.R. (10) 1923 Cal. 162), in cases arising under the earlier Rent Act there was a thread of connecting link between the Rent Controller and the High Court through the President of the Tribunal because this Court had the power to hear an appeal from a decision of the President of the Tribunal in certain cases. These cases are therefore distinguishable.

[28] Even if we take the limited view as regards the power of this Court to interfere in revision with orders of the special tribunal, it cannot be disputed that this Court cannot interfere with an order passed by the appointed Judge under S. 115 of the Code. If we are to hold that the power of revision is not excluded in those cases where the appeal under S. 32 of the Act is heard by the Chief Justice or the District Judge the result would be anomalous. The question would then depend on the fortuitous circumstances as to whether the appeal is heard by the Chief Judge, or the District Judge or the appointed Judge. Such a construction should not be adopted.

[29] In my opinion, a reasonable view to take of the matter is to hold that S. 32 (6) and (7) of the Act by necessary intendment has taken away the powers of this Court to interfere in revision under S. 115 of the Code with an order passed by the Rent Controller or by the Chief Judge or the District Judge or the appointed Judge.

[30] The preliminary objection, therefore, succeeds.

[31] As the question involved was in a state of uncertainty the parties will bear their own costs in these revision cases.

[32] The Rules are accordingly discharged.

Das Gupta J.—I agree.

K.S. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 265 *[C. N. 94.]*

R. P. MOOKERJEE AND LAHIRI JJ.

Abdul Aziz Khan — Petitioner v. *Lalit Mohan Banerjee—Opposite Party.*

Civil Rule No. 683 of 1949, D/- 25-1-1950, from order of 1st Court of Sub-J., Howrah, D/- 26-1-1949.

Tenancy Laws—Bengal Tenancy Act (VIII [8] of 1885), S. 26F (4) (a)—Application by transferee co-sharer—Limitation.

Where a co-sharer who is himself a transferee applies under S. 26F (4) (a) for joining in the application under S. 26F (1) as a co-applicant the starting point of limitation is the date of the application by the original

applicant and not the date of service of notice under S. 26F (3) as the applicant being a transferee no statutory notice is necessary and the application filed beyond one month from the date of original application is barred : A. I. R. (23) 1936 Cal. 576 and 41 C. W. N. 674 *held impliedly overruled by* A. I. R. (35) 1948 Cal. 48 (S. B.) [Para 7]

Bijan Behari Das Gupta and Ashutosh Ganguli —for Petitioner.

Apurbadhan Mukherji and Sudhir Kumar Dutta — for Opposite Party.

Lahiri J.— The applicant for pre-emption under S. 26F (1), Bengal Tenancy Act, obtained this rule which is directed against an order of the First Subordinate Judge, Howrah, affirming the decision of the Munsif Uluberia, by which the application of the opposite party to join as a co-applicant under S. 26F (4) (a) was allowed.

[2] The facts of the case which are undisputed are as follows: On 12th November 1946, the opposite party purchased a share of an occupancy holding at an auction sale held in execution of a decree but no notice of the purchase was served on the co-sharers under S. 26C. The petitioner came to know about the sale on 28th March 1948 and on 16th April 1948 he made the application under S. 26F (1). Notice of this application was served on the opposite party under S. 26F (3) on 16th July 1948, and on 19th July 1948 the opposite party filed an application under S. 26F (4) (a) for joining in the application as a co-applicant alleging that he was a co-sharer of the holding from before the date of his auction purchase. This application was resisted by the petitioner on the ground that it was filed beyond the period of special limitation provided for by sub-s. (4) (a) of S. 26F, Bengal Tenancy Act and as such it was liable to be dismissed.

[3] The Court of first instance held that though the application is barred under S. 26F (4) (a) it was within time under sub-s. (1) because the opposite party was not served with a notice under S. 26C and was therefore entitled to apply within three years from the date of sale under the decision of the Special Bench in the case of *Asmat Ali* v. *Mujahar Ali*, 52 C. W. N. 64 : (A. I. R. (35) 1948 Cal. 48). The appellate Court holds that the opposite party being a transferee was not required to be served with a notice under S. 26C and therefore his application was not maintainable under sub-s. (1); but the appellate Court affirmed the decision of the first Court on a different ground by applying the principle of certain decisions given by this Court under S. 26F as it stood before the amendment of 1938, e. g. *Gadadhar* v. *Gopal Chandra*, 40 C. W. N. 680.(A. I. R. (23) 1936 Cal. 343); *Sachindra Nath* v. *Trailakya Nath*, 40 C. W. N. 1023: (A. I. R. (23) 1936 Cal 576) and *Satis Chandra* v. *Jogendra Krishna*, 41 C. W. N. 674 in which it has been held that when on account of the default of the Court the notice of an application by a co-sharer landlord has not been served on other co-sharer landlords within a month, the Court has inherent power to relieve the latter against the time limit for making an application under sub-s. 4 (a) and an application made by a co-sharer landlord under sub-s. 4 (a) will be allowed provided it is filed within a reasonable time of the service of the notice upon him, although it is filed after a month from the date of the application under sub-s. (1).

[4] Mr. Das Gupta appearing for the petitioner has argued that the decisions under the old S. 26F will not apply to S. 26F after the amendment of 1938, because under S. 188, Bengal Tenancy Act, as it stood before the amendment of 1938 it was obligatory upon a co-sharer landlord to implead the remaining co-sharers in an application under S. 26F; whereas after the amendment of 1938, a cosharer tenant in making an application under S. 26F is not required to implead the other cosharer tenants. Reliance has also been placed on the decision in *Gobardhan* v. *Gunadhar*, 44 C. W N. 802 : (A. I. R. (28) 1941 Cal. 78), where it has been held that after the amendment of 1938 cosharer tenants are not necessary parties to an application under S 26F. With regard to this argument it is to be noticed that a transferee cosharer is certainly a necessary party to an application under S. 26F and sub-s. (3) provides for a notice to be given to the transferee. The transferee cosharer tenant in a proceeding under S. 26F after the amendment of 1938 therefore stands in the same position as a cosharer landlord in a proceeding under S. 26F before the amendment. Consequently the principle of the decision in *Satis Chandra* v. *Jogendra Krishna*, 41 C.W N. 674 would apply to the case of a cosharer tenant who is a transferee and if no notice is served on him within a month by the fault of the Court he must be allowed to pre-empt if he applies within a reasonable time from the service of the notice.

[5] But the difficulty in applying this principle is that in the Special Bench decision of *Asmat Ali* v. *Mojahar Ali*, 52 C. W. N 64 : (A. I. R. (35) 1948 Cal. 48) it was laid down that the doctrine of reasonable time is confined to cases of equitable relief which might be refused by the Court if the applicant slept over his rights and the relief by way of pre emption cannot be said to be an equitable relief. The cases relied upon by the appellate Court in the present case seem to have been overruled by implication by the aforesaid Special Bench decision.

[6] We have then to consider the question whether the present case is governed by the

Special Bench decision in *Asmat Ali's Case*, (52 C. W. N. 64 : A. I. R. (35) 1948 Cal. 48). That decision will apply only to cases where no notice was served under S. 26C and where the special rule of limitation provided for by S. 26F (4) (a) is not applicable. The language of S. 26F (4) (a) is clear. It provides that the co-sharer tenant may apply either within the time provided for in sub-s. (1) i. e., within 4 months of the service of notice under S. 26C or within one month from the date of the application whichever is later. In the case of *Golam Ehiya* v. *Abdul Rob*, 48 C. W. N. 417, Blank J., sitting singly appears to have held that the controlling words in S. 26F (4) (a) are "whichever is later." In other words, if the first fixed point, (i. e., four months from the date of service of notice under S. 26C) does not exist in a particular case, the entire provision about the special limitation is inapplicable. From the facts of that case it appears that there the notice under S. 26C (4) was mandatory and Blank J., held that the right of a cosharer tenant to obtain pre-emption could not be defeated by non-service of the statutory notice. In the case before us, the opposite party being a transferee was not entitled to the statutory notice. Consequently we have to hold that the decision given by Blank J., in *Golam Ehiya* v. *Abdul Rob*, 48 C. W. N. 417 will not apply to the facts of the present case.

[7] On the plain language of sub-s. 4 (a) of S. 26F, the starting point in the present case is the date of the application by the original applicant, namely, 16th April 1948 and we are not entitled to hold that the starting point is the date of service of the notice under sub-s. (3) of S. 26F. The application filed by the opposite party on 19th July 1948 being beyond one month from the date of the application by the original applicant must accordingly be held to be barred by limitation.

[8] The rule is accordingly made absolute. The orders of the Courts below must be set aside and the application filed by opposite party must be dismissed. There will be no order as to costs of this Court.

R. P. Mookerjee J.—I agree.

D.H. *Rule made absolute.*

***A. I. R. (37) 1950 Calcutta 267** *[C. N. 95.]*

CHATTERJEE J.

Bajrang Lal Laduram — Petitioner v. *Agarwal Brothers — Respondent.*

Ordinary Original Suit Decided on 19-8-1949.

(a) Arbitration Act (1940), Ss. 32 and 33 — Suit challenging existence or validity of arbitration clause in contract—Maintainability.

A suit to challenge the existence or validity of an arbitration clause in a contract or for determining the effect of an arbitration agreement or award is not maintainable by reason of S. 33, which provides that such a challenge must be made by means of an application and not by means of a suit: A. I. R. (36) 1949 E. P. 165, *Dissent*, [Para 18]

Annotation : ('46-Man.) Arbitration Act S. 32 N 1.

(b) Arbitration Act (1940), S. 33 — Application to establish existence or validity of arbitration agreement—Maintainability.

A person who affirms the existence of an arbitration agreement cannot apply to the Court under S. 33 or any other section of the Arbitration Act for an adjudication by the Court that such an agreement exists and is binding on the parties: A. I. R. (36) 1949 Bom. 158, *Dissent.* [Paras 19, 20 and 21]

The word "effect" in S. 33 does not mean the existence of an arbitration agreement. It connotes the purport, drift or tenor of the agreemet. [Para 19]

(Remedy of petitioner in such a case pointed out). [Para 21]

Annotation : ('46 Man.) Arbitration Act, S. 33 N 1.

A. C. Ganguly — for Petitioner

N. Barwell — for Respondent.

Order.—This is an application by Bajranglal Serowgee who carries on business under the name and style of Bajranglal Laduram for having the effect of an arbitration agreement determined by this Court. The application is really for an adjudication that an arbitration agreement between the parties is still subsisting.

[2] By contract No. 1633 dated 28th July 1948 the petitioner alleges that he agreed to purchase from the respondent 80,000 heavy cees bags in 200 bales at the rate of Rs. 140/1/- per 100 bags, delivery August 1948. The terms of the agreement appear from a copy of the Bought Note included in the annexure to the petition.

[3] Clause 13 of the said contract contained an agreement for arbitration in very wide terms.

[4] The petitioner's case is that on 16th August 1948 he sent shipping instructions to the respondent to bring 50 bales, that is, 20,000 heavy cees bags, and on 18th August 100 bales, that is, 40,000 heavy cees bags alongside the vessel "Kutsang." The respondent failed to bring the aforesaid goods alongside the ship and a letter was sent to the respondent complaining about this failure.

[5] It is alleged the petitioner by letter dated 31st August 1948, again requested the respondent to tender the pucca delivery order in respect of the balance of 50 bales of goods, that is, 20,000 heavy cees bags and offered to pay for and take delivery of the said pucca, delivery order. The respondent neither sent the 150 bales in terms of the shipping instructions nor did they give any delivery order. The petitioner's attorneys demanded payment of the different bills amounting to Rs. 15,992/6/4 but the respondent failed to pay. Thereupon on 13th December 1948 the petitioner filed a statement of case and referred the dispute to the arbitration of the Bengal Chamber of

Commerce and claimed the said sum from the respondent.

[6] The reply of the respondent was a complete denial of the transaction. Their case is, they never entered into the contract in question and they repudiated liability in toto. Some statements and counter statements were filed before the Tribunal of Arbitration of the Bengal Chamber of Commerce who, it is alleged, heard oral evidence.

[7] On or about 8th April 1948, the petitioner was informed by a letter from the Registrar, Bengal Chamber of Commerce that the Arbitrators were not prepared to proceed with the arbitration until the question of the existence of the arbitration agreement was decided by this Court.

[8] On receipt of this letter from the Registrar of the Bengal Chamber of Commerce dated 8th April 1948 the present application was presented.

[9] The real question I have got to determine is the maintainability of this application.

[10] The question argued before me is this : can a person who affirms the existence of an arbitration agreement apply to the Court under S. 33 or any other section of the Arbitration Act for an adjudication by the Court that such an agreement exists and is binding on the parties?

[11] In *Manik Lal* v. *Shiva Jute Bailing Ltd.*, 52 C. W. N. 389, Das J. held that the "existence" of an arbitration agreement which by S. 32, Arbitration Act, 1940, cannot be challenged by a suit is not the factual but the legal existence of an agreement on grounds like mistake, fraud, illegality, etc , under Ss. 19 to 30, Contract Act. His Lordship further held that S. 33 applies only when the applicant admits the factual existence of an agreement but challenges the "legal" existence thereof on such grounds as misrepresentation, fraud, etc. In *Baijnath* v. *Chhotulal*, 52 C. W. N. 397, Clough J. followed the judgment of Das J.

[12] Sinha J. has differed from the judgments of both these learned Judges in *Chaturbhuj* v. *Bhicamchand Chororia & Sons*, 53 C. W. N. 410. According to the learned Judge the intention of the framers of the Arbitration Act was that the right and liabilities of the parties in respect of an arbitration agreement or an award such as are mentioned in Ss. 31 and 32 of the Act should be litigated only in the Court having jurisdiction under S. 31 and on an application made under S. 33 and not by way of suit. The intention of the legislature was to take away the remedy by way of suit which the parties to an arbitration agreement or an award had before the passing of the Act and to relegate them to the remedies as provided in the Act.

[13] The opening words, "any party to the arbitration agreement" in S. 33 of the Act should be construed according to Sinha J. to mean a party who is alleged to be a party to an arbitration agreement but who challenges the existence thereof and that there is nothing in the section to restrict the meaning of the word, 'existence' to 'legal existence' and it should be read in its ordinary and natural meaning, namely, existence either in fact or in law.

[14] Mr. Barwell, learned counsel appearing on behalf of the respondent, relied on the judgment of Das and Clough JJ. while Mr. Ganguli for the petitioner relied on the view of Sinha J. In this case it is not necessary for me to come to any decision regarding this conflict of judicial authorities which should really be resolved by the Court of appeal. Even if Sinha J. is right in the view that he has taken, the party who challenges the existence of an arbitration agreement is entitled to apply under S. 33, Arbitration Act. That section provides a remedy to the party who challenges the existence of an agreement to refer to arbitration and he can come to Court and obtain a decision, even when the other side does not wish to enforce it. *Bhagwandas* v. *Atma Singh*, 47 Bom. L. R. 716 : A. I. R. (32) 1945 Bom. 494.

[15] Chapter V, Arbitration Act, contains the general provisions relating to all arbitrations i. e., arbitration without intervention of a Court, or arbitration in suit or arbitration with the intervention of a Court when there is no suit pending.

[16] Section 31 deals with jurisdiction. Sub-section (1) deals with the forum for filing awards. Sub-section (2) provides that all questions relating to the validity, effect or existence of an award or an arbitration agreement shall be decided by the Court in which an award under the agreement has been or may be filed and by no other Court. Sub-section (3) states that all applications relating to the conduct of the arbitration proceedings shall be made to such Court. Sub-section (4) makes it clear that that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of a reference and the arbitration proceedings shall be made in that Court and in no other Court.

[17] Section 32 and S. 33 are the new sections introduced by the Arbitration Act of 1940. They were introduced in accordance with the suggestions of the Civil Justice Committee and were meant to negative the decisions in *E. D. Sasson & Co.* v. *Ramdutt Ramkissen Das*, 50 Cal. 1 : (A. I. R. (9) 1922 P. C. 374) and *Matulal* v. *Ram Kissendas*, 47 Cal. 806 : (A. I. R. (7) 1920 Cal. 820), where it had been held that a suit must be

filed if a party wants to challenge the existence of a submission. Sections 32 and 33 are in the following terms :

"32. Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.

33. Any party to any arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

[18] The first part of S. 32 prevents a substantive right to challenge the existence of an arbitration agreement. The second part of that section prevents the setting aside, amending or modifying or in any way affecting an arbitration agreement, otherwise than as provided by the Act. It has been held by the Calcutta High Court that suit to challenge the existence or validity of an arbitration clause in a contract or for determining the effect of an arbitration agreement or award is not maintainable by reason of S. 33, Arbitration Act of 1940 which provides that such a challenge must be made by means of an application and not by means of a suit. *Deokinandan* v. *Basantlal*, I. L. R. (1941) 2 Cal. 123: A. I. R. (28) 1941 Cal. 527. A contrary view has been taken by a Division Bench of the East Punjab High Court in *Banwari Lal* v. *The Board of Trustees, Hindu College, Delhi*, A.I.R. (36) 1949 E. P. 165. With respect to the learned Judges of the East Punjab in my opinion the correct view was taken by Lort-Williams J., in the Calcutta case cited above. The Madras High Court has also taken the same view as the Calcutta High Court adopted : *Rashid Jamshed Sons and Co.* v. *Moolchand Jothajee*, (1945) 2 M. L. J. 98 : (A. I. R. (32) 1945 Mad. 371).

[19] Section 33 is a corollary to S. 32. Under S. 33, an arbitration agreement or an award has to be decided by means of an application. Section 33 provides a remedy not to the person who affirms the existence or validity of an arbitration agreement but to the person who challenged the same. Obviously, the legislature thought that the person who sets up a submission can go to arbitration and have the disputes decided by the arbitrators. Mr. Ganguli, learned counsel for the applicant, wants me to split up S. 33 and he contends that an application can be made to the Court (a) by any party to an arbitration agreement desiring to challenge the existence or validity of an arbitration agreement or (b) by any party to an arbitration agreement desiring to have the effect of either an arbitration agreement or an award determined. Counsel concedes that he cannot come under (a) because he is not challenging the existence or validity of the arbitration agreement as he is really asserting the existence of such agreement and is affirming the validity thereof. But he contends that he comes under (b) and he desires to have the effect of the arbitration agreement determined by this Court. I cannot accede to this contention. The words "existence, effect or validity of an arbitration agreement or award" are used in S. 32. Under S. 33 if any one challenges the arbitration agreement he can come to Court. If there is any question raised as to whether there is any particular dispute within the ambit of the arbitration agreement, or whether it has ceased to be operative on account of frustration or any supervening illegality or impossibility then that can also be determined under this section by means of an application. In my opinion, the word "effect" does not mean the existence of an arbitration agreement. It connotes in this context the purport, drift, or tenor of the agreement. What Mr. Ganguli wants me to decide is that there is in fact an existing, valid and binding arbitration agreement. Really there is no question of deciding the effect of that agreement.

[20] My attention has been drawn to a case decided by the Division Bench of the Bombay High Court in *M. Gulamali Abdulhussein and Co.* v. *Vishwambharlal Ruiya*, 51 Bom. L. R. 79: (A.I.R. (36) 1949 Bom. 158). The learned Judges Chagla C. J. and Tendolkar J., held that an application to establish the existence or validity of an arbitration agreement can be entertained by a Court under the Arbitration Act, 1940, though not under S. 33 thereof. According to these learned Judges when the Legislature enacted S. 32 and barred all suits with regard to the existence, effect or validity of an arbitration agreement and the object of the Legislature was that all questions with regard to these matters should be dealt with under the Arbitration Act, and not by substantive suits, it is open to a party to make any application with regard to which a suit is barred under S. 32. Section 33 according to Chagla C. J., is merely one instance of such an application. The Legislature cannot conceivably deal with all possible applications that may arise with regard to which suits are barred under S. 32.

[21] With great respect, I cannot agree with the view taken by Chagla C. J., in the above case. When the Legislature enacted S. 32 and barred all suits with regard to the existence, validity or effect of an arbitration agreement or award, it realised that proper procedure or

remedies should be prescribed or rights should be conferred on litigants for the determination of such questions and that is why S. 33 was enacted. Section 33 to my mind is not to be read as illustrative. It is difficult to follow how a general right to apply may be held to exist when the statute makes specific provisions providing for the right of a litigant to come to Court with regard to a specific class of cases under specific conditions. The fact that the right of suit is taken away by S. 32 does not confer a general right on the litigants to apply to Court. To my mind, it is not correct to urge that S. 32 has impliedly created a general right to apply to Court under that section. If that was the correct view, then S. 33 would be unnecessary. When the Legislature had its attention directed to the necessity of making provisions in order to provide for the situation created by the enactment of a provision like S. 32, then it must be assumed that S. 33 is exhaustive and not illustrative. Therefore, in my opinion, a person who denies the existence of an arbitration agreement cannot apply under the Arbitration Act. I cannot understand how can there be a general right to apply under an Act although there is no right to apply under any specific section of the Act.

[21] Mr. Ganguli contends that if this is the correct view, then the arbitration agreement would be wholly infructuous and he is left absolutely without any relief or remedy whatsoever and when a person has a right he must have a remedy. I do not agree that a person in the position of the petitioner is not without any remedy whatsoever. The arbitrators should proceed with the reference. The respondents can appear before the Tribunal of Arbitration under protest and without prejudice to their contention that there is no submission or arbitration agreement. That question cannot be decided by the arbitrators. If the arbitrators make an award on the merits in favour of the petitioner, then the respondent can apply under S. 33 in order to challenge the validity of the award. In any event, the Court will be in a position to determine whether there was a valid and binding arbitration agreement justifying the reference to the Tribunal of Arbitration before a decree is passed on the award. I am expressing no opinion on the existence or validity of the arbitration agreement at this stage.

[22] The application is dismissed. Costs will abide the result of the arbitration.

[23] The attention of the Tribunal of Arbitration of the Bengal Chamber of Commerce should be drawn to this judgment and they should be asked to proceed with the arbitration as I have indicated hereinbefore.

V.B.B. *Application dismissed.*

A. I. R. (37) 1950 Calcutta 270 *[C. N. 96.]*

HARRIES C. J. AND CHATTERJEE J.

Calcutta Agency Ltd. — Applicant v. *Commissioner of Income-tax, West Bengal—Respondent.*

Income-tax Reference No. 8 of 1949, D/- 9-9-1949.

(a) Income-tax Act (1922), S. 7, Proviso — Applicability.

Proviso to S. 7 was introduced to cover cases where a gross sum is fixed as salary or commission, which includes a necessary outlay on the part of the assessee in the carrying out of his duties. The deduction under that proviso can be made when the assessee is required by the terms of his employment to spend the amount in question and such expenditure must be incurred not only exclusively but necessarily for the performance of its duties. If there is no stipulation in the contract of service or employment to spend a particular amount, then the deduction is not permissible under the proviso. Payment by the assessee managing agents of a company of certain debts under subsequent agreement with the company by deduction from commission payable to them is not one to which the proviso applies. [Para 12]

Annotation: ('46-Man.) Income-tax Act S 7 N 1.

(b) Income-tax Act (1922), S. 10 (2) (xv)—Expenditure to remove difficulty in carrying on business.

A, a bank, obtained a decree against *B*, a Cotton Mill, and *C* a Company, acting as managing agents for the Mill *B*, for certain malfeasance committed by the director of company *C*. An agreement was entered into between *B* and *C* by which *B* was entitled to deduct certain portion of the commission payable to *C* for payment of the debts to *A* under the decree. The object of the agreement was to avoid the publicity of the action by *A* against *C* and consequent exposure and scandal and to maintain the managing agency. The payment did not bring into existence any new assets or any advantage for the enduring benefit of *C's* trade:

Held that as the object of the agreement was to remove the difficulty in carrying on the business of company *C*, the payment should be treated as expenditure from revenue and not capital and should be deducted in computation of profits and gains: (1927) 1 K. B. 719, *Foll.*; *Case law discussed.* [Para 26]

Annotation: ('46-Man.) Income-tax Act, S. 10 N. 13.

S. Mitra and Dilip Mitter—for Applicant.

Dr. S. K. Gupta and J. C. Pal—for Respondent.

Chatterjee J. — The following question has been referred by the Appellate Tribunal, Calcutta Bench, to the High Court for its opinion:

"Whether on the facts and in the circumstances of this case, the sum of Rs. 22,500 was taxable in the hands of the applicant company."

[2] The applicant is a private limited company incorporated in August 1932. From the Memorandum of Association of the company, it appears that it was brought into existence to float various companies including cotton mills.

[3] In November 1932 a cotton mill was floated under the name of Basanti Cotton Mills Ltd. By Art. 132 of the Articles of Association, the applicant company, the Calcutta Agency Ltd., was appointed the Managing Agent of the said Mill.

[4] The Managing Agents were to receive a monthly allowance of Rs. 500 so long as the sub-

scribed capital did not exceed Rs. 5,00,000 and a commission of 3 per cent on all gross sales of goods manufactured. In case the subscribed capital exceeded Rs. 5,00,000, then for every Rs. 2,00,000 of the increase the Managing Agents were to get an additional monthly allowance of Rs. 150.

[5] It appears that Nath Bank Ltd. instituted four suits against the Basanti Cotton Mills Ltd. In two out of the said four suits the Calcutta Agency Ltd. was impleaded as the co-defendant. The claim of the Nath Bank Ltd. was on certain hundies drawn by one Mr. S. C. Mitter purporting to act on behalf of the Calcutta Agency Ltd. These suits were decreed for Rs. 31, 593/9/3 and Rs. 21, 054/2/9. These decrees were passed by consent of the parties.

[6] In the other two suits in which the applicant company was not a party decrees were passed for Rs. 1,15,735/12/5 and for rupees 21,593/8/3.

[7] An agreement was entered into between the applicant company and the Basanti Cotton Mills Ltd. Inas much as good deal of argument has been advanced on the language of this agreement, the same is set out below :

"Memorandum of Agreement made between the Calcutta Agency Limited of the one part and Basanti Cotton Mills Limited of the other part Whereas the Nath Bank Limited demanded from the Mills the payment of the sum of Rs. 1,80,000 and interest thereon And Whereas the said Mills repudiated their liability in respect thereof as it appeared from the books of the said Mills that the said mills did not have the use of the said sum of Rs. 1,80,000 or any part thereof And Whereas the said Nath Bank Limited thereupon instituted four suits in High Court being suit Nos. 1683, 1720, 1735 and 1757 of 1939 for the said aggregate sum of Rs. 1,80,000 and the interest thereon And Whereas the said Mills have been advised to settle the said suits amicably And Whereas the Calcutta Agency Limited by its Directors S. N. Mitter or S. C. Mitter, having been and being still the Managing Agents of the said Mills have undertaken to reimburse the said Mills in respect of the decrees to be made in the said four suits in the manner hereinafter appearing NOW THESE PRESENTS WITNESS AND IT IS HEREBY AGREED AND DECLARED.

(i) That out of the commission of 3% payable by the said mills to the said Agency under Regulation 131 of the Articles of Association of the Company, the Company shall have a paramount lien on and deduct and set off a moiety thereof against any payment which the said Mills may make in respect of the said decrees or any of them and/or costs of the said suits.

(ii) The said moiety shall be one half of the commission so payable less such sum as the Directors of the Mills may from time to time allow to be deducted."

[8] By virtue of this agreement, the applicant company was in effect given Rs. 22,500 less than what was due to it by way of its remuneration.

[9] Before the Income-tax Officer it was urged on behalf of the applicant company that the sum of Rs. 22,500 should not be taxed in its hands as it was diverted by virtue of the above agreement and was paid to the Nath Bank by the Basanti Cotton Mills Ltd. and this sum, therefore, did not reach the applicant as remuneration. Both the Income-tax Officer and the Appellate Assistant Commissioner repelled this contention of the applicant.

[10] Before the Tribunal Mr. Mitra, learned counsel on behalf of the applicant company, contended that the remuneration received by the applicant was in the nature of salary or commission within S. 7, Income-tax Act. In this Court, Mr. Mitra put forward the same contention and relied on the first proviso to S. 7. Section 7 states that tax shall be payable by an assessee under the head "salaries" in respect of any salary or wages, any annuity, pension or gratuity, and any fees, commissions, perquisites or profits in lieu of, or in addition to, any salary or wages, which are due to him from an employer. The first proviso to S. 7 runs as follows:

"Provided that the tax shall not be payable in respect of any sum which the assessee by the conditions of his employment is required to spend out of his remuneration wholly, necessarily and exclusively in the performance of his duties."

[11] Mr. Mitra urges that payment out of the commission of the sum aforesaid was made by the applicant company "wholly, necessarily and exclusively" in the performance of its duties. Mr. Mitra's argument was that unless the company agreed to pay the amount aforesaid, its managing agency would have been terminated by the Mills and therefore such payment came within the said proviso to S. 7.

[12] The Tribunal held that the proviso to S. 7 was not intended to cover payment of this nature. It is difficult to bring this payment within the first proviso to S. 7. The expenditure must be made wholly, necessarily and exclusively in the performance of its duties. In my opinion, the payment made by the Managing Agents under the aforesaid agreement is not a deduction permissible under the said proviso to S. 7. That proviso was introduced to cover cases where a gross sum is fixed as salary or commission, which includes a necessary outlay on the part of the assessee in the carrying out of his duties. The deduction under that proviso can be made when the assessee is required by the terms of his employment to spend the amount in question and such expenditure must be incurred not only exclusively but necessarily for the performance of its duties. If there is no stipulation in the contract of service or employment to spend a particular amount, then the deduction is not permissible under the first proviso to S. 7. For example, when an engineer is appointed to supervise certain works outside the city and is required to maintain a motor car for the purpose

of inspecting the work site in the course of his duties, then the proviso would be attracted, as the expenditure would be then incurred necessarily and wholly in the performance of his duties.

[13] The next argument put forward by Mr. Mitra was that the expenditure came within S. 10 (2) (xv), Income-tax Act. Section 10 deals with the tax payable by an assessee in respect of profits and gains of business, profession or vocation. Clause (2) specifies permissible allowances or deductions. Sub-clause (xv) mentions :

"Any expenditure (out being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation."

[14] Mr. Mitra's argument is that if the applicant company had not agreed to pay the amount mentioned in the aforesaid agreement, then the Basanti Cotton Mills Ltd. would have sued the company for the realisation of the amount due on the Hundies and it seems that there would have no defence to the action. This would have subjected the applicant company to the danger of public exposure and in order to save itself from the scandal and in order to maintain the Managing Agency the applicant company agreed to deduct certain amounts from the Managing Agency commission and, therefore, such expenditure came within S. 10 (2) (xv) of the Act.

[15] Reference has been made to the case of *Mitchell* v. *B. W. Noble Ltd.*, (1927) 1 K.B. 719 : (96 L. J. K. B. 484). A company, which carried on an insurance business wanted in the interest of its business to get rid of one of its directors. The company entered into an agreement with him under which in consideration of a payment to him by the company of £19,200, the director undertook to retire from the company, to sell and transfer the 300 £1 shares held by him in the company to the remaining directors at par, and to abandon all claims that he might have against the company, or its directors. The other directors were parties to this agreement. £19,200 was payable in five annual instalments. The company paid the first instalment of £5200 and sought to deduct it for income-tax purposes from the profits in the year of payment as being money wholly and exclusively laid out for the purposes of the business. The commissioners allowed the claim. Rowlatt J., held that inasmuch as the directors were satisfied that in order to save the company from scandal it was necessary to get rid of the director and to pay him the sum in question, that sum must be regarded as money "wholly and exclusively laid out and expended for the purposes of the trade" of the company within the meaning of R. 3 of the Rules applicable to Cases I and II of Sch. D.

[16] The Court of appeal affirmed Rowlatt J., and held that the payment was not made to secure an actual asset so as effectually to increase the captial of the company, but was made in order to enable the directors to carry on the business of the company as they had done in the past, unfettered by the presence of the retiring director which might have had a bad effect on the credit of the company and, therefore, it must be treated as an income and not as a capital expenditure, and was deductible as such for income-tax purposes.

[17] Rowlatt J., held that the payment made to the director to get rid of him was a business expense and that it was not a capital expense. The learned Judge observed :

"But is it a capital expense on any ground ? As Lord Cave points out in *British Insulated and Helsby Cables Ltd.* v *Athorton*, 1926 A. C. 205 : (95 L. J. K. B. 336), it is a capital expense if you buy an asset or purchase an enduring advantage. This was not that case or anything like it."

[18] Dr. S. K. Gupta strongly urged that the payment which was made in this case was really not a business expense but it was a capital expense and, therefore, not deductible. He drew our attention to the judgment of Viscount Cave L. C. in *British Insulated and Helsby Cables Ltd.* v. *Athorton*, 1926 A.C. 205 : (95 L.J.K.B. 336). In that case, the House of Lords held that a lump sum set aside out of profits for contribution to a pension fund was in the nature of capital expenditure and was, therefore, not an admissible deduction. In his speech Viscount Cave L. C. said :

"But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

[19] Mr. Gupta argued that this payment in satisfaction of the decree was made with a view to bring into existence an advantage for the enduring benefit of the trade of the applicant company and thus it came within the dictum of Viscount Cave.

[20] It is to be observed, however, that the Lord Chancellor in *Atherton's case*, (1926 A. C. 205 : 95 L. J. K. B. 336), further pointed out that

"a sum of money expended not of necessity and with a view to a direct and immediate benefit to the trade but voluntarily and on grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade."

[21] *Atherton's case*: (1926 A. C. 205 : 95 L. J. K. B. 336) was discussed at some length before

the Court of appeal in *Mitchell case*: (1907-1 K. B. 719 : 96 L. J. K. B. 484). Lord Hanworth M. R. held that when payment is made in the course of business, with reference to a particular difficulty and is made not in order to secure an actual asset to the company, but to enable the company to continue to carry on, as it had done in the past, the same type and quality of business, it is not a capital expenditure. Sargant L.J. took the same view and pointed out that the payment was being made to the director in order to get rid of him and to preserve the status and dividend earning power of the company and that was within the ordinary purposes of the trade, profession or vocation of the company. The learned Lord Justice observed :

"It is quite impossible to put against the capital account of the company, as I conceive it a payment of this nature. It seems to me that the payment, though large and though exceptional, was not of such nature; it certainly was not capital withdrawn from the company, or any sum employed or intended to be employed as capital in the business. It was a payment which as a matter of fact was made out of the profits of the company, apparently, as to the £5200, in the year in which it was paid, and, as to the future payments, they will have to be made out of the profits of the year in which those payments will have to be made. To my mind, it is essentially different from those various payments in the cases which have been referred to which were of the nature of adding to or improving the equipment, or otherwise made for the permanent benefit of the company."

Lawrence L. J. was of the same view and said:

"I agree that the sum in question was wholly and exclusively expended by the company for the purpose of its business, in the sense that the sole object with which the company made the payment was to enable the company to continue to carry on and earn profits in its business."

[22] The *ratio decidendi* of *Mitchell's case*, (1927-1 K. B. 719 : (96 L. J. K. B. 484) is this. If an expenditure is made not to secure an actual asset but to remove a difficulty in carrying on the business and if it is made to continue the business on the same lines as before, then the expenditure is from revenue and not from capital. *Mitchell's case*, (1927-1 K. B. 719 : 96 L. J. K. B. 484) was followed in *Anglo Persian Oil Co., Ltd.* v. *Dale*, 1932-1 K. B. 124 : (100 L. J. K. B. 501). In *Dale's case*, (1932-1 K. B. 124: 100 L. J. K B. 504), a payment was made to determine an onerous agency agreement and it was held to be a revenue payment and was deductible by the company in ascertaining its net profits. The observation of the Lord Chancellor in *Atherton's case*, (1926 A. C. 205 : 95 L. J. K. B. 336) was explained by the Court of Appeal. It was pointed out that the payment in question in *Dale's case*, (1932 1 K. B. 124 : 100 L. J. K. B. 504) did not bring any assets into existence and it could not properly be said to have brought into existence an advantage for the enduring benefit of the company's trade within the meaning of that expression as used by Viscount Cave.

[23] Mr. Mitra cited the case of *Bijoysing Dhudhuria* v. *Commissioner of Income tax*, 60 I. A. 196 : (A. I. R. (20) 1933 P. C. 145). In that case by a decree a maintenance allowance in favour of a step-mother was made a charge upon the ancestral estate of a Raja. It was held that the decree diverted a portion of his income from the assessee and had directed it to his step-mother. To that extent what he received for her was not his income. The Privy Council observed:

"It is not a case of the application by the appellant of part of his income in a particular way; it is rather the allocation of a sum out of his revenue before it becomes income in his hands."

Really in charging the income of an individual the Income-tax Act intends to charge what reaches the individual as income. It was pointed out by Dr. Gupta that in *Jagadish Chandra* v. *Dhanpati Singh*, 1945 13 I. T. R. 64 : (A. I. R. (31) 1944 Pat. 280), a Division Bench of Patna High Court has held that where a testator has bequeathed his properties to another creating a charge for an annuity for maintenance the principle laid down in *Dhudhuria's case* (60 I.A. 196 : A. I. R. (20) 1933 P. C. 145) will apply and the annuity will not become income of the legatee, but where the legatee himself creates a charge for a debt payable to him that principle will not apply. In *Dhudhuria's case*, (60 I. A. 196 : A. I. R. (20) 1933 P. C. 145), however, the decree had been passed by consent of parties and there was no testamentary disposition by the Raja's father creating any charge.

[24] Dr. Gupta drew our attention to *Commissioner of Income-tax* v. *Manager, Katras Encumbered Estate*, 13 Pat. 197 : (A. I. R (21) 1934 Pat. 116 S B.). In that case the proprietor of a coal mine owed monies to a company. To secure the repayment of the monies due the proprietor mortgaged the mine to the company. He also executed a lease of the mine to the same company at a royalty. It was provided that a minimum sum of Rs. 8,000 a year was to be paid to the proprietor himself and the balance of royalty was to be applied by the mortgagee to the liquidation of the debt under the mortgage. It was held that the whole of the royalty was to be considered the income of the assessee and was asseseable to income tax. Courtney Terrell C. J distinguished the *Dhudhuria case*, (60 I. A. 196 : A. I. R. (20) 1933 P. C. 145) and pointed out that the position was entirely different when out of the profits or income a portion was to be paid to liquidate a debt.

[25] The learned Judges in the *Katras case*, (13 Pat. 197 : A. I. R. (21) 1934 Pat. 116 S.B.), however, had not to deal with facts which are present in this case. The assessee in that case was being taxed as an individual and there was no question of taxing any business and there was consequently no question of any allowance or deduction in respect of payment being made in order to enable a business to continue its same course as before.

[26] Of all the cases cited *Mitchell's case*, (1927-1 K. B. 719. 96 L. J. K. B. 484) most closely resembles the present case. The real question is what was the object of the agreement which provided for payment by the Mills to the Nath Bank. In *Mitchell's case*, (1927-1 K. B. 719 : 96 L. J. K. B. 484), the payment was made to a Director whose presence was detrimental to the company's business and the money was paid in order to avoid the publicity of an action for wrongful dismissal and it was held to be a proper deduction in arriving at the profits. In this case it is clear that the agreement was entered into with a view to avoid the publicity of an action against the managing agent and consequent exposure and scandal and in order to maintain the managing agency so that the company could carry on its business as before. The payment in question did not bring in any new assets into existence nor in my opinion can it properly be said that it brought into existence an advantage for the enduring benefit of the company's trade. The appellate tribunal observed that the decree was evidently passed against the appellant company for certain misfeasance committed by its directors and the appellant company agreed to pay it off from its remuneration. The method of book-keeping is, however, not conclusive. The object of the agreement was to enable the company to remove a difficulty in carrying on the business of the company and to earn profits in its businsss. Therefore, this case is covered by the judgment of the Court of Appeal in *Mitchell's case*, (1927-1 K. B. 719 : 96 L. J. K. B. 484) and the payment should be treated as expenditure from revenue and not from capital and is a proper deduction in the computation of profits or gains.

[27] The payment here cannot be attributed to capital inasmuch as it was not made with a view to bringing a tangible asset or advantage into existence. It is also to be noted that in order to make it a capital payment the asset or advantage is to be for the "enduring" benefit of the trade. As Rowlatt J. said by "enduring" is meant "enduring the way that fixed capital endures." Romer L. J. approved of this view in *Dale's case*, (1932-1 K. B. 124 : 100 L. J. K. B. 504). Therefore, the payment or expenditure in question was made or incurred in the conduct of the business of the company and it is not a capital expense.

[28] I answer the question framed in the statement of case in the negative and I hold that in the facts of this case the sum of Rs. 22,500 is not taxable in the hands of the applicant company. The applicant is entitled to the costs of the reference certified for two counsel.

Harries C. J.—I agree.

D.R.R. *Reference answered.*

[C. N. 97.]

**A. I. R. (37) 1950 Calcutta 274

SPECIAL BENCH

SEN, K. C. CHUNDER AND LAHIRI JJ.

Sunil Kumar Bose and others—*Petitioners* v. *The Chief Secretary to the Government of West Bengal and another*—*Opposite Party.*

Criminal Misc. C. Nos. 51, 61, 81, 96 of 1950; 178 & 179 of 1949 and 15, 2448, 1 to 5 of 1950, etc. D/- 27th February 1950.

✠(a) Constitution of India, Art. 13—Powers of Parliament and State Legislatures — Comparison with powers of Parliament in England—Question whether statute is valid or void—Powers of Court.

In England Parliament is supreme and it can pass any law however unreasonable it may seem, and to whatever extent it may curtail the liberty of the subject. There is no power in the Courts in that country to declare the law to be void or invalid. [Para 3]

In the republic of India there is a written Constitution in which certain fundamental rights are guaranteed to its citizens. These are mentioned in Part III of the Constitution. If Parliament or any State Legislature makes any law taking away these fundamental rights except in the manner and to the extent provided in Part III, then that law is void to the extent of its inconsistency with the provisions of Part III (vide Art. 13 (1)). Thus Parliament and the State Legislatures are not supreme to the extent that Parliament in England is supreme. The Legislatures in this country have only those powers of legislation which are bestowed upon them by the Constitution Act. If they pass an Act in excess of those powers, then that Act becomes void to that extent. [Para 3]

Under the Constitution the power to decide whether a piece of legislation is void or not, is given to the Courts, i.e,, the judiciary and nobody else. The power of the judiciary is supreme in this respect. [Para 4]

(b) Constitution of India, Art. 19 (1) (d)—Words "throughout the territory of India"—Meaning.

The words "throughout the territory of India" in Art. 19 (1) (d) were used because the Constitution is not guaranteeing to the citizen any right of free movement outside its territories; in fact it could not give any citizen such right because that would result in infringing the sovereignty of a foreign State. This phrase was used also to indicate that the Constitution was not giving the citizen any absolute right to move from the republic of India into some foreign State; in other words, it was saving passport restrictions. Further, those words were used to indicate that the Act was not giving a citizen any absolute right to enter the territory of India from outside. These are the reasons why the words "throughout the territory of India" have been used. [Para 6]

✠✠ (c) Public Safety — Bengal Criminal Law Amendment Act (VI [6] of 1930 as amended by Criminal Law Amendment (Amending) Ordinance, (1949), Preamble and S. 2 (1) — Act, if valid after passing of Constitution of India — Constitution of India, Arts. 13 (1), 19 (1) (d), 19 (5) and 22 (4).

The Bengal Criminal Law Amendment Act, 1930, even if it is an Act providing for preventive detention, is void under Art. 13 (1) of the Constitution of India because it is inconsistent with the provisions of Part III of the Constitution. [Para 17]

The detention which may be imposed upon a citizen by the Bengal Act amounts to restriction on the right of free movement guaranteed as one of the fundamental rights by Art. 19 (1) (d) of the Constitution of India, and the restriction is neither reasonable nor in the interests of the general public considering the fact that the Act is not an emergency measure. (For summary of the grounds why restrictions are not reasonable and in the interests of the public, see Para 14.)

[Paras 6, 14]

The Act is also in direct conflict with Art. 22 (4) of the Constitution of India. [Para 13]

The illegalities are fundamental and they taint the whole of the Act. The doctrine of severability cannot be applied. The entire Act is, therefore, void.

[Paras 15, 16]

(d) Public Safety—Bengal Criminal Law Amendment Act (VI [6] of 1930), S. 2 (1) (i) — Detention without forming opinion whether detenu was at any time member or is member of certain kind of association—Detention is illegal under Act (assuming that the Act is not void). [Para 18]

(e) Public Safety—Bengal Criminal Law Amendment Act (VI [6] of 1930), Preamble and S. 2—Act if provides for preventive detention — Detenu not produced before Magistrate within 24 hours as required under Art. 22 (2), Constitution of India—Effect—Constitution of India, Art. 22 (2).

The Bengal Criminal Law Amendment Act does not deal with preventive detention. The law regarding preventive detention is directed towards preventing a person from doing something which the Legislature thinks should not be done. The Act nowhere says that a person may be detained or otherwise dealt with in order to prevent him from doing anything. [Para 19]

There can be no doubt that if a person is detained, the detenu is deprived of his personal liberty. In such a case, if the detenu is not produced before any Magistrate within 24 hours of his arrest as required under Art. 22 (2) of the Constitution, the detenu is deprived of his personal liberty without complying with one of the most important items of procedure laid down in the Constitution regarding such deprivation. In these circumstances the order of detention cannot be upheld.

[Para 20]

(f) Interpretation of Statutes — Reference to another statute.

It is dangerous to interpret one law by reference to another unless the terms are identical or so similar as to justify a common deduction. [Para 19]

Annotation : ('46-Man.) Interpretation of Statutes, N. 2.

✠(g) Public Safety—West Bengal Security Ordinance (1949), S. 22 — Validity of Ordinance — Constitution of India, Arts. 13 and 22 (4).

The Ordinance is clearly an Ordinance providing for preventive detention, but the Ordinance is void because it is inconsistent with the provisions of the Constitution Act. [Paras 21, 22]

The West Bengal Security Ordinance, 1949, does not provide for any Advisory Board of the nature contemplated by Art. 22 (4), Constitution Act. [Para 21]

Further, the Ordinance does not impose restrictions which are reasonable and are in the interests of the general public. [Para 22]

✠(h) Public Safety — Preventive Detention (Extension of Duration) Order (1950) — Applicability to Bengal Criminal Law Amendment Act (1930) and West Bengal Security Ordinance (1949)—Constitution of India, Arts. 22 (7) and 373—Public Safety—Bengal Criminal Law Amendment Act (VI [6] of 1930) — Public Safety — West Bengal Security Ordinance (1949).

The Preventive Detention (Extension of Duration) Order, 1950, made by the President of the Indian Republic, can have no effect so far as the Bengal Criminal Law Amendment Act, 1930 and the West Bengal Security Ordinance, 1949 are concerned.

[Para 23]

The Act and the Ordinance became void as soon as the Constitution came into force (i. e., at midnight on 25th January 1950) by reason of the provisions of Art. 13 (1) of the Constitution. They cannot be revived by the subsequent Order of the President passed in the exercise of the powers conferred by Art. 22 (7) (a) and (b) read with Art. 373 of the Constitution. [Para 23]

(i) Public Safety —Preventive Detention (Extension of Duration) Order (1950) — Validity — Constitution of India, Arts. 13 (1) and 22 (7) (a) and (b).

The Preventive Detention Order of 1950 is of no effect. [Para 25]

The Order does not comply with the provisions of Art. 22 (7) (a) and (b), Constitution Act. [Para 26]

The Order is also void because the Bengal Criminal Law Amendment Act, 1930, is not an Act providing for preventive detention. [Para 26]

✠(j) Adaptation of Laws Order (1950), R. 28 — Validity — Constitution of India, Art. 372 — Public Safety — West Bengal Criminal Law Amendment Act (VI [6] of 1930) — Public Safety — West Bengal Security Ordinance (1949).

Rule 28 directs this Court as well as certain Tribunals and other authorities to construe the law in a certain manner. There is no provision of law or any principle or practice regarding legislation which would justify any legislature to direct a Court regarding the manner in which it has to construe the law. A Court construes a law in accordance with definite rules or canons of interpretation. It has to decide the meaning which a law bears. The jurisdiction of the Court in this respect must be unfettered. No Court can submit to an order from any authority directing it to construe a law in a particular manner. Such an order will be contrary to all principles and will result in making the Court a mere tool of the legislature or other authority which makes such an order. All that the legislature can do is to define certain terms but it must leave the Court to interpret the law according to those definitions.

[Para 29]

Apart from the fact that the Order conflicts with all principles of judicial independence it is something which is contrary to the express provisions of Art. 372 (2), Constitution Act. That sub-clause empowers the President to make adaptations and modifications of any law in force in the territory of India. It does not empower the Court to make such adaptations or modifications and indeed it would be very surprising if any Constitution Act were to impose upon the Court the duty of legislating. The Courts are meant to interpret legislation and not to make it. What the President has done is to throw upon the Court a burden which is exclusively his. He is to adapt or modify and he has no authority to ask the Court to do something which he alone is expressly empowered to do. Further, by that Article the Constitution Act has delegated cer-

tain powers to the President. He in turn cannot delegate those powers to any other authority. The principle *delegatus non delegare potest* would apply. [Para 29]

Article 372 (1) does not preserve the effect of all laws in force in the territory of India before the commencement of the Constitution. It keeps only such laws in force as are not inconsistent with the provisions of Part III. The Bengal Criminal Law Amendment Act, 1930 and the West Bengal Security Ordinance, 1949, are inconsistent with the provisions of Part III. They became therefore void from 12 midnight of 25th January 1950, when the Constitution came into force. That being so, even the President or the Legislature cannot make any adaptations or modifications of those laws in order to bring them in accord with the provisions of this Constitution. Those laws are dead and the dead law cannot be brought back to life by modification or adaptation. [Para 29]

Not only has the Order tried to convert the Court into a Legislative body but in doing so it has by a proviso reduced this newly created legislative body to a position of subordination and inferiority. The effect of the Order is this: The Judiciary is converted into a Legislature with limited powers, and the Executive is converted into a judiciary whose decisions are to be final. In this state of affairs, the Courts cannot give effect to this Adaptation of Laws Order, 1950, even though this Order may have emanated from the President of the Indian Republic. [Para 30]

A. K. Basu, K. K. Basu, Bejoy Bhose, Krishnaprasad Basu (in 51 of 50); A. K. Basu, K. K. Basu, Bejoy Bhose (in 61 of 50); Atul Chandra Gupta, Arun Kumar Dutt, Hemanta Krishna Mitra (in 81 & 95 of 50); Bejoy Bhose (in 96 of 50); S. C. Talukdar, Sadhan Gupta, Arun Prakash Chatterjee (in 178 & 179 of 49); Bejoy Bhose, Krishna Prasad Basu (in 24 & 48 of 50); Sadhan Gupta, Krishna Prasad Basu, Arun Prakash Chatterjee (in 10 of 50); Sadhan Gupta, Krishna Prasad Basu, Arun Prakash Chatterjee (in 106 & 108 of 50); Sadhan Gupta and Krishna Prasad Basu (in 148 of 50); S. S. Mukherjee and Arun Kumar Dutt (in 125 of 50) and Arun Prakash Chatterjee (in 15, 23 & 119 of 50)—for Petitioners.

Sir S. M. Bose, Advocate-General, M. N. Ghose, S. Chowdhury and N. K. Sen, Deputy Legal Remembrancer—for the State.

Order.—These are 381 Rules issued in respect of 381 persons 370 of whom are under detention by orders passed under the Bengal Criminal Law Amendment Act, 1930, as amended by the Criminal Law Amendment (Amending Ordinance, 1949) and two of whom, namely, Purna Chandra Ghose and Dulal Bose, are under detention by orders passed under the West Bengal Security Ordinance, 1949. Of the persons who are subject to these rules, eight have been discharged and one has escaped from custody. So far as these persons are concerned, the rules have become infructuous and no further orders on these rules are necessary.

[2] Most of these rules were issued before the Constitution of India came into force and they were under S. 491, Criminal P C. Thereafter the Constitution Act came into force by which the High Courts were given powers to issue, *inter alia*, writs in the nature of *habeas corpus* by Art. 226 (1) and all the rules issued by this Court were treated in the alternative as being rules *nisi* for the issue of writs of *habeas corpus*. The learned Advocate-General accepted this alternative and waived any claim to fresh notice.

[3] We shall deal first with the question of the legality of the detention of the persons who have been detained by orders passed under the Bengal Criminal Law Amendment Act, 1930. The first point for consideration is whether the aforesaid Act is a valid law or not. In the argument urged on behalf of the detenus it was contended, *inter alia*, that this Act is not an Act for preventive detention. With that argument we shall deal later. We shall assume for the present that the Act provides for preventive detention and decide whether the Act is valid having regard to its provisions and the provisions of the Constitution Act. Before going into details we would like to emphasise the powers given to the High Court by the Constitution Act as regards deciding whether a statute is valid or void. In England Parliament is supreme and it can pass any law, however unreasonable it may seem, and to whatever extent it may curtail the liberty of the subject. Once the law is passed by Parliament the Courts are helpless. They must give effect to the law according to the recognised canons of interpretation of statutes. There is no power in the Courts to declare the law to be void or invalid. In this connection it would not be out of place to refer to certain observations made by Lord Wright in the well-known case of *Liversidge* v. *Sir John Anderson*, 1942 A. C. 206 at p. 260 : (1941-3 ALL E. R. 338).

"Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament, or a statutory regulation, like Reg. 18B, which has admittedly the force of a statute, because there is no suggestion that it is *ultra vires* or outside the Emergency Powers (Defence) Act, under which it was made, is alleged to limit or curtail the liberty of the subject or vest in the executive extraordinary powers of detaining a subject, the only question is what is the precise extent of the powers given. The answer to that question is only to be found by scrutinizing the language of the enactment in the light of the circumstances and the general policy and object of the measure. I have ventured on these elementary and obvious observations because it seems to have been suggested on behalf of the appellant that this House was being asked to countenance arbitrary, despotic or tyrannuous conduct. But in the constitution of this country there are no guaranteed or absolute rights."

The position in the Republic of India is entirely different. Here, we have a written constitution in which certain fundamental rights are guaranteed to its citizens. These are mentioned in Part III, Constitution Act. If Parliament or any State Legislature makes any law taking away these fundamental rights except in the manner and to the extent provided in Part III, then that law is void to the extent of its inconsistency

with the provisions of PART III (*vide* Art. 13 (1)). Thus Parliament and the State Legislatures are not supreme to the extent that Parliament in England is supreme. The Legislatures in this country have only those powers of legislation which are bestowed upon them by the Constitution Act. If they pass an Act in excess of those powers, then that Act becomes void to that extent.

[4] The next question which arises is this; who is to decide the question whether a piece of legislation is void or not? Under our Constitution the Courts i. e., the Judiciary are to decide this and nobody else. We thus see that the powers of the Judiciary in our country is in this respect far greater than the powers of the Judiciary of Great Britain. Many observations regarding the effect and interpretation of laws passed by the Parliament of Great Britain are coloured by the fact that Parliament there is supreme and they are not wholly applicable in this country. Here the power of the Judiciary is supreme in this respect. We realise that Parliament may amend the Constitution Act but that can only be done if the provisions of Art. 368 of PART XX, Constitution Act are complied with. However, until the Act is amended the powers of the Legislatures and of the Judiciary are as stated above. The people of India have given us the power of interpreting the Constitution of India and of deciding whether any piece of legislation is or is not consistent with the provisions laid down in the Constitution of India.

[5] As stated at the beginning of the last paragraph we shall assume that the Bengal Criminal Law Amendment Act is an Act providing for preventive detention and decide on this basis whether the Act is valid or whether it is void in whole or in part as being inconsistent with the provisions of PART III, Constitution Act. Article 19 (1), Constitution Act deals with the "Right to Freedom." It specifies seven such rights and says that all citizens shall have these rights. We are concerned with the right mentioned in Art. 19 (1) (d), that is, the right "to move freely throughout the territory of India." That right is guaranteed to all citizens by Article 19 (1) (d). Article 19 (5) provides that nothing in sub-cl. (d) of Art. 19 (1)

"shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clause either in the interests of the general public or for the protection of the interests of any scheduled tribe."

We are not concerned in the present rules with the protection of the interest of any scheduled tribe. If Art. 19 (1) (d) and Art. 19 cl. (5) are read together, the meaning which can be deduced is this: every citizen shall have the right of moving freely from any part of the territory of India to any other part of such territory, but any law already passed before the Constitution Act came into force, or to be passed by the Legislatures established by the Constitution may curtail that right provided the curtailment or restrictions it imposes on that right are reasonable and in the interests of the general public. It is thus clear that, the right of free movement throughout the territory of India cannot be restricted unless (a) the restrictions are reasonble and (b) the restrictions are necessary in the interests of the general public. Both conditions must co-exist.

[6] Now, the question which arises is whether the detention which may be imposed upon a citizen by the Criminal Law Amendment Act amounts to restrictions on the right of free movement guaranteed by Art. 19 (1) (d). The learned Advocate-General argued that an order passed under the Bengal Criminal Law Amendment Act committing a person to custody in jail is not an order taking away the right "to move freely" throughout the territory of India which is mentioned in Art. 19 (1) (d). He contends that the words "throughout the territory of India" have been put in sub-cl. (d) for a particular purpose. The sub-clause according to him relates only to liberty of movement from one particular State to another or from one particular area to another and it does not relate to liberty of movement in general. We are unable to see that the words "throughout the territory of India" which appear in sub-cl. (d) and do not appear in the other sub clauses, except sub-clause (e), have the significance sought to be attached to them by the learned Advocate-General. In our opinion the words "throughout the territory of India" were used because the Constitution Act is not guaranteeing to the citizen any right of free movement outside its territories, in fact it could not give any citizen such right because that would result in infringing the sovereignty of a foreign State. This phrase was used also to indicate that the Constitution Act was not giving the citizen any absolute right to move from the Republic of India into some foreign State; in other words, it was saving passport restrictions. Further, those words were used to indicate that the Act was not giving a citizen any absolute right to enter the territory of India from outside. These, in our opinion, are the reasons why the words "throughout the territory of India" have been used. We are of opinion that if a person is committed to custody in jail, his right to move freely throughout the territory of India is being taken away. Now, the Bengal Criminal Law Amendment Act, 1930, by S. 2 (1) (f) gives the

Provincial Government the right to commit a citizen to custody in jail. We must therefore see whether the law giving such a right is one which imposes a restriction which is reasonable and which is in the interests of the general public.

[7] It will now be necessary to reproduce S. 2 (1), Bengal Criminal Law Amendment Act which is as follows :

"Where, in the opinion of the Provincial Government, there are reasonable grounds for believing that any person—

(i) is or was at any time a member of an association of which the objects and methods include the commission of any offence included in Sch. I or the doing of any act with a view to interfere by violence or threat of violence, with the administration of justice; or

(ii) is being or was at any time instigated or controlled by a member of any such association with a view to the commission or doing of any such offence or act; or

(iii) is doing or did at any time any act to assist the operations of any such association:

the Provincial Government may, by order in writing, give all or any of the following directions, namely, that such person-

(a) shall notify his residence and any change of residence to such authority as may be specified is the order;

(b) shall report himself to the police in such manner and at such periods as may be so specified:

(c) shall conduct himself in such manner or abstain from such Acts as may be so specified;

(d) shall reside or remain in any area so specified;

(e) shall not enter, reside in, or remain in any area so specified;

(f) shall be committed to custody in jail; and may at any time add to, amend, vary or rescind any order made under this section:

Provided that such order shall be reviewed by the Provincial Government at the end of one year from the date of making of the order, and shall not remain in force for more than one year unless upon such review the Provincial Government directs its continuance."

[8] We accept the argument of the learned Advocate-General that it is not open to us to decide whether the opinion of the Provincial Government is well founded or not. The words "where in the opinion of the Provincial Government there are reasonable grounds for believing etc." have been interpreted recently by a Special Bench of this Court in the case of *Bhupendra De* v. *Chief Secretary, the Government of West Bengal*, 53 C. W. N. 798: (A. I. R. (36) 1949 Cal. 633 : 51 Cr. L J. 169) and we have no hesitation in following that interpretation. The Provincial Government has to form the opinion that there are reasonable grounds and it is not for the Courts to decide whether the grounds are reasonable or not. That is a matter for the Provincial Government alone and the opinion of the Provincial Government is subjective and not justiciable. If the Provincial Government declares that in its opinion there are reasonable grounds for believing etc. this Court cannot investigate the grounds and say that the grounds are not reasonable. The reasonableness of the grounds is a matter for the decision of the Provincial Government alone and not for the Court. We are not now dealing with any question of *mala fides*. We thus see that the Provincial Government is constituted the sole and absolute arbitrator for the decision of the point whether there are reasonable grounds for believing etc. Now, what is meant by the terms 'Provincial Government.' According to the General Clauses Act (India), S. 43A the Government of the Province is the Governor. The Governor under the present constitution cannot act except in accordance with the advice of his ministers. Under the Government of India Act, 1935, the position was different. The Governor could do certain acts in his discretion, that is, without asking for the advice of any minister; he could do certain acts in his individual capacity, that is, only after consulting his ministers but he was not bound when acting in his individual capacity to follow the advice of his ministers. Under the present Constitution the power to act in his discretion or in his individual capacity has been taken away and the Governor therefore must act on the advice of his ministers. This is the constitutional position as explained to us by the learned Advocate General and we accept his view.

[9] Next, on enquiries made by this Court from the Advocate General he stated that orders of detention under the Bengal Criminal Law Amendment Act were passed, in fact, not by the Governor nor by any minister nor by the Chief Secretary but by the Deputy Secretary. This was done according to certain Rules of Business formulated by the Governor. The net result of these circumstances is that these persons have been detained because a Deputy Secretary has formed a certain opinion the justness or validity of which cannot be questioned by the Courts of law. In our opinion this provision of the law is neither reasonable nor in the interests of the general public. The right to personal liberty given to citizens by the Constitution Act is a fundamental and a precious right and it seems to us that it is not reasonable and not in the interests of the general public to empower an executive officer of the rank of the Deputy Secretary, who is not responsible to the Legislature, to take away such a fundamental right in the manner provided in the Bengal Criminal Law Amendment Act; in other words, it is neither reasonable nor in the interests of the general public that an executive officer of this kind should be empowered to send a man to custody in jail on an opinion formed by him on grounds which cannot be investigated by anybody. In this connection we would observe that the Bengal Criminal

Law Amendment Act is not an emergency measure. It is "an Act to supplement the ordinary criminal law in Bengal." Nowhere is it stated in the Act or suggested that it is an emergency measure. The Act is a permanent one and not enacted for any particular period and it has been in force since 1930. During times of emergency extraordinary measures may be taken and extra-ordinary legislation may be passed. Such legislation may be considered to be reasonable and in the interests of the general public having regard to the emergency then prevailing, but an Act which is not an emergency measure but merely an addition to the ordinary criminal law cannot be viewed in the same manner when it deprives a citizen of his fundamental right of freedom.

[10] Next, let us consider in further detail the provisions of S. 2, Bengal Criminal Law Amendment Act. Section 2 (1) (i) renders a person liable to committal to custody in jail if he was at any time a member of an association of the kind described in the section or is at the moment a member of such an association. The section does not say that the person who is to be so committed should know or even have reason to believe that the association had the objects and methods described in the section; nor does it say that these objects and methods should be the avowed objects of the association. Thus, a person who joins an association without knowing that it has the objects and methods mentioned in the section is liable to be confined in jail. Again, if a person many years ago joined such an association and thereafter left it as he disagreed with its objects he is also liable to be confined to jail. He may be, at the time the order is passed on him a person who is bed-ridden or a paralytic, nevertheless he is liable to be subjected to an order committing him to custody in jail. It seems to us that this provision is wholly unreasonable.

[11] Let us next examine S. 2 (l) (ii), Bengal Criminal Law Amendment Act. It discloses a more preposterous state of affairs. It says that if a person was at any time instigated or if he is being instigated by a member of an association of the description mentioned in the section he may be committed to jail. Here, again there is no provision that there should be any reasonable cause to believe that the person instigated was inclined to carry out the object of the person instigating him. If the person is investigated and he refuses to accede to the request of the instigator, he is still liable to be committed to jail. Again, if he was instigated say 20 years ago and then refused to carry out the object of the instigator, he is still liable to be committed to jail. We find it difficult to conceive how such a provision of law can be considered to be reasonable and in the interests of the general public. It may be said in certain circumstances that it is reasonable to commit the instigator to custody in jail if he is instigating the commission of a crime, but it passes our comprehension how it can be reasonable to enact that a person, merely because he was instigated is liable to be detained in custody in jail. The learned Advocate General argued that it should be presumed that the Act would be reasonably administered. We are not at all concerned with the question whether the person operating the Act will be reasonable or not. We are concerned with the sole question whether the provisions of the Act are reasonable and in the interests of the general public. If they are not, then the Act is void and no person however reasonable can be left to exercise powers under such an Act.

[12] Again, if one were to consider all the provisions of the Act one would find that there is no period fixed during which a person may be detained. The proviso to S. 2, Bengal Criminal Law Amendment Act says that the order shall be reviewed by the Provincial Government at the end of one year from the date of making it and shall not remain in force for more than one year unless upon such review the Provincial Government directs its continuance; in other words, the Provincial Government which in the present case means the Deputy Secretary may order the continuance of the detention for an unlimited period. It is true that S. 9 of the Act provides that the order shall be submitted to two Judges with the qualifications described therein in order to obtain their opinion whether or not there is lawful and sufficient cause for such an order, but this provision does not place any limitation on the Provincial Government for the continuance of the order for an indefinite period. In the first place, there is no time fixed within which the Judges are to give their opinion. Secondly, by virtue of S. 9, sub-s. (2) the Provincial Government may sit upon that opinion for an indefinite period and pass no orders upon it. Lastly, the Provincial Government is not bound to accept such opinion or report of the Judges. It is given power to pass such orders upon their report as to the Government appears just or proper. We would point out also that by virtue of the provisions of sub-s. (3) of S. 9 of the Act the person against whom an order under S. 2 (1) has been passed is not entitled to appear before the Judges either in person or by pleader, and the proceedings and report of the said Judges are made confidential. It is obvious that the safeguards to wrongful custody in jail which are pretended to be laid down in S. 9 are purely illusory. The order of the two Judges need never be accepted by the Government. No

one except the Government is permitted to know what the report of the two Judges is, nor is any one permitted to know what transpired in the proceedings before the two Judges. We thus see that the Government is again being made the only authority to decide whether its order is lawful or not. The Government is also the only authority to decide whether the detention should continue or not. Can it be said that it is reasonable and in the interests of the general public to give the Government, that is, the Deputy Secretary such absolute and unlimited powers? In our opinion it cannot.

[13] There is another point of great importance. Under Art. 22, sub art. (4), Constitution Act, it is laid down that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board consisting of persons having certain judicial qualifications has reported before the expiry of the said three months that there is in its opinion sufficient cause for such detention. The Bengal Criminal Law Amendment Act is in direct conflict with these provisions laid down in the Constitution Act. We shall deal later with the latest order passed by the President of the Republic of India whereby these rights given to the citizens under Art. 22 (4) are sought to be whittled down and we shall endeavour to show that this order is of no legal effect.

[14] We now propose to summarise the grounds of our opinion that the restrictions imposed by the Bengal Criminal Law Amendment Act upon the free movement of citizens throughout the territory of India are not reasonable and are not in the interests of the general public. They are as follows: (1) The Act gives the Provincial Government, that is to say, the Deputy Secretary, the power to detain persons if he forms a certain opinion and neither the Courts nor any other authority is entitled to question the reasonableness or the validity of such opinion. In this connection we would repeat again that the Bengal Criminal Law Amendment Act is not an emergency measure but a measure to supplement the ordinary criminal law. This fact is one which governs our determination of the question of the reasonableness and the public benefit in all its aspects; (2) The Act renders a citizen liable to commitment to custody in jail even though he has no sinister object or motive and merely because he was at any time or is a member of an association the objects of which are not known to him; (3) The Act provides for the commitment to prison of a citizen merely because he is a subject of instigation although he may not have any inclination to do the act instigated; (4) By the Bengal Criminal Law Amendment Act a person may be kept in custody for an indefinite period. The length of that period is left to the sole discretion of the Government, that is to say, of the Deputy Secretary; (5) Although the order of Government is to be submitted for opinion and report to two Judges the Government is not bound in any way to accept that opinion or report; (6) The person detained has no right to place his case before these two Judges either in person or by pleader, nor is he or any one else given the right to know anything about the proceedings before the Judges or the report furnished by them; and (7) The Bengal Criminal Law Amendment Act is in direct conflict with the provisions of Art. 22 (4), Constitution Act.

[15] The learned Advocate General argued that even if some portions of the Act are considered to be void on the ground that they are inconsistent with the provisions of Part III of the Constitution Act, the Court should give effect to those portions of the Act which are not in conflict with the Constitution Act, in other words, he asks us to split up the Act and give effect to such portions of it as are not in conflict with the Constitution Act. We are of opinion that this cannot be done having regard to our findings regarding the illegality of certain provisions of the Bengal Criminal Law Amendment Act. The illegalities which we have pointed out cannot be severed from the rest of the Act. They are fundamental illegalities and they taint the whole of the Act and are inextricably mixed up with the other provisions of the Act. The doctrine of severability can only be applied where a particular provision of an Act can be isolated from the rest of the Act and yet the Act can be worked.

[16] In the present case no such severance can be made. The whole Act is vitiated by the illegalities pointed out above and it is impossible to isolate those illegalities and pronounce that the rest of the Act is legal. In this connection we would refer to the observations of the Chief Justice of the High Court at Patna in the case of *Brahmeshwar Prasad* v. *The State of Bihar* (A I. R. (37) 1950 Pat. 265), a report of which has been furnished to us by the learned Advocate General. This is what the learned Chief Justice says:

"I now come to the second line of reply of the learned Government Advocate, namely severability.

Put crudely the argument comes to this. If a law provides for detention for six months, but the Constitution says that no law shall provide for detention for more than three months, then that law is not wolly void, but can be regarded as a good law as regards detention up to three months. The fallaciousness of such an argument is at once apparent. It would mean, not severing the bad portion of the law from the good and leaving the latter, but substituting a new and different law in place of the old. In fact it would mean legislation by

the Court and the abolition of one law and the substitution for it of a new and different law."

[17] In the present case the difficulties are still greater because the Bengal Criminal Law Amendment Act has been found by us to be void not merely because it provides for detention for a longer period than is permissible under the Constitution Act but for certain other more fundamental reasons. It is not for us to legislate. We are merely to interpret an Act and discover whether it is void or not. We are not to substitute a new and more reasonable Act in the place of the Bengal Criminal Law Amendment Act. We thus hold that the entire Act is void for the reasons stated above and that the detention of the persons who obtained these Rules is illegal.

[18] We shall now deal with these Rules on the footing that the Act is not void. In our opinion, if this assumption is made, the order of detention is bad inasmuch as the provisions of the Act have not been followed. We would refer again to the provisions of S. 2 (1), Bengal Criminal Law Amendment Act. In our opinion this section means that the Provincial Government must come to a definite opinion before it can pass an order of detention. Section 2 (1) (i) says that where in the opinion of the Provincial Government there are reasonable grounds for believing that any person is or was at any time a member of an association with objects and methods etc. may pass an order committing that person to jail or placing certain other restrictions on him as are mentioned in S. 2 (1) (iii) (a) to (f). We would point out that the words used are "is or was at any time a member." The orders of Government in all these cases except those which have been passed under the West Bengal Security Ordinance of 1949 are in the following form :

"Whereas in the opinion of the Provincial Government there are reasonable grounds for believing that Sri Sunil Kumar Basu, son of late Jatindra Nath Basu of p. 43, New Shambazar Street, (Bhupendra Basu Avenue), Calcutta,

(i) is or was a member of an association of which the objects and methods include the commission of offences included in Sch. 1 to the Bengal Criminal Law Amendment Act, 1930 (Bengal Act VI [6] of 1930)

(ii) is doing or did acts to assist the operations of an association of which the objects and methods include—

the commission of offences included in Sch. 1 to the Bengal Criminal Law Amendment Act, 1930 (Bengal Act VI [6] of 1930).

The Governor, in exercise of the powers conferred by S. 2, Bengal Criminal Law Amendment Act, 1930 (Bengal Act VI [6] of 1930), is pleased to make the following order : "

It is quite clear from this order that the Government has come to no definite conclusion. Section 2 (1), so to speak, offers the Government a choice of matters on which it is required to form an opinion. If the Government is of opinion that a person is a member of an association etc., it may pass the orders mentioned in S. 2 (1). Similarly, if the Government is of opinion that a person was at any time a member of an association etc., it may pass all or any of the orders mentioned in the section. The Government must make its choice. What the Government in this case has done is to make no choice. It uses the words "was at any time or is." In other words, what the Government is saying is this : "I am not sure if the person was at any time a member, nor am I sure that he is at present a member. Nevertheless I order him to be detained because I am of opinion that he was at any time or is a member." We would say with great respect that in our opinion this statement in the order does not make sense. The only inference from this order is that the Government has formed no opinion at all. It has merely repeated the very words of the section. There is a danger in merely repeating the very words of a section in an order. The alternatives given in a section of a statute may be reasonable. We do not say that in this particular case these alternatives are even reasonable. But an order of Government stating that in his opinion both alternatives are present is clearly meaningless. When a section distinguishes between a person who was at any time a member and a person who is a member of an association it means that it is dealing with persons of two distinct types; otherwise there would be no sense in mentioning these alternatives in the section. It follows from this that the Government must make up its mind as to the category to which a person it is proposing to detain belongs. The Government here has done no such thing. We hold therefore that the order of Government is not in accordance with the provisions of the Bengal Criminal Law Amendment Act and that it indicates that the Government has formed no opinion at all. In this connection the learned Advocate General drew our attention to the case of *King Emperor* v. *Shibnath Banerjee*, 1944-6 F. C. R. 1 : (A. I. R. (30) 1943 F. C. 75 : 45 Cr. L. J. 341). In that case the Central Government expressed its opinion in the very words of the section which contained certain alternatives. Two of the learned Judges Zafrulla Khan and Srinivasa Varadachariar JJ. held that such an order was bad whereas Sir Patrick Spens C. J., held that the order was valid. The view of Sir Patrick Spens was upheld by the Judicial Committee but it expressed no definite opinion on this point. We are of opinion, however, that the contention of the learned Advocate General cannot be given effect to inasmuch as the phraseology of the Acts in that case and the phraseology of the

present Act are quite different. Rule 26 of the Defence of India Rules is what was being construed. The relevant portion of that rule is in the following terms :

"The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war it is necessary so to do, may make an order

(a) .....

(b) directing that he be detained."

Here, the Central Government could detain a particular person with a view to prevent him from doing one or other of several acts. In such a case it was held by the Chief Justice that an order which mentioned that the Government was detaining a person with a view to prevent him from doing all or any of those acts was perfectly justifiable. The present cases are quite different. The Bengal Criminal Law Amendment Act, S. 2 (1) does not say that the Government may detain a person with a view to prevent him from doing one or all of several Acts. What it says is that if the Provincial Government is of opinion that a person belongs to one category or another he may be detained. The distinction is obvious. Before you can detain a person under such a provision of the law you must be satisfied that he belongs to one or other of those categories. Under R. 26, Defence of India Rules, all that the Government has to do is to form an opinion that it is necessary to detain a person in order to prevent him from doing one or other of certain acts. In this rule it was not necessary for the Government to form an opinion definitely as to which act such person may do. He may be a person who is prone to do one or other of such acts. Under the Bengal Criminal Law Amendment Act, S. 2 (1), the Government has to form an opinion as to whether a person sought to be detained was at any time a member of an association or whether he is at present a member of an association. We are of opinion, therefore, that as the Provincial Government has formed no opinion at all on the matter, it had no authority to pass the orders of detention, that it has passed and that consequently the orders are bad.

[19] We have already dealt with these Rules on the footing that the Bengal Criminal Law Amendment Act is an Act providing for preventive detention and have shown that even if it were so, the detention orders which are the subject-matter of these Rules are bad. We are of opinion, however, that the Bengal Criminal Law Amendment Act does not deal with preventive detention. The law regarding preventive detention, as we understand it is directed towards preventing a person from doing something which the Legislature thinks should not be done. Nowhere in the Act do we find any expression which indicates that the law is designed for the purpose of preventing a person from doing anything. We have set out the preamble in the earlier part of the judgment and it contains nothing which would indicate that the law is a preventive measure. Section 2 of the Act, which is the most important section in the Act and which gives powers of detention to the Provincial Government does not say that these powers are given for the purpose of preventing anything being done. It merely lays down that a person may be detained or dealt with in certain other ways if he is or was a member of a certain kind of association or if he is or was being instigated or controlled by a member of a certain kind of association or if he is doing or did at any time any act to assist the operation of such association. It nowhere says that a person may be detained or otherwise dealt with in order to prevent him from doing anything. If you detain a person if he is a member of an association you are not detaining him in order to prevent him from being a member of the association but you are restricting his liberty because he is a member of such association, *a fortiori*, if you detain or otherwise restrict the liberty of a person because he was a member of an association, you are not doing anything in order to prevent him from being such member. The same arguments would apply to the provisions contained in S. 2 (1) (ii) and (iii). The law does not lay down that the authority detaining a person or otherwise restricting his liberty should be satisfied that the detention is necessary for the prevention of anything. That being so, we are of opinion that the Bengal Criminal Law Amendment Act is not a law of preventive detention. The learned Advocate-General drew our attention to a certain passage in Dicey's Law of the Constitution, Edn. IX at page 231 where a certain Irish Act was described as an Act which gave the executive absolute power of arbitrary and preventive arrest. We do not think it will serve any useful purpose to discuss this passage of the Irish law referred to. It is dangerous to interpret one law by reference to another unless the terms are identical or so similar as to justify a common deduction. It would be safe and more correct to ascertain the nature of the Bengal Criminal Law Amendment Act by reference to its own provisions. Having regard to those provisions we have no hesitation in saying that the law is not a law providing for preventive detention.

[20] Now, if it is not such a law, then it is impossible to justify the orders passed in these cases. Article 21, Constitution Act says this : "No person shall be deprived of his life or personal liberty except according to procedure established by law." There can be no doubt that in these cases the detenus have been deprived of their personal liberty. The order depriving them of such liberty can be upheld only if it is an order passed according to the procedure established by law. Article 22 (1) and (2), Constitution Act, provides some portion of such procedure. It says this :

22. (1) "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

(2) "Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate."

It is admitted that in these cases the detenus have not been produced before any Magistrate within twenty four hours of their arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate. Thus the detenus have been deprived of their personal liberty without complying with one of the most important items of procedure laid down in the Constitution Act regarding such deprivation. In the circumstances the order of detention cannot be upheld.

[21] We shall now deal with the two cases in which persons have been detained under the West Bengal Security Ordinance, 1949. This Ordinance is clearly an Ordinance providing for preventive detention, but in our opinion this Ordinance is void because it is inconsistent with the provisions of the Constitution Act. The Ordinance in S. 22 provides for the detention of a person for a period not exceeding nine months. Under Art. 22 (4), Constitution Act, it is provided that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board has reported that there is in its opinion sufficient cause for such detention. The West Bengal Security Ordinance, 1949, does not provide for any Advisory Board of the nature contemplated by the Constitution Act. It says that the Provincial Government may place before a Judge of the High Court the grounds on which the order of preventive detention is made. The section is clearly not mandatory. The Government if it so chooses need not place before the aforesaid Judge its order of detention.

[22] Next, we would point out that reference to a Judge of the High Court is only to be made where an order is passed under cl. (a) of sub-s. (1) of S. 21 of the aforesaid Ordinance, that is to say, in the case of an order directing detention. Section 21 (1) of the said Ordinance deals with several other restrictions on the liberty of the subject. In the case of those other restrictions there is no provision whatsoever for any reference being made to a High Court Judge. On the contrary, the provision in S. 22 of the Ordinance, empowers the Government in those cases to renew its orders from time to time after the expiry of each period of nine months. The other reasons which we have given for holding that the Bengal Criminal Law Amendment Act does not impose restrictions which are reasonable and are in the interests of the general public apply to the West Bengal Security Ordinance, 1949. We hold therefore that the order as passed on the two persons Purna Chandra Ghose and Dulal Bose under the West Bengal Security Ordinance, 1949, is void as it is inconsistent with the Constitution Act.

[23] We shall now deal with the Preventive Detention (Extension of Duration) Order, 1950, made by the President of the Indian Republic. We are of opinion that it can have no effect so far as the Bengal Criminal Law Amendment Act, 1930 and the West Bengal Security Ordinance, 1949 are concerned and our reasons are as follows : The Constitution came into force at midnight on 25th January 1950. The President was not sworn as President until 10.15 A. M. on 26th January 1950. In other words, he was not President until the Constitution came into force. As soon as the Constitution came into force the two abovementioned laws became void by reason of the provisions of Art. 13 (1) for the reasons which we have already given. The Preventive Detention (Extension of Duration) Order, 1950, provides that the maximum period for which a person may be detained shall be, in the case of a person detained immediately before the commencement of the Constitution, three months; and in the case of persons detained in pursuance of an order made after such commencement for a period of three months from the date of such order. If these two provisions could be given effect so far as the Bengal Criminal Law Amendment Act, 1930, and the West Bengal Security Ordinance, 1949, are concerned, then some at least of the reasons given for declaring these measures void would disappear, but we find that there is an insuperable difficulty to apply the Preventive Detention (Extension of Duration) Order, 1950, to the above mentioned two Acts. The Acts having become void they cannot be vivified or revived by such

an order which purports to have been passed in the exercise of powers conferred by sub-cls. (a) and (b) of cl. (7) of Art. 22, Constitution Act read with Art. 373 of the said Constitution Act. In this connection we can do no better than quote the observations of the Chief Justice of the Patna High Court in the case of *Brahmeswar Prasad* v. *The State of Bihar*, (A.I.R. (37) 1950 Pat. 265).

[24] The learned Chief Justice says this:

"In my judgment no such order made by him under cl. (7) could in any way prevent an Act becoming void under Art. 13 (1) and this for two reasons. The first and primary reason is that under Art. 13 (1) quite clearly provisions become void, if they become void at all directly and instantaneously with the Constitution coming into force whereas an order by the President can only originate and become valid after the Constitution has come into force. There can be no such order of the President except as a consequence of the Constitution having come into force and given him power to make it. That is to say such order must be logically subsequent to the voidability which the coming into force of the Constitution itself affects. That, in my opinion follows directly and logically from the laws of cause and effect. But it is in fact not necessary to enter into philosophical questions of the infinite divisibility of time and the nature of simultaneity, because in fact we are here concerned with a time lapse of over ten hours. The Constitution came into force on the midnight of 25th and the Act, if it became void at all, became void then. But the President did not enter upon his office until he took the oath on 26th at 10-15 A. M.

As to these propositions, there can be no question, Art. 394 of the Constitution provides that certain Articles with none of which we are concerned, shall come into force at once, and the remaining provisions shall come into force on 26th January 1950. Article 367 (1) makes the General Clauses Act, 1897, applicable and the General Clauses Act provides in S. 5 (3) that where an Act is to come into force on a certain day, it shall come into force at midnight of the preceding day. Under Art. 60 the President must make and subscribe an oath before entering upon his office. The same thing is apparent from the Constitution (Removal of Difficulties) Order No. 1 published with Notfn. No. 1 in the Gazette of India (Extraordinary) of 7th January 1950, which prescribes that such person as the Constituent Assembly shall have elected as President shall, before entering upon his office, make and subscribe the oath or affirmation prescribed in Art. 60. Notification No. F35/4/49 Public, published in the Gazette of India (Extraordinary) on 26th January 1950) shows that the Governor General proclaimed the new Constitution at 10-15 A.M. on 26th January. After that the President took the oath, and took his seat as President of India and assumed the office. Quite clearly the President could make no valid order until after 10 15 A.M. on 26th whereas those provisions in Act III [3] of 1950 repugnant to the Constitution became void directly after midnight on 25th. It is quite apparent that the subsequent order of the President could not restore an Act which had already become void and ceased to exist. Nor does his order purport to do so."

[25] We set forth further reasons for holding that the Preventive Detention Order of 1950 is of no effect.

[26] Article 22, sub-art. (7) (a) and (b) are in the following terms:

22 (7). Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-cl. (a) of cl. (4).

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention."

It is quite clear that these two sub-clauses contemplate the taking out of a certain class of persons from the operation of the law laid down in sub-cl. (4) by which the maximum period of three months is prescribed. Parliament should therefore when enlarging the maximum period of detention set forth what class or classes of persons are to be detained for a period longer than three months. In this case the President has not done any such thing. He has made no selection of any class or classes but he has extended the period of preventive detention to all cases of persons preventively detained. Further, Art. 22, Sub-Art. (7) (a) states that the Parliament may prescribe the circumstances under which the detention should be extended for a period longer than three months. Here no such circumstances are mentioned. Rule 2 of the Preventive Detention (Extension of Duration) Order, 1950 begins thus: "Where in any class of cases or under any circumstances specified in any law providing for preventive detention etc." Such an order is not one which complies with the provisions of Art. 22, sub-Art. (7) (a) Constitution Act. Next, cl. (b) of Sub.Art. (7) of Art. 22 says that the Parliament may prescribe the maximum period for which any person in any class or classes of cases may be detained under any law providing for preventive detention. Although the words "the maximum period" are mentioned in R. 3, Preventive Detention (Extension of Duration) Order 1950, as a matter of fact no maximum period is provided. The words "the maximum period" connote the fixation of a particular period which is the maximum. Rule 3 of the aforesaid order would have the effect of fixing various periods. In the case of a person in detention before the commencement of the Constitution the period is three months from the commencement of the Constitution. Now a person may have been in detention for four months before the commencement of the Constitution. Under the Order passed by the President the maximum period for him would be three additional months or seven months. Another person may have been in detention one month before the commencement of the Constitution. For him the maximum period would be four months. Thus no fixed maximum period has been prescribed and the Preventive Detention (Extension of Duration) Order, 1950,

is therefore void. We would repeat again that the order would also be void because of the view we have taken namely that the Bengal Criminal Law Amendment Act, 1930, is not an Act providing for preventive detention.

[27] Having regard to all these circumstances we must hold that the detention of the petitioners in all these cases is illegal and we direct that they be set at liberty forthwith.

[28] After we have completed our judgment we were sent a copy of a Rule of an order by the President of the Republic of India entitled "Adaptation of Laws Order, 1950". The Rule of the aforesaid Order of which we were sent a copy is R. 28 and it runs as follows:

"28. Any Court, Tribunal or authority required or empowered to enforce any law in force in the territory of India immediately before the appointed day shall, notwithstanding that this order makes no provision or insufficient provision for the adaptation of the law for the purpose of bringing it into accord with the provisions of the Constitution, construe the law with all such adaptations as are necessary for the said purpose:

Provided that, if any question arises regarding the adaptations with which such law should be construed, for the said purpose, the question shall be referred to the Central Government if the law relates to a matter enumerated in List I or List III in the Seventh Schedule to the Constitution and to the State Government concerned in any other case, and the decision of that Government on any such reference shall be final."

[29] Although the learned Advocate General wanted an appointment to make his submissions on the rule when questioned by us he stated that he had nothing to say on it. We must frankly confess that we find it difficult to put any reasonable construction upon it. It directs this Court as well as certain Tribunals and other authorities to construe the law in a certain manner. We are quite unaware of any provision of law or any principle or practice regarding legislation which would justify any legislature to direct a Court regarding the manner in which it has to construe the law. A Court construes a law in accordance with definite rules or canons of interpretation. It has to decide the meaning which a law bears. The jurisdiction of the Court in this respect must be unfettered. No Court can submit to an order from any authority directing it to construe a law in a particular manner. Such an order will be contrary to all principles and will result in making the Court a mere tool of the legislature or other authority which makes such an order. All that the legislature can do is to define certain terms but it must leave the Court to interpret the law according to those definitions. This order purports to be a law passed in accordance with the provisions of Art. 372 (2), Constitution Act. In our opinion although the order is garbed in such a way as to simulate a legislative enactment, it is nothing of the kind. It is a direction pure and simple by the Executive to the Court to construe a law not necessarily in accordance with justice or legal principles but in accordance with the desire of the Executive. Obviously this Court cannot submit to an Adaptation Order of this kind. Apart from the fact that the Order conflicts with all principles of judicial independence we would further point out that it is something which is contrary to the express provisions of Art. 372 (2), Constitution Act. That sub-clause empowers the President to make adaptations and modifications of any law in force in the territory of India. It does not empower the Court to make such adaptations or modifications and indeed it would be very surprising if any Constitution Act were to impose upon the Court the duty of legislating. The Courts are meant to interpret legislation and not to make it. What the President has done is to throw upon the Court a burden which is exclusively his. He is to adapt or modify and he has no authority to ask the Court to do something which he alone is expressly empowered to do. We would further point out that by that Article the Constitution Act has delegated certain powers to the President. He in turn cannot delegate those powers to any other authority. The principle *delegatus non delegare potest* would apply. Article 372 (1), Constitution Act states that notwithstanding the repeals by this Constitution of the enactments referred to in Art. 395 and subject to the other provisions of this Constitution, all laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority. Article 395 refers to the repeals of the Indian Independence Act and the Government of India Act together with all enactments amending or supplementing the latter not including the abolition of Privy Council Jurisdiction Act, 1949. The Bengal Criminal Law Amendment Act, 1930, and the West Bengal Security Ordinance, 1949, have nothing to do with the Acts mentioned in Art, 395. Article 372 (1) says that all laws in force in the territory of India immediately before the commencement of the Constitution shall continue to be in force, but there is a necessary and important provision in the Article which cannot be lost sight of. It says that those laws shall be in force subject to the other provisions of this Constitution. Article 13 (1), Constitution Act says that all laws in force in the territory of India before the commencement of the Constitution in so far as they are inconsistent with the provision of Part III shall to the extent of such inconsistency be void. Thus Art. 372 (1) does not preserve the effect of all laws in force in the territory of India before the commencement of

the Constitution. It keeps only such laws in force as are not inconsistent with the provisions of Part III. We have held that the Bengal Criminal Law Amendment Act, 1930, and the West Bengal Security Ordinance, 1949, are inconsistent with the provisions of Part III. They became therefore void from 12 midnight of 25th January 1950, when the Constitution came into force. That being so, we are of opinion that even the President or the Legislature cannot make any adaptations or modifications of those laws in order to bring them in accord with the provisions of this Constitution. Those laws are dead and we fail to see how a dead law can be brought back to life by modification or adaptation.

[30] We have something further to say with respect to R. 28, Adaption of Laws Order, 1950. Not only has the Order tried to convert the Court into a legislative body but in doing so it has by a proviso reduced this newly created legislative body to a position of subordination and inferiority. The proviso says that if the Court makes any such adaptation as is contemplated in the first part of the rule, if the adapted law relates to matters enumerated in List I or List III in Sch. 7 to the Constitution it shall be subject to adjudication by the State Government concerned. It adds that the decision of the Government on any such reference shall be final. In other words what this Order purports to do is this: It converts the Central or State Executive into judicial authorities with the power of revising the decisions of the Courts of law and makes their decision on the point final. Taken as a whole the effect of the Order is this: The Judiciary is converted into a Legislature with limited powers, and the Executive is converted into a Judiciary whose decisions are to be final. In this confusing state of affairs, the only thing for us to do is to act in accordance with the oath which we took when we assumed office when we swore to bear true faith and allegiance to the Constitution of India and to perform our duties of office duly and faithfully without fear or favour and affection or ill will and where we also swore to uphold the Constitution and the laws. In our opinion we would be false to our oath if we gave effect to this Adaptation of Laws Order, 1950, even though this Order may have emanated from the President of the Indian Republic our respect for whom is no less than that of anybody else.

[31] The Advocate-General has next brought to our notice a new Act called the Preventive Detention Act, 1950, passed by Parliament on 25th February 1950, and he says that the orders for detention under the Bengal Criminal Law Amendment Act, 1930, and the West Bengal Security Ordinance, 1949, have been cancelled but that the detentions have been continued under the Preventive Detention Act, 1950. He suggests that in the circumstances the Rules have become infructuous. We cannot agree with this view. We issued these Rules upon the State on the footing that the detention was under the Bengal Criminal Law Amendment Act, 1930 and the West Bengal Security Ordinance, 1949. The detention under these legislative measures was sought to be justified by the State. We must therefore pronounce upon the validity of such detention irrespective of the what new legislative measures have now been introduced. Our decision, if correct, may have the effect of giving the detenus valuable rights both under the criminal law and the civil law. We do not propose to deprive them of these rights by not pronouncing our judgment. Whether the detenus are now detained under any valid law is not a matter for consideration in the disposal of these Rules. We pronounce no opinion on the validity of such detention or upon the propriety of the conduct of the authorities in continuing a detention which we have pronounced to be illegal or upon the risks which the detaining authority may be taking upon themselves by detaining the petitioners under this new law in spite of our orders. That is a matter which may form the subject of further proceedings the results of which we cannot anticipate.

[32] It may be that in spite of all our efforts the petitioners will be re-arrested and sent back to custody. That is a matter with which we are not now concerned. Our duty is that of right action, the result and fruits of our action are not for us to consider. That must be left to that divine providence which controls the destiny of us all.

[33] The citizens of the Republic have given great powers to the Judiciary. We recognise that great powers necessarily involve grave responsibilities, but we are not dismayed. It has always been the proud tradition of this Court to stand between the subject and any encroachment on his liberty by the executive or any other authority however high. It is a great tradition which we have inherited and we believe that this Court will be worthy of this inheritance. Amidst the strident clamour of political strife and the tumult of the clash of conflicting classes we must remain impartial. This Court is no respecter of persons and its endeavour must be to ensure that above this clamour and tumult the strong calm voice of justice shall always be heard. *Fiat justitia ruat coelum.*

[34] Leave to appeal is granted under Art. 132, Constitution Act.

V.B.B. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 287 *[C. N. 98.]*

HARRIES C. J. AND SARKAR J.

Benoy Krishna Mukerjee—Judgment-debtor — Appellant v. *Mohanlal Goenka, Decree-holder and others—Respondents.*

A. F. O. O. No. 95 of 1945, D/- 10th February 1950, against order of Sub-J., Asansol, D/- 30th January 1945.

(a) Civil P. C. (1908), O. 21, R. 6 — Transferee Court, when has jurisdiction to execute decree.

When a decree is sent by the Court which passed it to another Court for execution a copy of the decree together with a certificate of non-satisfaction or part satisfaction is sent to the Court which has to execute the decree and when the Court to which these documents are sent, receives the documents it then has jurisdiction to execute the decree. [Para 14]

Annotation: ('44-Com.) Civil P. C., O. 21 R. 6 N. 1.

(b) Calcutta High Court Civil Rules and Orders (Part I), R. 264—Certificate under S. 41, Civil P. C., without covering letter—Civil P. C. (1908), S. 41.

A notice of non-satisfaction under S. 41 of the Code would still be such a notice even though a covering letter as required by R. 264 has not been sent with it. [Para 19]

Annotation : ('44-Com.) Civil P. C., S. 41 N. 2.

(c) Civil P. C. (1908), S. 41 — Certificate sent when it should not have been sent—Effect.

A certificate of non satisfaction under S. 41 to the transferor Court deprives the transferee Court of jurisdiction whether the certificate should or should not in the circumstances have been sent. [Para 29]

Annotation : ('44-Com.) Civil P. C., S. 41. N. 2.

(d) Civil P. C. (1908), S. 41—Copy of decree not returned—Transferee Court, if retains jurisdiction.

Once certificate of non-satisfaction has been sent by the transferee Court to the Court that passed the decree the transferee Court ceases to have jurisdiction, though it might have failed to return the copy of the decree sent to it. [Para 44]

Annotation : ('44-Com.) Civil P. C., S. 41 N 3.

(e) Civil P. C. (1908), S. 11 —*Res judicata* in execution proceedings—Civil P. C. (1908), S. 47—Evidence Act (1872), S. 115.

The entertainment by the Court to which a decree is sent for execution of a second execution case and passing of an order for sale therein are without jurisdiction after the certificate of non-satisfaction has been sent to the transmitting Court. Such an order is null and void and can neither operate as an estoppel nor as a bar in *res judicata* to an application under S. 47, Civil P. C., to set aside the sale by the judgment-debtor who discovers the defect subsequent to the order for sale. [Para 53]

Annotation : ('44-Com.) Civil P. C., S. 11 N. 23 ; ('46-Man.) Evidence Act, S. 115 N. 39.

(f) Civil P. C. (1908), S. 151 — Inherent power of Court to correct its own proceedings.

Where a Court is misled due to the fault of the decree-holder into ordering a sale in execution of a decree without jurisdiction, the Court has inherent power to correct its proceedings by setting aside the sale. [Para 61]

Annotation : ('44-Com.) Civil P. C., S. 151 N. 6.

Dr. N. C. Sen Gupta, Dr. R. B. Pal, Balai Lal Pal and Abinash Chandra Majumdar—for Appellant.

Atul Chandra Gupta, Benoyendra Prosad Bagchi, Bankim Chandra Roy, Amiya Kumar Mukherjee and Biswanath Naskar (for Dy. Registrar)—for Respondents.

Harries C. J. — This is an appeal from an order of a learned Subordinate Judge of Asansol, dismissing an application to set aside a sale. The application was made under Ss. 47 and 151, Civil P. C.

[2] To appreciate the points in issue it will be necessary to state the facts in some detail.

[3] Nagarmull Rajgharia, now deceased, whose personal representative has been brought on the record as respondent in his stead, obtained a decree in Suit No. 1518 of 1923 on the Original Side of this Court. The decree was eventually transferred for execution by this Court to the Court of the Subordinate Judge at Asansol through the District Judge of Burdwan. A certificate of non-satisfaction under S. 41, Civil P. C., was sent by this Court which was transmitted to the Asansol Court. The decree-holder Nagarmull Rajgharia commenced Money Execution Case No. 296 of 1931 in the Court of the Subordinate Judge at Asansol, but that case was eventually dismissed for default on 27th February 1932. The Court at Asansol sent what purported to be a certificate of non-satisfaction under S. 41, Civil P. C., to this Court and it is to be observed that the decree was never again transferred to the Court at Asansol for execution. Later, however, the decree-holder made another application for execution at Asansol and Money Execution Case No. 224 of 1932 was commenced. In the course of that execution the decree-holder purchased the Sripur Colliery on 9th June 1933, but the sale was set aside on 29th January 1934 on an application by one of the judgment-debtors, the appellant in this appeal, under O. 21, R. 90, Civil P. C. A certificate purporting to be a certificate under S. 41, Civil P. C., was sent by the Asansol Court to the High Court. The decree-holder appealed against this order setting aside the sale, but his appeal was dismissed by this Court. The records of Misc. Case No. 224 of 1932 were returned to this Court by the Asansol Court on 17th September 1935 and the execution case was revived.

[4] The property, namely, Sripur Colliery, was again sold in an execution sale to the decree-holder for Rs. 12,000 but this sale was set aside. The property was again resold and purchased by the decree-holder for Rs. 2,50,000 on 27th May 1938. The appellant made an application to set aside this sale which was rejected. He preferred an appeal to this Court which was ultimately dismissed and an application by him for leave to appeal to the Privy Council failed.

[5] It appears that the judgment-debtor instituted a suit being Title Suit No. 3 of 1936 in the Court of the Subordinate Judge at Asansol to recover a sum of money and to enforce a charge against the Sripur Colliery and for per-

mission to redeem a charge declared in favour of the said decree-holder Nagarmull Rajgharia in Suit No. 1518 of 1923. The appellant's suit was dismissed in the Court at Asansol, but on 13th August 1940 an appeal from that decree was allowed in this Court.

[6] In order to ascertain the amount due to the decree-holder, Nagarmall Ragharia in suit No. 1518 of 1923 the appellant instructed his attorney to search the records of that suit and it is said that as a result of that search the appellant came to know for the first time on 23rd August 1940 that the Asansol Court had sent a certificate of non-satisfaction in Money Execution Case No. 296 of 1931 to this Court and that no fresh certificate of non-satisfaction had been sent by this Court to the Court at Asansol. The appellant then realised for the first time that the Court at Asansol had no jurisdiction to entertain the second execution case, namely, Money Execution Case No. 224 of 1932 and that all the proceedings in that case were null and void as they were without jurisdiction. It seems that an application to review the order of the High Court dismissing the application to set aside the sale for Rs. 2,50,000 was made but was rejected. But no point was made on this matter and it does not appear when that application was made.

[7] As the appellant alleged that the Court at Asansol had no jurisdiction to entertain the second application for execution and therefore no jurisdiction to order or conduct a sale, an application was made to the Court at Asansol under Ss. 47 and 151, Civil P. C., praying that the sale be set aside as it was a sale without jurisdiction.

[8] The decree-holder objected and contended that the Court at Asansol had jurisdiction to entertain the proceedings and in the alternative, if it had no jurisdiction, the appellant having failed to press the point in the proceedings was now barred by the doctrine of *res judicata* from contending that the Court had no jurisdiction.

[9] The matter eventually came before the learned Subordinate Judge who held in the first place that the Court at Asansol had jurisdiction to entertain the second application for execution. In the view of the learned Subordinate Judge, the document purporting to be a certificate of non-satisfaction sent under S. 41, Civil P. C. to the High Court when the first application was dismissed for default was not in fact or in law a certificate of non-satisfaction which deprived the Court at Asansol of jurisdiction further to entertain execution of the decree. In the view of the learned Subordinate Judge, this notice was merely an intimation to the High Court that the first attempt at execution had failed for non-appearance of the decree-holder. As in the view of the learned Subordinate Judge there was no certificate of non-satisfaction sent to the High Court the Court at Asansol had retained jurisdiction to execute the decree and therefore all the proceedings were with jurisdiction.

[10] In the second place the Court was of opinion that this question of jurisdiction should have been raised and pressed. But as that was not done the Court could not later be asked to re-agitate the matter and hold that it had no jurisdiction. In short it held that the judgment-debtor appellant was barred by the doctrine of *res judicata* from raising the point.

[10a] In the Court of the Subordinate Judge there seems to have been some discussion as to whether or not there was on the file in the Court at Asansol a certificate of non-satisfaction from this Court when the second execution case was started. Allegations were made by the appellant that the documents were abstracted from the record in the High Court and placed in the record of the execution case at Asansol. It is unnecessary, however, to consider this question because learned advocate for the respondent conceded before us that no fresh certificate of non-satisfaction was sent by the High Court to the Court of Asansol after receipt by the High Court of the certificate under S. 41 despatched by the Asansol Court to the High Court and received by the latter on 11th March 1932. It will be seen therefore that no fresh certificate of non-satisfaction was sent by this Court to Asansol which would give that Court jurisdiction. The respondent's case is that the Asansol Court had jurisdiction throughout and had not sent any certificate under S. 41 which would deprive that Court of its jurisdiction.

[11] It is quite clear that the Court at Asansol had no inherent jurisdiction to execute a decree made on the Original Side of this Court. A decree of this Court however could be transferred to Asansol for execution under the provisions of S. 39, Civil P. C. which is in these terms:

"(1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court, which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction."

[12] It is common ground that the decree in question could be and was transferred by this Court to the Court at Asansol for execution.

[13] Section 41 of the Code provides:

"The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure."

[14] When a decree is sent by the Court which passed it to another Court for execution a copy of the decree together with a certificate of non-satisfaction or part satisfaction is sent to the Court which has to execute the decree and it is clear that when the Court to which these documents are sent, receives the documents it then has jurisdiction to execute the decree. It is admitted that this Court sent a copy of the decree and a certificate of non-satisfaction to the Asansol Court and therefore that Court had jurisdiction to execute the decree and therefore had jurisdiction to entertain the first application for execution which resulted in Money Execution Case No. 296 of 1931.

[15] As I have stated earlier, this application was dismissed for default and there can be no doubt that a certificate was sent to this Court giving the result of the application for execution. According to the judgment-debtor appellant this was a certificate of non-satisfaction under S. 41, Civil P. C., whereas according to the respondent it was nothing more than an intimation that the first attempt at execution had failed.

[16] The certificate was in Form No. 5 of Appendix E, Civil P. C., that is, in the form of a "certificate of execution of a decree transferred to another Court" under O. 21, R. 6 of the Code. This Court has adapted that form for certificates under S. 41 of the Code and there is a note on the form that the form may also be used for certificates under S. 41 of the Code. Such a form was undoubtedly used and the details of the execution are given in the form and under the column 'How the case is disposed of" appear the words "Dismissed for default, 27th February 1932."

[17] It is clear, therefore, that the Court at Asansol intended this document to be a certificate under S .41 of the Code, that is a certificate of non-satisfaction. It is urged however that the Court at Asansol could never have intended this certificate to be a certificate under S. 41 of the Code because it had not complied with the Rules of the Court. Rule 264 of the Civil Rules and Orders (Part I) of this Court provides that a covering letter should be sent with a certificate of non-satisfaction. But there is no covering letter on the record of this Court and it would appear that no such letter was sent with this certificate. The respondent contends that as R. 264 was not complied with, it is clear that the document was never intended to be a certificate of non-satisfaction under S. 41 of the Code.

[18] The learned Subordinate Judge attached no importance to the failure to send the covering letter with the certificate and I think rightly. Rule 264 of the Civil Rules and Orders referred to above is in these terms:

"Decree sent to the High Court for execution under S. 39 and certificates communicating the result of execution proceedings to the High Court under S. 41 of the Code, shall be accompanied by covering letters."

[19] It is difficult to appreciate what was in the mind of this Court when this rule was drafted. A covering letter as a rule contains nothing more than a statement that accompanying the letter is a certain document and I cannot see that the absence or otherwise of a covering letter can affect the nature of the document sent. If it was a notice of non-satisfaction under S. 41 of the Code it would, I think, be such a notice with or without a covering letter and I think the learned Subordinate Judge was right in not attaching any importance to the want of a covering letter.

[20] It is clear, however, that the Court at Asansol did not send with the certificate purporting to be one under S. 41 of the Code a copy of the decree which had been sent to it and that fact is also suggested to be of importance. It is urged by the respondent that if the Asansol Court really intended the certificate to be one under S. 41 it would have sent a copy of the decree along with it.

[21] I think there can be no doubt that the certificate sent was a certificate of non-satisfaction under S. 41 of the Code. It was sent in the form prescribed by this Court for such certificates. If it was not intended to be a certificate of non-satisfaction then there was no need for the Court at Asansol to send any intimation at all.

[22] Mr. Atul Gupta on behalf of the respondent has contended that all that the Asansol Court had intended when sending this certificate was to intimate to this Court out of courtesy that the first attempt at execution at Asansol had failed. It was contended that the Court at Asansol was informing this Court quite unnecessarily of the fate of other proceedings. A similar certificate was sent to this Court on 1st February 1934 when a sale in the second execution case was set aside. This, it is said, was not necessary, but the certificate shows that it was intended as a certificate of non-satisfaction. It shows that a

sale was held and that sale was set aside and the execution case dismissed on 29th January 1934.

[23] I cannot assume that the Asansol Court never intended to act under S. 41 of the Code and that it was merely out of courtesy informing this Court of the result of various steps in in the execution.

[24] Further it appears to me that the Court at Asansol did intend that the certificate should be a certificate under S. 41 because when the second execution case was commenced in 1932 the first order in the case makes it clear that the Court assumed that it had jurisdiction, because it wrongly thought that a fresh certificate of non-satisfaction had been received by the Court at Asansol. The first order in the second execution case is dated 24th November 1932 and is in these words:

"Register. Let the certificate of non-satisfaction received be annexed to the record. Issue notices under O. 21, R. 22, Civil P. C. upon the judgment-debtors returnable on 23rd December 1932."

[25] From the terms of this order it is clear that the Asansol Court was of opinion that what gave it jurisdiction to entertain the second execution case was the fact that a fresh certificate of non-satisfaction had been received from this Court, though in fact no such certificate had ever been received. This order, I think, makes it clear that the Asansol Court was of opinion that a fresh certificate of non-satisfaction from this Court was necessary to give it jurisdiction and it could only have held that view if it was of opinion that the Court at Asansol had lost jurisdiction to execute the decree by reason of something which it had done in connection with the earlier execution case. The only thing that it had done in connection with the earlier case which could deprive it of jurisdiction was to send to this Court what purported to be a certificate of non-satisfaction under S. 41, Civil P. C.

[26] For these reasons I am satisfied that the Asansol Court not only sent what purported to be a certificate of non-satisfaction under S. 41 of the Code to this Court, but intended such certificate to be a certificate of non-satisfaction. I do not agree with the learned Subordinate Judge that the document was never intended to be such a certificate and was only an intimation that the first attempt at execution had failed.

[27] Mr. Atul Gupta on behalf of the respondent has contended that the circumstances existing in this case when the first application for execution was dismissed for default did not warrant the despatch of a certificate of non-satisfaction under S. 41 of the Code. He relied upon the words of S. 41 which are :

"The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution or where the former Court fails to execute the same the circumstances attending such failure."

[28] Mr. Gupta's argument is that the transferee Court was never intended by the Code to send a certificate of non-satisfaction unless it had failed to execute the decree. It is only when the Court is satisfied that it can do no more towards executing the decree that such a certificate should be sent. Failure to execute the decree at the first attempt for non-appearance of the decree-holder is not, according to Mr. Gupta, total failure to execute the decree. The Court, according to the respondents should have waited and should not have sent a certificate of non-satisfaction until it was clear that it could do nothing more to execute this decree. It, however, sent what purported to be a notice under the section when the first attempt to execute failed for non-appearance of the decree-holder.

[29] I am inclined to think that the construction placed upon this section by Mr. Atul Gupta is right. But that does not solve the question. If what was sent to this Court was a certificate of non-satisfaction under S. 41 then that deprived the Asansol Court of jurisdiction whether the certificate should or should not in the circumstances have been sent. The fact that the certificate was sent when it should not have been sent cannot affect the question if the certificate was intended to be a certificate of non-satisfaction as I hold it was.

[30] Reliance was placed by Mr. Gupta upon the case of *Abda Begam* v. *Muzaffar Husen Khan*, 20 ALL. 129: (1897 A. W. N. 218) the headnote of which reads as follows:

"The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or has executed it so far as that Court has been able to execute it within its jurisdiction and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree and has certified that fact to the Court which forwarded the decree. The mere striking off of an application for execution on the ground of informality in the application does not terminate the jurisdiction of the Court to execute the decree, nor render it necessary for the Court to send any certificate to the Court which forwarded the decree for execution."

[31] In the Allahabad case the first application for execution made in the transferee Court was struck off on the ground that it did not comply with certain sections of the Code then in force. Later the Subordinate Judge of the transferee Court certified to the Court that passed the decree, that on the objection of the judgment-debtor the application for execution was struck off. On the same day, on which this certificate was sent, the decree-holder applied

again to the transferee Court to execute the decree. The application, however, was dismissed on the ground that the transferee Court was no longer seized of the case and was *functus officio*. On appeal, however, the High Court held that the transferee Court in spite of the certificate which it had sent had jurisdiction to entertain the execution. The Court appears to have thought that the document which was sent was not a certificate of non-satisfaction and indeed it was not. It was merely an intimation that an application for execution had been struck off whatever that phrase may mean. In the United Provinces and in other Provinces it has been repeatedly held that striking off an application for execution is not in fact a dismissal and applications for execution struck off or, to use a familiar phrase used in those provinces, "consigned to the record room," may be revived. Those orders are not regarded as complete dismissals of the application. At p. 132 the Bench which decided the Allahabad case observed :

"In our opinion the Court of the Subordinate Judge of Cawnpore did not fail to execute the decree within the meaning of S. 223; it merely struck off an application on the ground of informality. We further consider that the case was not a case in which the Subordinate Judge of Cawnpore was justified in sending any certificate to the Court at Lucknow. Neither of the events had arisen which would have justified the Subordinate Judge in sending any certificate under S. 223, for there was neither execution nor failure."

[32] The facts of the Allahabad case differ from the facts of the present case. In the case before us the execution application had been dismissed, though for default, and that was the end of the application. In the Allahabad case the application had simply been struck off on the ground of informality and I have little doubt that it could have been revived on the informalities being corrected. In any event in the Allahabad case there was nothing to indicate that execution in the transferee Court could not proceed. Whereas in the case before us the Asansol Court might well have come to the conclusion that any attempt to execute in that Court was hopeless and it could have inferred that fact from the absence of the decree holder in support of his application. Further in the Allahabad case the certificate which was sent made it clear that the application was only struck off and not that it had been dismissed for any reason.

[33] I am somewhat doubtful whether a Court can go into the question whether what purports to be a certificate under S. 41 was or was not such a certificate if on the face of it it clearly is such a certificate. In any event I do not think it necessary to consider the matter further because I am satisfied that the Asansol Court intended this certificate to be a certificate under S. 41 even if it is open to this Court to go into the question of what it did intend. There were grounds in the present case to justify the issue of such a certificate and I think it was issued and even if it was wrongly issued it deprived the transferee Court of jurisdiction because it was intended to be and was in fact a certificate under S. 41, Civil P. C.

[34] As I have stated earlier a copy of the decree was not returned to this Court with the certificate and the learned Subordinate Judge appears to have thought that to deprive the Asansol Court of jurisdiction the copy of the decree would have to be sent with the certificate of non-satisfaction. It is to be observed that the original decree is not sent to the transferee Court, but merely a copy of the same, and therefore it is by no means essential that the copy should be returned when the transferee Court notifies satisfaction or non-satisfaction. Further it is to be observed that there is nothing in the present Code of Civil Procedure that requires the transferee Court to return the copy of the decree along with the certificate of non-satisfaction. Section 41 of the Code is silent as to the return of the copy of the decree.

[35] The learned Subordinate Judge, however, relied upon a Full Bench decision of this Court in the case of *J. G. Bagram* v. *J. P. Wise*, 10 W. R. 46 : (1 Beng. L. R. 91), in which it was held that when a decree of one Court has been transmitted under Ss. 284 *et seq* of Act VIII [8] of 1859, to another Court for execution, and when that Court has struck off for default the first proceedings in execution of the judgment-creditor, the Court to which the decree has been transmitted has jurisdiction to allow the proceedings to be revived. At p. 50 Sir Barnes Peacock C. J., who delivered the judgment of the Full Bench observed :

"It is quite clear that the Court to which the decree was sent had jurisdiction over its own order striking off the case, whatever the striking off amounts to. As soon as a copy of the decree which is sent for execution to another Court is filed in the Court to which it is transmitted, it has the same effect as a decree of that Court, and by S. 283 that Court is to proceed to execute it according to its own rules in the like cases. The order for striking off the application for execution of the decree did not strike the copy of the decree off the records of the Court to which it was sent for execution; and as long as it remains there the Court to which it was sent may deal with it, and any application for execution of it as if it was a judgment of that Court. If in the present case, the decree had been a decree of the Backerganj Court, that Court would have had power to entertain the application."

[36] It is to be observed however that the provisions of the Code then obtaining were very different from the provisions of the present Code. There was no provision then similar to S. 41 of the present Code which required the

transferee Court to certify to the Court which passed the decree that the decree had been executed or that there had been a failure to execute the decree. It would appear that as long as a copy of the decree together with a certificate that satisfaction thereof had not been obtained within the jurisdiction of the Court that passed it remained with the transferee Court that Court had jurisdiction. This case therefore is no authority for the proposition that under the present Code the transferee Court retains jurisdiction if it retains a copy of the decree though it has sent a certificate of non-satisfaction under S. 41 of the Code to the Court that passed the decree.

[37] The case of *Muhammad Ibrahim* v. *Chhatoo Lal*, 5 Pat. 398 : (A. I. R. (13) 1926 Pat. 274) was relied upon by both parties. In that case a Bench held that the jurisdiction of the Court to which a decree has been sent for execution ceases as soon as the Court takes action under S. 41, Civil P. C, and certifies to the Court which passed the decree the circumstances attending the failure on the part of the transferee Court to execute the decree.

[38] The appellant urged that this case clearly decided that once the Asansol Court had sent a certificate of non-satisfaction to this Court, the Asansol Court had no further jurisdiction. Learned Advocate for the respondent contended that in this case the transferee Court had returned the copy of the decree. But if it had, Das J. who delivered the judgment of the Bench attached no importance whatsoever to that fact. It seems to me quite clear that this Patna case supports to the full the contention of the appellant that the Asansol Court ceased to have jurisdiction when it despatched a certificate of non-satisfaction after the first application for execution had been dismissed for default. It is to be observed that in the Patna case the certificate under S. 41 was a certificate sent after dismissal for default.

[39] The respondent also relied upon the case of *Maharajah of Bobbili* v. *Narasaraju*, 43 I. A. 238 : (A. I. R. (3) 1916 P. C. 16), in which it was held that when the decree of a District Court had been sent under the Code of Civil Procedure, S. 223, to the Court of a Munsif for execution and had not been returned to the District Court, the 'proper Court' within the meaning of the Limitation Act, 1908, Sch. 1 Art. 182 (5) in which to apply for execution, or to take some step-in-aid of execution of the decree is the Court of the Munsif. Consequently, in the above circumstances, an application in the District Court would not prevent the time for enforcing the decree from running (under Art. 182) from the date upon which it was made.

[40] In this case the Munsif to whose Court the decree had been transferred for execution neither returned the copy of the decree nor sent a notice of non-satisfaction and therefore it was held that an application made in the Court of the District Judge for execution before the Munsif certified non-satisfaction and returned the decree was an application made to a Court without jurisdiction. This is clear from the observations of Sir John Edge, who delivered the judgment of the Board, at p. 242 :

"As the decree of 5th April 1904 had by order of the Court of the District Judge been sent on 30th September 1904, to the Court of the Munsif Parvatipur for execution by the latter Court, and as the copy of the decree with the non-satisfaction certificate was not returned to the Court of the District Judge until 3rd August 1910, and as the petition of 13th December 1907, was for execution of the decree by sale of the immoveable property of the respondents which was within the local limits of the jurisdiction of the Munsif's Court, their Lordships having regard particularly to Ss. 223, 224, 228 and 230, Civil P. C. 1882, are satisfied that when that petition of 13th December 1907, was presented to the Court of the District Judge that Court was not the proper Court to which the application to execute the decree by sale of the immoveable property which had been attached by the Court of the Munsif should have been made and that the proper Court to which the application should have been made was the Court of the Munisif of Parvatipur as that was the Court whose duty it then was to execute the decree so far as it could be executed by that Court."

[41] It is true that in these observations Sir John Edge refers to the fact that the Munsif had neither returned a certificate of non-satisfaction as he was required by S. 223 of the Code of 1882 (now S. 41 of the present Code) nor a copy of the decree to Court which passed the decree. Section 223 did not require the transferee Court to return a copy of the decree and therefore it appears to me that no undue weight should be attached to the fact that the copy of the decree was not returned. I do not think that this Privy Council case is an authority for the proposition that to deprive the transferee Court of jurisdiction that Court must send not only a certificate of non-satisfaction, but also must return a copy of the decree sent to it. Neither the Code of 1882 nor the present Code required the transferee Court, in case of failure to execute, to return a copy of the decree, though doubtless in most cases it would do so when it sent a certificate of non-satisfaction. In my view there is nothing in the present law which requires a transferee Court when it has fully executed the decree or has failed to execute the decree wholly or in part, to return a copy of the decree sent to it along with a certificate of non-satisfaction. That being so, I think the learned Subordinate Judge was wrong in holding that the Asansol Court still retained jurisdiction by reason of the fact that a copy of the decree did not accompany the

certificate of non-satisfaction under S. 41, Civil P. C, which it sent to this Court when the first application for execution was dismissed for default.

[42] On the other hand I think that these cases show that once a certificate for non-satisfaction has been sent the transferee Court ceases to have jurisdiction. This view of the Privy Council case was taken by a Bench of this Court in the case of *Jatindra Kumar* v. *Ramesh Chandra*, 43 C. W. N. 412, in which a decree was sent for execution in Court B and that Court sent intimation of non-satisfaction to a Central Court which under the practice prevailing was to send such intimation to Court A which had passed the decree but no such intimation was sent by the Central Court and the decree-holder made an application for execution in Court B but that Court returned the application on the ground that it had already certified non-satisfaction and the decree-holder then applied to Court A and it was held that Court A had no jurisdiction.

[43] On appeal this decision was reversed and this Court held that Court A had jurisdiction.

[44] In this case though Court A had not actually received the certificate of non-satisfaction it had been sent by the transferee Court B to the Central Court for transmission to Court and, therefore Court B had ceased to have jurisdiction and Court A which had passed the decree had, therefore, jurisdiction when the application was made to it. This appears to me to be a case clearly in support of the appellant's present contention and we must follow it and hold that once certificate of non-satisfaction has been sent by the transferee Court to the Court that passed the decree the transferee Court ceases to have jurisdiction, though it might have failed to return the copy of the decree sent to it.

[45] From the above it is clear that after the Asansol Court sent the notice of non-satisfaction under S. 41, Civil P.C., it ceased to have jurisdiction over the execution of this decree and that being so, it should not have entertained the second application for execution. It however did so and two sales in the second execution were set aside and eventually a sale for Rs. 2,50,000 was effected which the Court refused to set aside.

[46] On behalf of the appellant it has been contended that if the Asansol Court had no jurisdiction to entertain the second application for execution then the whole of its orders were made without jurisdiction and are, therefore, null and void. That being so it is urged that an application could be made under Ss. 47 and 151 to set aside the sale as being a sale without jurisdiction.

[47] Mr. Atul Gupta contended that the appellant at the hearing before the learned Subordinate Judge conceded that no application under S. 47 lay and that the application must be treated as one under S. 151, Civil P C. The learned Subordinate Judge does make a reference to such an admission by Dr. Radha Binode Pal who was one of the learned Advocates for the appellant in the Court below. However, we are informed in argument before the learned Subordinate Judge, the leading Advocate Dr. Naresh Sen Dupta withdrew this concession and contended that the application was one under S. 47, Civil P. C. If there was an admission, it was on a point of law not binding on the appellant and further Mr. Atul Gupta does not press the point having regard to a statement made by Dr. Naresh Sen Gupta that he contended eventually that the application was one under S. 47, Civil P. C.

[48] Mr. Atul Gupta contended that if the application was one under S. 151, Civil P. C., then no appeal lay and that is so. But having regard to the statement of Dr. Naresh Sen Gupta we are bound to hold that this was an application under S. 47, Civil P. C., as it was stated to be and, therefore, an appeal lay from the order of the Subordinate Judge.

[49] In my view, the Court of the Subordinate Judge at Asansol had no inherent jurisdiction to entertain an application for execution of a decree made on the Original Side of this Court. A judgment delivered by a Court not competent to deliver it cannot operate as *res judicata* and in my view the orders of the Subordinate Judge of Asansol, being wholly without jurisdiction cannot be relied upon to found a defence upon the principles of *res judicata*. It is true that the appellant could and should have raised the question in the second execution case that the Asansol Court had no jurisdiction in the absence of a certificate of non-satisfaction from the High Court to entertain the application. But in my view though this point was neither made nor pressed. these orders of the learned Subordinate Judge in the second execution application cannot be urged as a bar to the present application under the doctrine of *res judicata*. It is true that S. 11, Civil P. C., does not apply to execution proceedings but it has been held by their Lordships of the Privy Council that the principles of the law relating to *res judicata* do apply to execution proceedings and Mr. Atul Gupta has urged that the present application is barred by *res judicata*. Dr. Naresh Sen Gupta on behalf of the appellant concedes that the doctrine of *res judicata* does apply to execution proceedings, but he has contended that the doctrine has no scope in the present case because the orders of the Subordinate Judge were wholly

without jurisdiction as there was lack of inherent jurisdiction in the Court.

[50] It appears to me that this is not a case of an irregular assumption of jurisdiction, but rather of a want of inherent jurisdiction. The Court at Asansol, as I have said, had no inherent jurisdiction to execute a decree made on the Original Side of this Court. It could only do so on receipt of a certificate of non-satisfaction from this Court and a copy of the decree. Having received neither, the Asansol Court when it entertained the second application, had no jurisdiction at all.

[51] The present case appears to me to be similar to the case of *Rajlakshmi Dassee* v. *Katyayani Dassee*, 38 Cal. 639 : (12 I. C. 464), where a suit was intentionally undervalued. The defendants raised no objection as regards valuation, and the suit was tried. The appeal was filed before the District Judge instead of before the High Court, in consequence of the undervaluation, and the District Judge decided the appeal, by a consent decree. It was held by a Bench of this Court that if a Court has no jurisdiction over the subject-matter of the litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities, and not only voidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they may be presented. It was further held that these principles apply not only to original Courts, but also to Courts of appeal and that jurisdiction could not be conferred upon a Court of appeal by consent of parties, and any waiver on their part could not make up for the lack or defect of jurisdiction. At p. 668 Sir Asutosh Mookerjee J. observed :

"It is an elementary principle of law, that if a Court has no jurisdiction over the subject matter, its judgment and orders are mere nullities, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they are presented. If a Court has no jurisdiction, its judgment is not merely voidable, but void, and it is wholly unimportant how precisely certain and technically correct its proceedings and decisions may have been, if it has no power to hear and determine the cause, its authority is wholly usurped and its judgments and orders are the exercise of arbitrary power under the forms, but without the sanction of the law."

[52] After citing certain cases the learned Judge at p. 669 observes :

"These cases lay down the doctrine that, where no jurisdiction exists, no action on the part of the plaintiff, no inaction on the part of the defendant, can invest the Court with any of the elements of power or of vitality, so as to convert the proceeding before it into a proper judicial process. If a Court assumes to act where it has no jurisdiction, its adjudications are all utterly void and have no effect either as an estoppel or otherwise. From this point of view the consent decree is entirely unavailing for want of jurisdiction, and consequently neither binds nor bars the plaintiff."

[53] It seems to me that this case establishes that the orders of the Subordinate Judge of Asansol in the second execution case are wholly null and void and can have no effect either as an estoppel or otherwise. In short, they cannot be pleaded in bar of the present application on the principles of *res judicata*. The decisions must be treated as if they had never been made and therefore the sale is wholly ineffective and must be set aside.

[54] In an earlier case of *Gurdeo Singh* v. *Chandrika Singh*, 36 Cal. 193 : (1 I. C. 913), the same learned Judge had to deal with a case not of inherent want of jurisdiction, but a case of an irregular assumption of jurisdiction. In that case a suit was instituted originally in the Court of the Second Subordinate Judge; the District Judge transferred the case to his own Court acting in the exercise of the powers conferred on him by S. 25, Civil P. C. of 1882. Subsequently, the District Judge transferred the case to the First Subordinate Judge as he himself was about to proceed on leave. The case was tried by him and no objection was taken by either party to the effect that the Subordinate Judge had no jurisdiction to try the case. On an objection taken as to the want of jurisdiction it was held that under S. 18 of Act XII [12] of 1887, the Subordinate Judge unquestionably possessed jurisdiction over the subject-matter of the litigation, and that therefore the case was not one of absolute want of jurisdiction, but was at best an irregular assumption of jurisdiction, and as no objection at an earlier stage of the proceedings was taken by the defendants appellants, they waived their right to take exception to the power of the Subordinate Judge to try the cause under authority of an order of transfer made by the District Judge.

[55] These cases purport to follow the well-known decision of their Lordships of the Privy Council in *Ledgard* v. *Bull*, 13 I. A. 134:(9 ALL. 191 P. C.). In that case a suit having been instituted in the Court of the Subordinate Judge who was incompetent to try it, the same was transferred by consent of parties to the Court of the District Judge for convenience of trial. It was held that such transference was incompetent, and that such consent did not operate as a waiver of the plea to the jurisdiction which was taken in the defendant's written statement and subsequently insisted upon. Dealing with this matter Lord Watson, who delivered the judgment of the Board at p. 144 observed :

"The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to entertain it, and that the order of trans-

ference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit, if it were competently brought, and their Lordships do not doubt that, in such a case, a defendant may be barred, by his own conduct, from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause in which the Judge is competent to try, the parties without objection join issue, and go to trial upon merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit."

[56] In this case their Lordships drew a distinction between lack of inherent jurisdiction and an irregular assumption of jurisdiction. Where there is an inherent lack of jurisdiction parties cannot by their mutual consent convert a proceeding into a proper judicial process. If they cannot do it by mutual consent *a fortiori* they cannot do it by not taking a point as to want of jurisdiction. If the proceeding cannot in the words of Lord Watson be converted "into a proper judicial process" then it seems to me that the orders of a Court in such a case cannot possibly operate by way of *res judicata*.

[57] The same view has been taken in *Lakhmi Chand* v. *Madho Rao*, 52 ALL. 868: (A.I.R. (17) 1930 ALL. 681), where it was held that in the absence of a certificate from the Collector a civil Court had no jurisdiction to try a suit relating to a pension or grant of money or land revenue made by Government and a judgment of a civil Court in such a suit without a certificate under S. 6, Pensions Act, could not operate as *res judicata*.

[58] A similar case was *Raghubir Saran* v. *Hori Lal*, 53 ALL. 560 : (A. I. R. (18) 1931 ALL. 454), where a suit was brought in a Court in the District of X on a mortgage of property situate in the District of Y and a decree was passed without any adjudication of the question of jurisdiction. It was held that the decree did not operate as *res judicata* so as to bar a suit to set aside the decree for want of jurisdiction.

[59] Mr. Atul Gupta eventually contended that possibly these orders of the learned Subordinate Judge could not be pleaded as a bar to a suit brought for setting aside the sale and for recovery of possession of the property if it had been handed over to the auction purchaser. It must be remembered in the present case that the auction purchaser was the decree-holder himself and a dispute regarding this sale is a dispute between the parties to the decree relating to the execution, discharge or satisfaction of the decree. Such matters must be agitated by proceedings under S. 47, Civil P. C., and therefore it would appear to me that no suit would lie in the present case. In any event I cannot see why, as the principles of *res judicata* are applicable to execution proceedings, the same rule should not apply to a subsequent application in execution and to a suit. Why should these orders not operate as *res judicata* in a suit, but operate as *res judicata* in a subsequent application in execution proceedings? Mr. Atul Gupta contended that if these orders of the learned Subordinate Judge could not be pleaded as a bar to the present application then applications under S. 47 would be interminable and that it would always be open to the judgment-debtor to harass the decree-holder by alleging want of inherent jurisdiction. It must be observed, however, that there are comparatively few cases in which the want of inherent jurisdiction can be urged and the fact that the decree-holder might be harassed is no reason for not giving effect to the contentions of the appellant if they were well-founded.

[60] Lastly, it was urged by the appellant that a Court has inherent power to correct its own proceedings when it has been misled, for example, by the fraud of one of the parties. Reliance was placed on a Bench decision of this Court in *Peary Choudhury* v. *Sonoory Dass*, 19 C. W. N. 419 : (A. I. R. (2) 1915 Cal. 622). In that case a decree passed by consent in an appeal was set aside on an application by the respondent under O. 41, R. 19, Civil P. C., the Court finding that the appellant got the service of the notice of the appeal suppressed and had a false and fraudulent *vakalatnama* and a petition of compromise filed and that the respondent came to know about the compromise decree only after process in execution of the decree was taken out. The Bench held that O. 41, R. 19 had no application to the case, but the decree could be set aside on review under O. 47, R. 1, and the Court had also inherent jurisdiction to set aside the decree. The Bench further observed that it was an inherent power of every Court to correct its own proceedings when it had been misled.

[61] In the present case the Court at Asansol was undoubtedly misled because the first order in the second execution case dated 24th November 1932, presupposes the existence of a fresh certificate of non-satisfaction and such is ordered to be annexed on the record. How the Court was misled is not clear, but it was undoubtedly due to the fault of the respondent decree-holder, because at that stage the judgment-debtor appellant was not before the Court. If the decree-holder misled the Court, as he must have, then it appears to me that this Bench decision applies and that the Court has inherent power to correct

its own proceedings. The only way in which it can correct its own proceedings is to set aside this sale which was wholly without jurisdiction. In my view the learned Subordinate Judge was wrong in holding that the application was barred by the doctrine of *res judicata*. The appellant did in his objections vaguely raise the question of jurisdiction, but even so the matter was never pressed and never adjudicated upon. Whether adjudication would have affected the question the Court need not consider as all that can be argued is that the question of jurisdiction could and should have been raised and therefore cannot be agitated again. In my view the orders did not preclude the appellant from urging that the sale should be set aside and in my opinion the learned Subordinate Judge should have set aside this sale for want of jurisdiction.

[62] In the result therefore this appeal is allowed. The order of the lower Court is set aside and the sale is set aside and the whole proceedings are held to be void and of no effect. The appellant is entitled to his costs in this Court and in the Court below. I would assess the hearing fee in this Court at ten gold mohurs.

Sarkar J.—I agree.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 296 *[C. N. 99]*

ROXBURGH J.

Ashutosh Bhattacharjee — Plaintiff — Appellant v. *Satindra Kumar Choudhury and another — Defendants — Respondents.*

F. A. T. No. 1296 of 1949, D/- 9-2-1950.

Court-fees Act (1870), Sch. 1, Art. 1 — Appeal regarding costs only — Costs whether form 'subject-matter in dispute.'

It is an admitted practice of the Calcutta High Court that where a part of the main subject-matter is in dispute in appeal, even though there is a specific dispute about the costs because they have not followed the event, no fee is charged ; in other words, the amount of costs in that case is not taken to be part of the subject-matter in dispute. No difference can be made in the case where the dispute on the main subject-matter, so to speak, in the appellate Court vanishes to zero and the question is of about costs only. The practice should be consistent. Thus where an appeal relates only to the question of costs in suit for specific performance of an agreement of sale of property valued at Rs. 75,000 though it is governed by Art. 1 of Sch. I. no court-fee is payable as the costs are not to be taken as part of the subject-matter in dispute. [Para 12]

Annotation : ('49-Com.) Sch. 1, Art. 1, N. 16, Pt. 1.

Paresh Nath Mukherjee and Chandra Nath Mukherjee — for Appellant.

J. Mazumdar Asst. Govt. Pleader — for the State.

Order.— This is a reference under S. 5, Court-fees Act. The appellant in this case obtained a decree for specific performance of a contract of sale of some immovable property, valuing the suit at Rs. 75,000. The lower Court directed that the parties would bear their own costs. The appeal to this Court relates only to the order which in effect deprives the appellant of the cost which he would ordinarily expect to receive. The memorandum of appeal was filed with a court-fee stamp of Rs 2 only. The Stamp Reporter demanded an *ad valorem* court-fee on the amount of costs. The matter was placed before the Taxing Officer and has now been referred to me for decision.

[2] Two decisions of this Court relating to the matter of court-fees chargeable in respect of costs are referred to in the reference by the Taxing Officer, viz., a decision of Nasim Ali J. in the case of F. A. T. No. 2488 of 1937 (*Kshirode Chandra Sen* v. *Sm. Bhagbati Dasi*) and a decision of Chatterjea J. in the case of *Kamal Kumari* v. *Rangpur North Bengal Bank Ltd.*, 25 C. W. N. 934 : (A. I. R. (8) 1921 Cal. 55).

[3] In the course of arguments my attention has also been drawn to a decision of Mitter J. in the case of *Jyoti Prosad* v. *Jogendra Ram Roy*, 32 C. W. N. 1105 : (A. I. R. (15) 1928 Cal. 878).

[4] The case of *Kamal Kumari Devi* v. *Rangpur North Bengal Bank*, 25 C. W. N. 934: (A. I. R. (8) 1921 Cal. 55) arose out of a cross-objection where costs had been disallowed in a suit on a mortgage. Chatterjea J. first considered the general question as to the liability for court-fees in respect of a dispute in appeal relating to costs whether alone or whether also joined with an appeal as to the main subject-matter. He pointed out that it had been the regular practice of this Court that in no case were any court-fees charged in respect of a dispute as to costs where there was also an appeal with regard to the main subject-matter in dispute. He then discussed various cases of other Courts including in particular *In re Makki*, 19 Mad. 350 and found that no distinction could be made between cases where the appeal related to the whole subject-matter of the original suit, or only to part thereof. In particular he cited as an example the case of a suit for Rs. 1,000 with a decree for Rs. 990, no costs being allowed. He pointed out that if there was an appeal in respect of Rs. 10 not allowed, as well as in respect of the whole costs, court-fees would be charged on Rs. 10 only. He also relied on two cases of the Privy Council on the question of the meaning of the "subject-matter in dispute" viz., *Doorga Doss* v. *Ramanath* 8 M I. A. 262 : (1 Sar 772) and *Nilmadhab Dass* v. *Bishumbhar Doss*, 13 M. I. A. 85: (3 Beng. L. R. 27 P. C.)

[5] This decision was referred to by the Taxing Officer in the reference before Nasim Ali J. in the case of *Kshirod Chandra Sen* v. *Sm. Bhagabati Dasi*, in F. A. T. No. 2488 of 1937, but

was not discussed by the latter. The case before Nasim Ali J. related to an appeal against an award under the Land Acquisition Act, and was really disposed of as covered clearly by S. 8, Court fees Act. Nasim Ali J. observed:

"Where the relief as to costs is the only relief claimed in the appeal. the value of the subject-matter of the apoeal is the amount of costs in dispute in the appeal. Further it is conceded by the learned Advocate for the appellant in this case that the subject-matter of the present appeal is really the difference between the amount awarded as compensation to the appellant and tha amount claimed by the appellant in this appeal as the amount of costs is to be deducted from the amount of compensation claimed by the appellant."

[6] It would seem, therefore, that although there was an observation by Nasim Ali J. on the question which arises in the present case, the decision in the case was really based on S. 8, Court-fees Act.

[7] The case of *Jyoti Prosad* v. *Jogendra Ram Roy*, 32 C. W. N. 1105: (A. I. R. (15) 1928 Cal. 878) was a partition case in which on appeal the only question in dispute was as to costs. Mitter J. held that the case was nevertheless one clearly governed by Art. 17 of Sch. II and the fee payable was Rs 15.

[8] The cases cited have discussed the various cases of different Courts in which similar questions had arisen. The judgment of Chatterjee J. has itself been the subject of later discussion in such cases as *Ma Shin* v. *Maung Shwe Hnit*, 2 Rang. 637: (A. I. R. (12) 1925 Rang. 145) and *Chiranji Lal* v. *Bool Chand*, 52 ALL 1020: (A. I. R. (17) 1930 ALL. 832) and the view there expressed has not been accepted. Some comment was also made in the *Rangoon case* on Chatterjee J. reference to the decisions of the Privy Council.

[9] There can be no doubt that ordinarily where there is an appeal against a decision where the order that has been made as to costs is the normal order, the costs following the event, no one, I think, has ever suggested that although the costs are included in the decree, on appeal any court-fee has to be paid in respect of the costs calculated separately. This practice, in my opinion, seems to be based on the view which was expressed in the Privy Council cases cited. Costs are not regarded as being any part of a subject-matter in dispute either in the suit or in the appeal. In the appeal, the appellant does not in such an event really dispute the order as to costs for it is the natural order that is ordinarily made following the decision as to the main subject-matter in dispute, and if he himself succeeds in the appeal in regard to the main subject-matter, automatically he will expect to succeed with regard to the costs.

[10] The question then arises whether any difference is created where costs do not follow the event and the party affected by the order appeals against the order as to costs either alone or along with an appeal as to the main subject-matter. The same problem also arises in a cross-objection. The matter was tersely dealt with by Sir Arthur J. H. Collins in the case of *In re Makki*, (19 Mad. 350) by, saying:

"The appellant has made the costs the subject-matter of dispute, and therefore, a court-fee stamp is leviable."

[11] Taking the question in its widest form, the difficulty I should feel in accepting that view, apart from the question of what has been the practice in this Court, is that it seems to ignore the problem, which was pointed out by Mitter, J. in the case of *Jyoti Prosad* (32 C. W. N. 1105: A. I. R. (15) 1928 Cal. 878) referred to above, in a case coming under Sch. II Art. 17. The matter seems more simple if the main subject-matter in dispute is one on which court-fee is payable *ad avlorem* and comes under Art. I, Sch. 1, and by following the view of Sir Arthur J. H. Collins it can be said that all that is necessary is to add the costs, where specifically to be in dispute, to the main amount in dispute and charge court fee accordingly. The same, as pointed out by Mitter J., cannot be easily done if the main subject matter in dispute has no value and the case comes under Art. 17 of Sch. II.

[12] But in any case the matter seems to me, so far as this Court is concerned at any rate, to be settled by the admitted practice that at any rate where a part of the main subject-matter is in dispute in appeal, even though there is a specific dispute about the costs because they have not followed the event, no fee is charged: in other words, the amout of costs in that case is not taken to be part of the subject matter in dispute. I cannot see how, if that is the practice in such a case any difference can be made in the case where the dispute on the main subject matter, so to speak, in the appellate Court vanishes to zero. It seems to me that the practice should be consistent and while agreeing that in a case, such as the present. which is admittedly one under Art. 1 Sch. 1, court-fee leviable is to be calculated under that Article, I come to the conclusion that as the costs are not to be taken as part of the subject-matter in dispute, the slightly anomalous result is reached that there is an appeal, though the amount of the subject-matter in dispute being in the particular case is nil. The court-fee payable under Art. 1 of Sch. 1 there is also nil, because, in my opinion the fees payable are 6 annas on Rs. 5 or part thereof, and here the so called part is nothing : nothing cannot, in my opinion, be deemed to be a part of something. The Court-

fees Act is in essence a taxing statute and if the interpretation given is deemed by the powers concerned not to achieve the results they wish, there is no difficulty in their making specific provision for this problem of appeals relating to cost only.

[13] I should mention that in the case of *Kamal Kumari Devi* v. *Rungpur North Bengal Bank*, 25 C. W. N. 934 : (A. I. R. (8) 1921 Cal. 55), Chatterji J. was dealing with a cross-objection and made it specifically clear that he expressed no opinion as what is to be done as to the memorandum of appeal; but, on the other hand, in view of the manner in which he dealt with the cross-objection, there can be little doubt that he would not have followed the view I now express. Indeed so far as I can see, there can be no difference between the two cases and both the cross-objection and the memorandum of appeal come under Art. 1 Sch. I and are chargeable either as I have indicated, if the view is taken as I have done that the amount of costs does not form part of the subject matter in dispute, or is chargeable in full *ad valorem* on the view taken by other High Courts. I cannot see how either can be held as coming under Art. II Sch. II or Art. 1 D of Sch. II. All that section 6 of the Court-fees Act says is that certain documents are to be chargeable with certain fees according to the Schedules. It nowhere said that every document filed in a Court is necessarily chargeable with a fee specified somewhere under the Court-fees Act, and if it cannot be fitted under one, or if the article under which it appears to come does not give any amount of fee as chargeable then by some process of reasoning it must somehow or other be fitted under some other Article.

[14] I would also point out that some if not all of the reasons given by Chatterjea J. for distinguishing between the case of a memorandum of appeal and a cross-objection appear to have lost their validity in view of the amendment of S. 2, Court fees Act, 1870 by Bengal Act VII (7) of 1935 whereby a suit has been defined as including an appeal, and an appeal as including a cross-objection.

[15] At any rate, so far as the memorandum of appeal is concerned, the decision of Chatterjea J. left the matter entirely open. In my opinion, in a case like the present one, it clearly comes, as I have said, under Art. 1 Sch. I, although the result is that the fee payable is nothing. The court-fee paid in this case is more than adequate.

D.R.R. *Reference answered.*

A. I. R. (37) 1950 Calcutta 298 *[C. N. 100.]*

G. N. DAS AND DAS GUPTA JJ.

Midnapore Zemindary Co. Ltd. — *Defendants-Appellants* v. *Naba Kumar Singh Dudhoria and others* — *Plaintiffs-Respondents.*

Letters Patent Appeal No. 2 of 1948, D/-9th February 1950, against judgment of Biswas J., in A. F. A. D. No. 1736 of 1943, D/-27th February 1948.

Limitation Act (1908), S. 9 — Tenancy Law — Bengal Tenancy Act (VIII [8] of 1885), S. 185 and Sch. III, Part I, Art. 2 (b)—Limitation—Extension in case of suspended cause of action.

Under the ordinary law of limitation as enacted in S. 9, Limitation Act, 1908, the period of limitation can be extended in three classes of cases, viz., (1) where injustice has been caused by an act of Court, (2) where the cause of action was satisfied and (3) where the cause of action was cancelled. [Para 8]

Though S. 185, Beng. Tenancy Act expressly makes S. 9, Limitation Act, inapplicable to the suits specified in Sch. III of the Act, it has been held that limitation may be extended when the claim to recover the rent is either satisfied or extinguished or rendered legally unenforceable in consequence of a transaction to which the defendant is a party and the validity whereof is in controversy and awaits a final adjudication. [Paras 12, 15]

Where therefore in a suit to recover rent for accreted land, the High Court held that the landlord had no right to recover the rent and the plaintiff succeeded in the Privy Council, his right to recover such rent was suspended so long as the decision of the High Court stood and he was entitled to the extension of period of limitation under the above principle for recovery of rent for the next period. The defendant who had been successful in his plea of non-liability to pay rent in High Court and had thus compelled the plaintiff to appeal to the Supreme Court, could not be allowed to turn round and plead bar of limitation to evade the liability to pay rent: *Case law discussed.* [Paras 9, 18 and 19]

Annotation: ('42-Com.), Limitation Act, S. 9, N. 11.

Jnanendra Nath Mukherji — for Appellants.

Apurbadhan Mukherji and Amiya Kumar Mukherjee —for Respondents.

G. N. Das. — This appeal is at the instance of the defendant in a suit for recovery of arrears of rent limited in the course of the trial to a claim for the year 1344 B. S. The facts are not in controversy and may be briefly stated as follows: The defendant held a putni taluk in respect of lands appertaining to touzi No. 523 under the plaintiffs. In the year 1914 the lands which are the subject-matter of this suit for rent accreted to the parent touzi No. 523 and were formed into a temporary settled estate bearing touzi No. 3653. In the record of rights finally published under Part II Chap. X, Bengal Tenancy Act a sum of Rs. 1028-2-0 was settled as the rent payable in respect of the accreted lands. Two suits for rent were instituted by the plaintiffs for recovery of rent for two successive periods, namely 1328 to 1331 B. S. and 1332 to 1335 B. S. These suits for rent were ultimately dismissed by this Court in second appeal on the ground that no additional rent was payable in respect of the lands in suit. The decision of this

Court was pronounced on 29th July 1938 and is reported in *Midnapore Zemindari Co.* v. *Chandra Singha*, 68 C. L. J. 305 : (A. I. R. (26) 1939 Cal. 1). Against this decision the plaintiffs took an appeal to the Privy Council. The appeal succeeded. The decision of the Judicial Committee was pronounced on 18th December 1941 and is reported in *Chandra Singh* v. *Midnapore Zemindary Co. Ltd.*, 69 I. A. 51: (A. I. R. (29) 1942 P. C. 8). The effect of the decision of the Privy Council was that the defendant was held to be liable to pay rent to the plaintiffs at the rate of Rs. 1028-2-0 per annum. Consequent on the decision of the Privy Council, on 22nd July 1942 corresponding to 5th Sraban 1349 B. S. the plaintiffs instituted the present suit for recovery of rent.

[2] The defence to the suit was one of limitation. This defence succeeded in the Courts below. On an appeal to this Court our learned brother Biswas J. was of the opinion that the claim was not barred by limitation. The appeal was accordingly allowed. In the present appeal by the defendant the only question which calls for our determination is a question of limitation.

[3] Under S. 53, Bengal Tenancy Act, (hereinafter called the Act) rent is payable subject to an agreement or established usage to the contrary, in four equal instalments falling due on the last day of each quarter of the agricultural year. Article 2 (b) Part I, Sch. III prescribes the period of limitation for a suit for recovery of arrears of rent to be three years from "the last day of the agricultural year in which the arrears fall due". In other words, the claim for the period in suit, that is 1344 B. S. became barred on 1st Baisakh 1348 B. S. but as 1st Baisakh 1348 B. S. was a holiday, a suit for recovery of the arrears of rent for 1344 B. S. had to be instituted on 2nd Baisakh 1348 B. S. The claim was, therefore, *prima facie* barred under Art. 2 (b) Part I, Sch. III of the Act. The suit was, therefore, *prima facie* liable to be dismissed under S. 184 of the Act.

[4] The defendant-appellant contends that this is the legal position and bases his argument on the plain terms of Art. 2 (b) Part I, Sch. III. His contention is that the time having once begun to run it was not suspended by reason of the pendency of the appeal before the Privy Council.

[5] For the plaintiffs respondents Mr. Apurba Dhan Mukherji urges that the plaintiffs were entitled to a suspension of the period of limitation from 29th July 1938, the date of the decision of this Court, negativing the plaintiffs' right to recover the rent claimed, to 18th November 1941, the date of the Order in Council when their right to recover rent was finally established.

[6] It is undisputed that if this period is added to the period of limitation prescribed by Art. 2 (b) Part I, Sch. III the claim is within time. The question is whether the plaintiffs are so entitled.

[7] The principle that once time begins to run no subsequent disability or inability to sue can stop the running of time was embodied in S. 11 of Act XIV [14] of 1859 and was re-enacted with some amplification in the later Limitation Act, namely Act XI [11] of 1871 and Act XV [15] of 1877 and is now contained in S. 9 of Act IX [9] of 1908.

[8] The scope of the section has been the subject of discussion in multitudinous cases. The cases bearing on the point were reviewed by Mukerji J. in the case of *Sm. Sarat Kamini Dasi* v. *Nagendra Nath Pal*, 29 C. W. N. 973 : (A. I. R. (13) 1926 Cal. 65) and the law was thus summarised at p. 988 :

"I am of opinion that except perhaps in cases where injustice has been occasioned by a Court by its own acts or oversights there is no scope for the application of any principles of equity in the administering of the statutes of limitation, that in point of fact the Judicial Committee has not, however, much the language used by their Lordships in some of the decisions may suggest the same, laid down any such principle as being of universal applicability and that all the decisions of the Judicial Committee as well as most of the cases decided in this country are supportable on grounds which are in no sense founded on any general equitable principle extraneous to or unauthorised by the statute. In cases in which the question arises as to the starting point of time for the purposes of limitation, these decisions are mostly reconcilable with a proper appreciation of what the cause of action means when the starting point is the cause of action or with a proper interpretation of the words used in the third column of the articles in other cases; and in cases where the question of suspension arises, if time has once begun to run it never again ceases to run, *but there may be satisfaction of a claim or the cancellation of a cause of action operating to suspend the rights of the plaintiff* who may, on the removal of the satisfaction or cancellation avail of a fresh cause of action which arises by reason thereof."

If the present case fell to be decided under the ordinary law of limitation as enacted in the Limitation Act (Act IX [9] of 1908) the period of limitation can be extended according to the above observations in three classes of cases, viz., (1) where injustice has been caused by an act of Court, (2) where the cause of action was satisfied and (3) where the cause of action was cancelled.

[9] The facts of the present case do not attract the second exception. In a broader sense of the word cancelled the third exception may apply and the time during which the right of the plaintiff to successfully recover the rent from the defendant was negatived by the decision of this Court may be excluded. The first exception is supported by the weighty observations of

Lord Eldon in *Pulteney* v. *Warren*, (1801) 6 Ves. 73 at p. 92 : (31 E. R. 944) :

"If there is a principle upon which Courts of Justice ought to act without scruple it is this: to relieve parties against injustice occasioned by his own acts or oversights at the instance of the party against whom the relief is sought."

[10] The above observations were relied upon by this Court in the case of *Lakhan Chandra*, v. *Madhu Sudan*, 35 Cal. 209 : (7 C. L. J. 59) and the time during which, as a result of an erroneous decision of a Court the plaintiffs' right of suit was in jeopardy, was excluded. The view taken by this Court was affirmed on appeal by the Privy Council in the case of *Nrityа Moni Dassi* v. *Lakhan Chandra*, 43 Cal. 660: (A. I. R. (3) 1916 P. C. 96).

[11] The principle above stated, supports the contention of the plaintiffs, in the facts of the present case where also, the erroneous decision of this Court which negatived the plaintiffs' right to receive rent from the defendant was responsible for the delay in the filing of the suit.

[12] The present case is, however, one which does not fall to be decided under the general law but under the provisions of the Bengal Tenancy Act. Section 185 of the Act expressly makes S. 9, Limitation Act, 1908, inapplicable to suits specified in Sch. III annexed to the Act.

[13] The reason for the exclusion is stated in Rampini's Bengal Tenancy Act, 4th Edn., under the notes to S. 185. The plain implication of the exclusion is that in proper cases the time for filing a suit may remain in abeyance. Thus in the case of *Mt. Ranee Surnomoyee* v. *Shashi Mokhee*, 12 M. I. A. 242 at p. 253 :(2 Beng. L. R. 10 P. C.), it was observed as follows:

"They must also respectfully dissent from another statement of the learned Judges of the High Court, to the effect that the appellant might have sued for these arrears pending the proceedings to set aside the sale of the putnee. It is clear, that until the sale had been finally set aside, she was in the position of a person whose claims had been satisfied, *and that her suit might have been successfully met by a plea to that effect.*"

[14] In the later case of *Hem Chandra* v. *Kali Prosanna*, 30 I. A. 177 at p. 181 : (30 Cal. 1033 P. C.), their Lordships of the Judicial Committee held that the proceedings in an earlier suit for enhancement of rent 'stayed the operation of the law of limitation."

[15] In my opinion the above cases proceed on the principle that limitation may be extended when the claim to recover the rent is either satisfied or extinguished or rendered legally unenforceable in consequence of a transaction to which the defendant is a party and the validity whereof is in controversy and awaits a final adjudication.

[16] The above view is also supported by the following observations of their Lordships of the Privy Council in the case of *Bassu Kuar* v. *Dhun Singh*, 15 I. A. 211 (11 ALL. 47 P. C.).

"And it would be an inconvenient state of the law if it were found necessary to institute a vain litigation under peril of losing the property if he does not."

[17] This principle was restated in a slightly different form in the case of *Nagendra Nath* v. *Suresh Chandra*, 59 I. A. 283: (A. I. R. (19) 1932 P. C. 165.):

"It is at least an intelligible rule that so long as there is any question sub judice between any of the parties, those affected shall not pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage."

[18] In my opinion it will be a lamentable state of the law if the defendant who had by an appeal to this Court successfully upheld his plea of non-liability to pay rent to the plaintiff and thereby compelled the plaintiff to resort to the highest Court for redress, is allowed to turn round and plead that the lapse of time occasioned by the said appeal, had relieved the defendant from his liability to pay the rent by the bar of limitation.

[19] In my opinion neither expediency nor justice nor the spirit of the law as contained in Art. 2 (b) Part I Sch. III read with S. 185, Bengal Tenancy Act compels the Court to give effect to such a plea of the defendant.

[20] The contention raised on behalf of the defendant appellant must therefore be overruled.

[21] The result therefore is that the decision of our learned brother Biswas J. must be affirmed and this appeal dismissed with costs.

Das Gupta J.—I agree.

D.R.R. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 300 *[C. N. 101.]*

G. N. DAS AND DAS GUPTA JJ.

Aparnath Mukherjee—*Plaintiff-Appellant* v. *Kanai Lal Chatterjee and others*—*Respondents.*

Letters Patent Appeal No. 8 of 1948, D/- 10-2-1950, against judgment of Amarendra Nath Sen J., in A. F. A. D. No. 1176 of 1943, D/- 20-7-1948.

Civil P C. (1908), S. 11—Pre-emption proceedings under Bengal Tenancy Act (1885) (as amended in 1938), S 26F —Question of status — Decision on— If res judicata—Tenancy Laws — Bengal Tenancy Act (VIII [8] of 1885) (as amended in 1938), S 26F.

As the proceedings under S. 26F, Bengal Tenancy Act, are instituted by an application and are not suits strictly so called, S. 11 does not in terms apply, but principles analogous to those embodied in the said section apply. [Para 7]

The express decision in a proceeding under S. 26F of the amended Bengal Tenancy Act to the effect that the tenancy in question is an occupancy holding is

res judicata in a subsequent suit between the same parties for a declaration that the tenancy is a mokrari mourashi holding and not an occupancy holding : 43 C. W. N. 1046; 46 C. W. N. 133 and A. I. R. (29) 1942 Cal. 445, *Disting.* [Para 15]

Annotation : ('44-Com.) Civil P. C., S. 11 N. 28.

Sitaram Banerjee and Md. Asir — for Appellant.

Shyamadas Bhattacherya — for Respondents.

G. N. Das J.—This appeal is by the plaintiff against a decision of our learned brother Sen J. The only question which has been canvassed before us on behalf of the appellant is a question of *res judicata*. The facts which bear on this question may be briefly stated as follows: Ramdhan, Panubala and Hiran Bala were co-sharer tenants of a holding, the share of Ramdhan being 8 annas and those of Panu and Hiran Bala 4 as. each. In March 1940 Ramdhan sold his 8 annas share to the plaintiff stating that the holding which was sold was an occupancy holding. The other co-sharers Panu Bala and Hiran Bala thereupon made an application for pre-emption under S. 26F, Bengal Tenancy Act as amended in 1938 (hereinafter called the Act). The plaintiff who was the opposite party in the pre-emption proceedings disputed the claim of the pre-emptors *inter alia* on the ground that the holding in question was a mokrari mourashi holding and that pre-emption under S. 26F, Bengal Tenancy Act could not be allowed. The learned Munsif held that the holding in question was an occupancy holding and on this finding made an order under S. 26F of the Act. The plaintiff who was the opposite party in those proceedings unsuccessfully filed an appeal before the lower appellate Court. Thereafter on 12th September 1941 the plaintiff raised the present suit for a declaration that he had a right to the tenancy as a mokrari mourashi raiyat to the extent of 8 annas share and for a permanent injunction restraining the defendant from taking possession on the ground that the decision in Misc. Appeal No. 12 of the 1st Court, Subordinate Judge, Hooghly, was erroneous.

[2] One of the defences taken to this suit was that the question whether the plaintiff was a mokrari mourashi tenant or an occupancy raiyat was concluded by the decision in the pre-emption proceedings. Both the Courts below concurred in holding that the status of the plaintiff was that of a mokrari mourashi raiyat and that the decision in the pre-emption proceedings did not operate as a bar to the re-agitation of this question and on these findings gave the plaintiff a decree. On appeal to this Court. Sen J. took a contrary view and held that the question of the status of the plaintiff was decided in the pre emption proceedings and that this decision operated as *res judicata*. The appeal was accordingly allowed by the learned Judge. It is against this decision that the present appeal has been taken.

[3] The sole question between the parties in this appeal is whether the decision in a proceeding under S. 26F of the amended Bengal Tenancy Act to the effect that the tenancy in question is an occupancy holding, is *res judicata* in a subsequent suit between the same parties for a declaration that the tenancy is a mokrari mourashi holding and not an occupancy holding.

[4] The proceedings under S. 26F of the Act start on an application and not by a suit. The procedure to be followed in such cases is by force of S. 143 (2) of the Act, not regulated by the Code of Civil Procedure but is subject to any rules which may be passed by this Court under S. 143 (1) of the Act.

[5] It is now fairly well settled that a question of title can be determined in such proceedings, though the Court is not bound to do so. *Hossein Ali* v. *Kala Chand*, 51 C. W. N. 415 : (A. I. R (34) 1947 Cal. 444), *Balai Chand* v. *Niharan Chandra*, 51 C. W. N. 644 : (A. I. R. (34) 1947 Cal. 410)

[6] It has also been decided in this Court that S. 26F cl (10) of the Act provides for only one appeal, a second appeal being incompetent—*Lord Bishop of Mylapur* v. *Meher Ali*, 41 C. W. N. 993 : (I. L. R. (1937) 2 Cal. 496); *Kulada Prosad* v. *Pratibhanath*, 62 Cal 149 : (A. I. R. (22) 1935 Cal. 91). Though cl. 10 does not expressly say that the order passed on such an appeal is final, the necessary implication is that the order passed on an appeal under S. 26F is final.

[7] As the proceedings under S. 26F are instituted by an application and are not suits strictly so called S. 11, Civil P. C. does not in terms apply, but as has been held in numerous cases principles analogous to those embodied in the said section apply. I may refer, in particular, to the latest pronouncement of the Judicial Committee of the Privy Council in the case of *Shivaraj* v. *Edappakath Ayissa Bi*, 54 C. W. N. 55 : (A. I. R. (36) 1949 P. C. 302) where the principles of constructive *res judicata* were made applicable to procedure in execution of a decree.

[8] In the present case the question of status was expressly put into issue and was decided in the previous proceedings under S. 26F.

[9] Mr. Banerjee appearing for the appellant strongly relies on the decision of this Court in the case of *Maha Luxmi Bank* v. *Abdul Khaleque*, 43 C. W. N. 1046. In that case, consequent on an order under S. 26J of the Act, directing the tenant to pay to the landlord the balance of the landlord's fees, the former instituted a suit for declaration that the holding in question was a mokrari mourashi holding and

for a permanent injunction restraining the latter from realising the money decreed in the S. 26J proceedings. This Court held that the decision on the question of status in the 26F proceedings was not *res judicata* though the order directing the payment of the landlord's fees was conclusive and binding between the parties and could not be impeached in a later suit.

[10] The reasons given in that judgment may be analysed as follows: (1) There was a vital difference between a suit and an application both as regards scope and the nature of the orders and the powers of the Court in dealing with the matter; (2) the Court dealing with an application under S. 26F cannot make any declaration as to the status of the tenant, (3) the question of the character of the tenancy cannot be deemed to be finally decided in proceedings under S. 26F which have been aptly described as summary proceedings; (4) the cases in which their Lordships of the Judicial Committee apply the principle of res judicata in cases outside S. 11, Civil P. C. fall into two classes, viz (a) where an interlocutory judgment has been passed in a proceeding and this was held to be conclusive in a later stage of the same proceeding; (b) where a contentious proceeding which though not technically a suit culminates in a final order which has all the charateristics of a decree and is open to challenge by way of appeal; and (5) on general principles as enunciated in *Barrs* v. *Jackson*, (1842) 57 R. R. 461: (14 L. J. Ch 433), either party may litigate for any other purpose provided the immediate object of the decision be not attempted to be withdrawn from its operation.

[11] It may be pointed out at the outset that the decision in the case of *Maha Luxmi Bank* v. *A. Khaleque* 43 C. W. N. 1046 on the question of *res judicata* was obiter inasmuch the Munsif who decided the 26J proceedings expressly refrained from deciding the question of status (see p. 1054).

[12] I am not unmindful of the fact that the above decision was followed in the case of *Biswa Nath* v. *Bhupendra Nath*, 46 C. W. N. 133; *Srish Chandra* v. *Kala Chand* 46 C.W.N.169: (A I R (29)1942 Cal 445). All the above three cases were however decided before the amendment of S. 26F in 1938, at a time when there was no provision for an appeal to a higher Court. This last fact, viz. that there was no provision for an appeal to a superior tribunal, was relied on as a circumstance to indicate that the proceedings under S. 26J, Bengal Tenancy Act, were of a summary character.

[13] Adverting now to the reasons given by the learned Judges in *Maha Luxmi Bank's case*, 43 C.W.N. 1046, I may however observe that it has been decided, as already stated, that the Court dealing with an application under S. 26F of the Act has power to decide the question of the title or of the nature of the tenancy if raised by the parties. It is also to be noted that in order to decide a question of *res judicata* the Court has to look to the substance of the matter and that the previous judgment which is relied on to raise the plea operates as an estoppel not merely as regards the actual decision but also as regards all the findings which are essential to sustain the judgment. *Lilabati* v. *Vishnu Chobey*, 6 C. L. J. 621 at p. 630; *Panchu Mondal* v. *Chandra Kanta*, 14 C. L. J. 220 at p. 224. (12 I.C. 9). It may also be noted that the proceedings under S. 26F under the amended law cannot be regarded as of a summary character. The adjudication made in such proceedings is open to challenge by way of an appeal.

[14] It is not, however, necessary for the purposes of the present case to pursue the matter further. All the three cases referred to already were decided prior to the amendment, in 1938 when the right of appeal was expressly conferred, and are distinguishable on this ground. The decision in the case of *Prosanna Kumar* v. *Adyasakti Debi*, 46 C.W.N. 1022: (A.I.R.(29)1942 Cal 586) has been distinguished and dissented from in the case of *Shankaracharjya* v. *Sademoni*, 49 C. W. N. 580.(A. I. R. (32) 1945 Cal 474) and *Balai Chand* v. *Nibaran Chadra*, 51 C. W. N. 644: (A. I. R. (34) 1947 Cal 410.) The case is distinguishable because in that case the question of the nature of the tenancy was not raised or decided in the proceedings uuder S. 26F of the Act and as such the decision under S. 26F of the Act could not operate as *res judicata*. The case was also decided under the unamended S. 29F of the Act.

[15] It is true that in applying the principle of *resjudicata* to cases which are not suits strictly so called the tests for deciding the validity of the plea must be coveal with the conditions embodied in S. 11 of the Code subject to this that the proceedings, the decision, whereof is said to be a bar were not suits strictly so called but part of the character of suits. If we apply this principle to the facts of this case, in my opinion there is no escape from the conclusion that the express decision on the question of status which was made in the 26F proceedings is binding on the parties in the present suit on the principle of finality in litigation. This view receives support from the Bench decision of this Court in the case of *Balai Chand* v. *Nibaran Chandra* 51 C. W. N. 644, : (A. I. R. (34) 1947 Cal 410)

[16] The sole contention raised by Mr. Banerjee in this appeal fails and this appeal must be dismissed with costs.

Das Gupta J.— I agree.

V.B.B. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 303 *[C. N. 102.]*

SEN AND K. C. CHUNDER JJ.

B. N. Roy—Petitioner v. *Shyam Sundar Sadhukhan—Accused—Opposite Party.*

Criminal Revn. No. 1156 of 1949, D/- 8th February 1950.

Bengal Food Adulteration Act (VI [6] of 1919), Ss. 6 (1) (v), 5 (1) (b) —S. 6 (1) (v) if governed by S. 5 (1) (b).

Section 6 (1) (v) is not governed by S. 5 (1) (b). S. 6(1)(v) is a distinct and separate section and it prohibits a person from keeping for sale mustard oil unless it is derived exclusively from mustard seeds. The case under S. 6 (1) (v) has nothing to do with saponification value or the iodine content of the oil nor has the Court, under that section, to consider when a presumption of adulteration should arise. [Para 3]

S. S. Mukerjee and Sunil Kumar Basu
—for Petitioner.

N. K. Basu and Sisir Kumar-Basu
—for Opposite Party.

Sen J.—This Rule was obtained against an order acquitting the opposite party Sham Sundar Sadhukhan of a charge under S. 6 (1), Bengal Food Adulteration Act. The order of acquittal was passed by Jonab S. M. A. Meerza, Magistrate, 1st Class, Serampore. Against this order an application was made to the District Magistrate and it was rejected. The Health Officer of the Serampore Municipality then moved this Court and obtained this Rule against the order of acquittal.

[2] The case is of a very simple nature and we are of opinion that the order of acquittal cannot stand. The accused has a shop in New Gate Street, Serampore, where he sells mustard oil. Samples of mustard oil exposed for sale in this shop were taken and sent to the Public Analyst. He has made a report which is Ex. 2. Therein it is stated *inter alia* that argemone oil was present in the sample. Upon this report being furnished the present prosecution was started.

[3] The learned Magistrate acquitted the accused on grounds stated in his judgment which we are not quite able to appreciate. There is the clear finding that argemone oil was present in the sample taken from the shop of the accused. This is the report of the Public Analyst and it does not seem to have been challenged. In the report certain other details have been given regarding the saponification value and the iodine content of the oil and from the report it seems that so far as the saponification value and the iodine value are concerned the mustard oil conforms to the standard laid down by the law. It seems that it is on this ground that the learned Magistrate has acquitted the accused. He says further that the quantity of the argemone oil present has not been stated. He presumes from the fact that the saponification value and the iodine value are within limits that the percentage of argemone oil was necessarily very small. What grounds he had for such presumption we do not know. The two questions are quite distinct and we are not aware of the fact that there is any inter relation between the presence of argemone oil and the saponification value and the iodine value in the oil. The learned Magistrate then goes on to say that it is a matter of common knowledge that argemone seeds are unavoidably mixed up with mustard seeds. After saying this he relies upon the case of *Mithan Lal* v. *Emperor*, 149 I. C. 222 : (A. I. R. (21) 1934 ALL. 439 : 35 Cr. L. J. 912) and says that in accordance with the above ruling the accused should bs acquitted. Learned Advocate appearing on behalf of the petitioner points out to us S. 6 (1) (v) of the aforesaid Act. According to that subsection the law prohibits a person from selling, exposing for sale, etc. mustard oil unless it is derived exclusively from mustured seeds. He then draws our attention to the provisions of S. 21 of the Act which says that any person contravening any of the provisions of the Act mentioned in the first column of the table just below the section shall be punished, etc. Now, in the table we find in col. 1, S. 6, subs. (1) and in col. 2 we find the following words: "Sale, etc. of milk, butter, ghee, wheat flour, mustard oil or notified article which ie not of the prescribed quality or not is labelled or marked in the prescribed manner." He argues that it has been conclusively proved that the oil has not been derived exclusively from mustard seeds and that therefore the provisions of S. 6 (1) of the Act have been disobeyed. It follows, he says, that the accused is punishable under S. 21 of the Act. Mr. Basu appearing on behalf of the accused relied upon S. 5 (1) (b) of the Act. He also relied upon the preamble of the Act and certain Notifications of the Government made under the provisions of the Act. His contention put shortly is that the presence of the argemone oil was minute and unavoidable and that consequently there should be no presumption that the oil was adulterated. That being so, he says, the order of acquittal is proper. In our opinion this contention cannot be upheld. Section 5 (1) (b) deals with the sale of food and it says that where any article of food is unavoidably mixed with some extrane-

ous matter in the process of collection or preparation an offence shall not be deemed to be committed where such extraneous matter is found in the food. That section has nothing whatever to do with the provisions of S. 6 (1) (v). Section 6 (1) (v) is a distinct and separate section and it prohibits a person from keeping mustard oil unless it is derived exclusively from mustard seeds In our opinion the case has nothing to do with saponification value or iodine content nor is it a case in which the Court has to consider when a presumption of adulteration should arise. Although it is framed with the object of preventing adulteration of food, it is not a section which is governed by S. 5, it is a distinct section and its wording is in our opinion absolutely clear and incapable of misapprehension. It prohibits the storing, or keeping for sale of mustard oil which is not derived exclusively from mustard seeds.

[4] We are of opinion therefore that the Court below has misdirected itself on the question of law. The matter is of serious public importance and we are of opinion that in the circumstances we should set aside the order of acquittal and direct a retrial in the light of the observations made above. The retrial shall be held by some other Magistrate who shall be appointed by the District Magistrate of Hooghly in this behalf.

Chunder J.—I agree.

G.M.J. *Retrial ordered.*

A. I. R. (37) 1950 Calcutta 304 *[C. N. 103.]*

LAHIRI AND GUHA JJ.

Buffatan Bibi and another—*Defendants*—*Appellants* v. *Sheikh Abdul Salim*—*Plaintiff*—*Respondent.*

A. F. A. D. No. 2074 of 1945, D/- 2-3-1950, against decree of Sub-J., 1st Court, Howrah, D/- 29-8-1945.

Muhammadan Law — Marriage — Dissolution — Agreement giving wife right of separate residence and maintenance and divorce—Contract Act (1872), S. 23.

An ante-nuptial agreement by a Muhammadan husband in a kabinnama that he would pay separate maintenance to his wife in case of disagreement and that the wife would have power to get herself divorced in case of failure to pay maintenance for a certain period is not opposed to public policy and is enforceable under the Muhammadan law. [Para 2]

The wife exercising the power under the kabinnama must establish that the conditions entitling her to exercise the power have been fulfilled. [Para 3]

Apurbadhan Mukherjee—for Appellants.

Sambhu Nath Banerjee (Sr.)—for Respondent.

Lahiri J. — This appeal is by defendants 1 and 2 and is directed against the judgment of the Subordinate Judge of Howrah by which he has decreed the plaintiff's suit for restitution of conjugal rights. Defendant 1 is the wife and defendant 2 is the father-in-law of the plaintiff. The plaintiff's case in the plaint is that he was married to defendant 1 and continued to live with defendant 1 quite happily till defendant 1 fled from the house of the plaintiff on the evil advice of her father. Thereafter the wife, that is, defendant 1, instituted a case for maintenance under S. 488, Criminal P. C., against the plaintiff, but that case was dismissed. The plaintiff requested defendant 1 to come to his house on many occasions but without success. Defendant 1 contested the suit by a written statement in which she alleged that under the terms of Kabinnama which was executed by the plaintiff before the marriage she had validly divorced herself from her husband and as such she was no longer the wife of the plaintiff and it was further alleged that the plaintiff was guilty of cruelty towards defendant 1. The suit was dismissed by the Court of first instance upon the finding that the plaintiff used to assault his wife and was otherwise guilty of ill-treatment towards her and as such he was not entitled to a decree for restitution of conjugal rights. On appeal by the plaintiff, the decision of the learned Munsif has been reversed by the Court of appeal below upon the view that the wife has failed to prove that the plaintiff was guilty of ill treatment towards her. With regard to the Kabinnama the Court of appeal below has held that an agreement between the husband and the wife to the effect that the wife should be free to leave the husband and take up residence elsewhere in case of being unable to agree with the husband is void. Against this decision of the Court of appeal below the present appeal has been filed by defendants 1 and 2.

[2] Mr. Mukherjee appearing on behalf of the appellants has contended in the first place that the proposition of law formulated by the learned Subordinate Judge as to the validity of the stipulation in the Kabinnama is wrong. It has been argued that under the Muhammadan law a husband enjoys an absolute power of divorcing his wife and he may delegate that power to his wife by a contract. In support of this proposition Mr. Mukherjee has invited our attention to Baillie's Digest on Muhammadan Law, Book III Chap. III where the following passage occurs:

"As a man may in person repudiate his wife so he may commit the power of repudiating her to herself or a third party."

In Wilson's Anglo Muhammadan Law, Edn. VI, there is a passage in S. 66 which runs as follows:

"The husband may confer a power of repudiation on his wife or on some third party, and a divorce will take effect if, and when, the power, so conferred, is exercised."

Similar observations are to be found in Tyabji's Muhammadan Law in Ss. 128 to 134 where the

learned author says that the husband may delegate his power of divorce to his wife. Upon these authorities it is quite clear that a Muhammadan husband has the right to delegate his power of divorce to his wife. The learned Subordinate Judge has relied upon Art. 216, Cl. (3), Mulla's Mahomedan Law for the view that a contract between a husband and wife that the wife would be free to live separately in case of disagreement with her husband is void under the Mahomedan law. A reference to the relevant article shows that the learned author did not formulate any such proposition as stated above. In the first place, Sir Dinsha Mulla in Art. 216 (3) was dealing with post-nuptial agreement in the second half of cl. (3) but in the present case we are not concerned with a post-nuptial but with an ante-nuptial contract. Secondly, in the case of *Abbas Ali* v. *Nazemunnessa Begum* reported in 43 C. W. N. 1059, a Division Bench of this Court held that an agreement by a Mahomedan husband in a Kabinnama that he would pay separate maintenance to his wife in case of disagreement is not opposed to public policy and is enforceable under the Mahomedan law. The Kabinnama which has been marked Ex. C. in the present case contains the following provisions : [Here follow the text of the Kabinnama in Bengali language.] From the above passage it is clear that the husband was authorising the wife to live in her father's house in case of disagreement with her husband and was binding himself to pay her maintenance at the rate of Rs. 10 per month and was further conferring upon his wife the power to get herself divorced in case the husband failed to pay maintenance for six consecutive months. The learned Subordinate Judge takes the view that so long as cruelty and ill-treatment are not proved, the plaintiff-appellant would not be bound to maintain the wife at the place of her father and upon that view the only question to which he addressed himself was whether the plaintiff was guilty of cruelty towards his wife. We are disposed to hold that this view of the wife's right is not in conformity with the conditions in the Kabinnama because the Kabinnama expressly confers upon the wife the right to live in her father's house in case of disagreement and imposes a liability upon her husband to pay her separate maintenance so long as she lives in her father's house and we hold that this agreement is valid and binding upon the plaintiff.

[3] In considering the evidence on the question as to why the wife left her husband's house, the learned Judge has come to the following findings; in the first place, he holds that the father-in-law of the plaintiff took away his daughter with or without the knowledge and consent of the plaintiff at a time when she was carrying for three or four months. In the second place, the learned Subordinate Judge has also found that defendant 1 developed a dislike for her husband and for that purpose she was not willing to live with him and she had a secret desire in her mind for a younger husband. In the third place, it has been found that it is quite likely that the wife is not so much against her husband but she is in the complete control of her father, defendant 2, and the latter is thinking of another marriage for her for his own selfish gain. From these findings it is not clear to us whether defendant 1, left her husband, as contemplated by the Kabinnama, Ex. C, on account of disagreement with her husband. The discussion of the evidence on the question of cruelty is, in our judgment, vitiated to some extent by the surmises made by the learned Subordinate Judge on the circumstantial evidence of the case. Mr. Bannerjee appearing in support of the plaintiff-respondent has cited the case of *Mirjan Ali* v. *Mt. MaimunaBibi*, which is a decision of the Assam High Court in 53 C.W.N. 302 : (A. I. R. (36) 1949 Assam 14), where it has been held that when a Muhammadan wife seeks to exercise a delegated power of divorcing herself, she must establish clearly that the conditions entitling her to exercise the power have been fulfilled. With respect we agree with the view in the said decision but we are afraid that the appreciation of the evidence in the present case by the Court of appeal below has been vitiated by misconception of the legal rights of defendant 1 under the Kabinnama and also by the surmises made by the learned Subordinate Judge on the circumstantial evidence.

[4] Mr. Mukherjee appearing in support of the appeal has also argued that the order of perpetual injunction against the father defendant 2, is not maintainable under S. 54, Specific Relief Act. The question under that section is whether there was an obligation on the part of defendant 2, in favour of the plaintiff in the circumstances of this case. The Court of appeal below will, therefore, consider the evidence on this point and come to a specific finding as to whether defendant 2, actually stood in the way of defendant 1's returning to her husband. Upon a consideration of this evidence, the Court of appeal below will come to a decision as to whether any injunction should be granted against defendant 2.

[5] In this view of the matter, the appeal is allowed and the judgment and decree of the Court of appeal below are set aside and the case is remanded to that Court for a reconsideration of the evidence in the light of the observations made above.

[6] There will be no order for costs in this Court. Further costs will be in the discretion of the Court of appeal below.

Guha J.—I agree.

G.M.J. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 306 *[C. N. 104.]*

HARRIES C. J. AND BACHAWAT J.

Gokul Chandra Chatterjee—*Accused*—*Petitioner* v. *The State*—*Opposite Party.*

Criminal Revn. Appln. Nos. 598 and 1092 of 1949, D/- 1st March 1950.

(a) Evidence Act (1872), S. 32 (1)—Circumstances of transaction resulting in death.

Where letters written by a woman to members of her family during a period of 5 to 9 months before her suicide showed that her state of mind was seriously affected by the cruel conduct of the members :

Held that though the statements in the letters had some relation to the cause of her suicide, they were not sufficiently nor closely enough connected with the actual transaction and could not be said to be circumstances of the transaction which resulted in death and hence were not admissible. [Para 26]

Annotation : ('46-Man.) Evidence Act, S. 32 N. 7.

(b) Evidence Act (1872), S. 167 — Admission of inadmissible evidence — Criminal P. C. (1898), S. 423.

Where admission of inadmissible evidence might have seriously influenced the minds of the jury and made them return an erroneous verdict, the High Court will set aside the verdict and conviction and will try the case itself if it appears that the decision of the jury might have been influenced by sympathy and pity for the deceased and her near relatives. [Para 27]

Annotation : ('46-Man.) Evidence Act, S. 167 N. 6 and 7 ; ('49-Com.) Criminal P. C., S. 423, N. 40.

(c) Criminal P. C. (1898), S. 297 — Misdirection or non-direction—Effect.

Where the case of the prosecution was that the accused had on two particular dates instigated the deceased woman to commit suicide and not that previous sustained and continuous cruelty on the part of the accused amounted to an instigation or abetment of suicide :

Held that failure on the part of the Judge in not directing the Jury that the previous general evidence of cruelty would not prove a case of abetment vitiated the charge. [Para 16]

Annotation : ('49-Com.) Criminal P. C., S. 297, N. 11, 12 and 13.

Harendra Nath Roy Choudhury—for Petitioner.
Debabrata Mookerjee—for the State.

Harries C. J. — This is an application for revision by one Gokul Chandra Chatterjee who was convicted of an offence under S. 306, Penal Code and sentenced to eighteen months' rigorous imprisonment.

[2] The petitioner was tried by a learned Assistant Sessions Judge sitting with a jury upon a charge of abetment of suicide. His son Biswa Ranjan Chatterjee was also tried with him upon the same charge. The jury unanimously found Biswa Ranjan not guilty and the learned Judge accepted the verdict and acquitted him. The jury however by a majority of three to two found the petitioner guilty and accepting the verdict the learned Judge sentenced him, as I have indicated, to eighteen months' rigorous imprisonment. An appeal to the Sessions Judge was dismissed.

[3] The charge was concerned with the death of a young woman called Swarnalata who, according to the prosecution committed suicide by standing between the rails in front of a moving train. There was some suggestion in the Court below that this was not a case of suicide, but obviously it was, and it has not been suggested before us that the death was accidental. The allegation against the petitioner was that he along with his son had instigated this young woman to commit suicide on the day previous to her death and on the day of her death shortly before she was killed by the train.

[4] This young woman Swarnalata was married to Bankim, a son of the petitioner Gokul. She was the daughter of one Chandi Charan Ganguly of a village called Chaumashina which was not far away from the village in which Gokul lived. It is said that the marriage between Swarnalata and Bankim was an unhappy one and that practically from the outset the young girl who was only about fifteen years of age when she married was ill-treated and assaulted hy her mother-in-law, by her husband and Biswa Ranjan, the husband's brother. A son was born to Swarnalata, but it is said that about a month after the child was born Swarnalata left the house of Gokul, her father-in-law, and went to her father's house at Chaumashina. According to the prosecution Swarnalata was really driven away from her father-in-law's house and was deprived of all access to her small son. She wrote a number of letters to her father-in-law and her mother-in-law begging that the child should be sent to Chaumashina, but the petitioner was adamant.

[5] On 13th March 1948, Swarnalata according to the prosecution accompanied by her two uncles Anadi (P. W. 1) and Abani (P. W. 3) went to the house of Gokul and there saw her young son. Gokul, it is said, abused Swarnalata and asked her to leave the house at once. Swarnalata who it is said had picked up the child was deprived of the child and Biswa Ranjan pushed her and she fell in the courtyard. She clung to the petitioner's feet and begged him to allow her to stay with her child, but it is said that both Gokul and Biswa Ranjan told her to go away and told her to kill herself by taking poison or by placing herself under a railway train.

[6] It seems that this occurrence had brought a number of neighbours to the scene, who had assembled in front of the house. The two uncles after this occurrence made a report at the *thana* and it is significant to note that in the entry in the diary there is no reference whatsoever of any incitement to suicide by either the petitioner or Biswa Ranjan. It seems that after making this report the Head Constable came to Gokul and asked him to allow his daughter-in-law to spend the night at his house, but Gokul would not allow her to do so and Swarnalata and her two uncles had to spend the night elsewhere.

[7] The following morning Swarnalata and her two uncles again went to the house of Gokul and found that Swarnalata's husband Bankim was also present, Swarnalata, it is said, on entering the house asked her uncles to go home and Anadi and Abani went to Bankura Railway Station to catch the 10.30 A.M. Down-Gomoh Passenger Train for Ramsagar Railway Station which was their destination.

[8] According to the prosecution Gokul, Biswa Ranjan and Bankim together with Swarnalata arrived on the platform just when the train was about to start and the three of them pushed Swarnalata into a compartment reserved for females. It is said that on this occasion also Gokul and Biswa Ranjan incited Swarnalata to commit suicide by throwing herself under a train.

[9] Two co-villagers of Anadi and Abani are said to have seen Swarnalata being pushed into a ladies' compartment though Anadi and Abani who were in the train saw nothing. These two villagers told the two uncles who went to the ladies' compartment when the train stopped at the next station and took Swarnalata back to their compartment. The train in due course arrived at Ramsagar when Abani went in search of a bullock cart while Swarnalata and Anadi stood waiting on the platform. Whilst they were waiting the Up Gomoh Passenger Train was seen about to enter Ramsagar Station. Swarnalata, it is said, ran from the platform and got on the railway line and stood between the tracks facing the engine of the approaching train and was knocked down and killed almost instantaneously. An Assistant Sub-Inspector of Police, Bankura, held an inquiry and came to the conclusion that it was a case of suicide.

[10] Nothing appears to have been done by either of the uncles until March 17 when a complaint was sent to the Superintendent of Police of Bankura District. In this complaint, it is said that Swarnalata was unhappy in the house of her father-in-law and that she had been compelled to leave Gokul's house and return to her father's village. The cause of the unhappiness was stated to be certain debts which were said to be owing to Gokul. It is then stated that Swarnalata gave birth to a son, but that the child was kept away from her and that as a result Swarnalata became most unhappy and very anxious to return to her husband's house in order to see the child. It is then stated that the informant Abani together with his brother Anadi and Swarnalata went on Falgun 28 last to Gokul's house. The report then proceeds to describe the hostile reception they received. Swarnalata begged for the child and these words appear:

"And she began to cry, saying that she would commit suicide, would place her head under a running train, and such other things, unless her son was given to her. Gokul Chattopadhya, Satyabala, Biswaranjan and Bankim abused her in indecent language and said, 'Come, let us get thee into a train; go, place thy head there go and die'.

[11] It will be observed that Abani suggests that Bankim was present on the first occasion though the evidence is that Bankim only returned and was present on the following day when the two uncles of the girl returned to the house. The report then refers to Swarnalata being brought to the train by Gokul and his sons and being pushed by force into a women's compartment. Swarnalata is said to have cried: "Give me my son. Allow me to stay in your house, otherwise I will commit suicide by laying my head under a running train" and such other things. Nothing is said as to any reply by Gokul, though it is now said that Gukul again instigated her to commit suicide.

[12] The police took up the investigation and in due course the petitioner together with Biswa Ranjan and Bankim were charged. Bankim however was discharged by the Magistrate conducting the preliminary enquiry, but the petitioner and Biswa Ranjan were committed to stand their trial in the Court of Sessions. They were tried and dealt with as I have indicated.

[13] A good deal of evidence was called at the Sessions trial with a view to showing in the first place the cruel conduct of the accused person. Letters were also put in evidence said to have been written by the deceased to Gokul and members of Gokul's family. The last of these letters was written about five months before the suicide and the first of them about eight months before that incident. I shall discuss at a later stage whether these letters were admissible. They were tendered to show the state of the woman's mind which it is alleged was the result of cruelty on the part of Gokul and members of his family. Evidence was also called concerning the incident at Gokul's house on 13th March and the incident at Bankura raliway station on 14th March.

[14] The learned Judge in his charge to the jury which in my view was far too long dealt with the evidence in detail.

[15] On behalf of the petitioner, it has been urged that there was a grave misdirection in the charge in that the learned Judge did not make it clear to the jury that the charge related to instigation or abetment of suicide on two days, namely, 13th March and 14th March. As I have said there was a good deal of evidence tending to show cruelty on the part of Gokul and members of his family previous to 13th and 14th March. In fact the evidence tended to show that the accused acted cruelly towards the deceased for some years before the deceased took her life.

[16] It was not the case of the prosecution that this sustained and continuous cruelty amounted to an instigation or abetment of suicide. The case for the prosecution was that Gokul and his co-accused had on 13th and 14th March instigated this woman to do away with herself. The learned Judge should have made it clear to the jury that the success or failure of the prosecution depended entirely upon whether the jury accepted the evidence relating to the two incidents of 13th March and 14th March during which incidents it is alleged that Gokul and his co-accused actually by words instigated the deceased to comit suicide. The evidence as to cruelty was only relevant to explain how Swarnalata came to be at Gokul's house on 13th March and explained the conduct of Swarnalata and the conduct of Gokul and the members of his family. This evidence as to cruelty to the girl before 13th March 1948 though relevant was not evidence which established the charge and the evidence could never establish the charge unless the jury were satisfied that the words alleged to have been spoken by Gokul and his co-accused were spoken on 13th and 14th March 1948. In my view, the charge does not state with sufficient clearness the relevancy of the general evidence with regard to cruelty. The jury might well have come to the conclusion that the charge of abetment had been made out though they might not have been satisfied with the evidence relating to the two specific incidents relied on by the prosecution. The charge should have made it clearer that the evidence of cruelty though established would not prove a case of abetment and that the charges were bound to fail unless the jury were satisfied that the evidence relating to the two incidents of 13th and 14th March 1948 was true; his failure to direct the jury properly as to the relevancy of the evidence of cruelty does to my mind vitiate the charge. The jury might well have convicted because of this evidence of cruelty and that evidence alone.

[17] As I have stated earlier, letters were admitted in evidence which were proved to have been written by the deceased woman during a period of three or four months the first letter being written about eight or nine months before her death and the last letter about five months before her death. These letters show that the deceased woman was suffering acutely from the fact that she was being refused access to her child. They are letters which show that her state of mind was seriously affected by the cruel conduct of the accused.

[18] These letters were admitted in evidence by the learned Judge in spite of objection by the defence. In the view of the learned Judge the letters were admissible under S. 32 (1), Evidence Act. That section in so far as it is relevant reads as follows :

"Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases.

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

[19] There can be no doubt that these letters were written statement made by a person who was dead at the time of the trial. The statement could only be admissible if they were statements made by the deceased as to the cause of her death or as to any of the circumstances of the transaction which resulted in her death.

[20] These are not statements as to the cause of her death but it is contended that these letters are statements as to some of the circumstances of the transaction which resulted in her death.

[21] According to the prosecution the transaction which resulted in her death was the instigation of the petitioner Gokul and members of his family and the tragic act of the girl in standing before a moving train and thus being run over and killed.

[22] Mr. Debabrata Mookerjee on behalf of the State has contended that the previous cruelty referred to in these letters were part of the circumstances of the transaction which resulted in her death and as the letters related to such circumstances they were admissible.

[23] The meaning of the phrase "the circumstances of the transaction which resulted in his death" was considered by their Lordships of the

Privy Council in the case of *Pakala Naraya Swami* v. *King-Emperor*, 43 C. W. N. 473 : (A. I. R. (26) 1939 P. C. 47 : 40 Cr. L. J. 364). In that case the question arose whether a statement made by the deceased to his widow that he was going to Berhampur was admissible in evidence under S. 32 (1), Evidence Act. The deceased was killed at Berhampur and their Lordships held that the statement to the widow that he was going to Berhampur was a statement as to one of the circumstances of the transaction which resulted in his death. But for the fact that he went to Berhampur he would not have been killed there and his going to Berhampur was one of the circumstances of the transaction which resulted in his death. The statement that he was going to Berhampur therefore was a statement concerning one of the circumstances of the transaction relating to his death and therefore their Lordships of the Privy Council held the statement to be admissible.

[24] At page 478 Lord Atkin who delivered the judgment of the Board dealing with these words observed as follows :

"The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction, general expressions indicating fear or suspicion of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown or was not the person accused. Such a statement migh indeed be exculpatory of the person accused. 'Circumstances of the transaction' is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in 'circumstantial evidence' which includes evidence of all relevant facts. It is on the other hand narrower than '*res gestae*.' Circumstances must have some proximate relation to the actual occurrence: though as for instance in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose."

[25] Learned advocate for the petitioner has contended that evidence of previous crulety though such evidence might be relevant is not evidence relating to any circumstances of the transaction. As Lord Atkin has pointed out "the circumstances must be circumstances of the transaction" which resulted in death and evidence of previous crulety, to my mind cannot be regarded as evidence of the circumstances of the transaction which resulted in death. For example, if one of the letters contained a statement that she was going to her father-in-law's house on the following day to try and obtain the child, it might be argued that such a statement would be a statement of the circumstances of the transaction resulting in her death, because but for the fact that she went to the house the alleged instigation by Gokul could never have taken place. However, as I have said, the last letter written was about five monts before the death and it appears to me that the connection between the letters and the death is not sufficiently close to make the letters statements of circumstances of the transactions resulting in death. As Lord Atkin put it "the circumstances must have some proximate relation to the actual occurrence."

[26] Lord Atkin gave as an example that a man might express the fear or suspicion that a particular individual might harm him or even kill him but if this was a general expression indicating fear it would not be admissible in evidence under S. 32, Evidence Act as it could not be said to have some proximate relation to the actual occurrence. In the present case, it cannot be said that statements in the letters have no relation to the cause of death. What drove her to kill herself was undoubtedly her unhappy state of mind, but the statements in my view have not that proximate relation to the actual occurrence as to make them admissible under S. 32 (1), Evidence Act. They cannot be said to be circumstances of the transaction which resulted in death. In other words, they are not sufficiently nor closely enough connected with the actual transaction and that being so the letters were not, in my view, admissible and were wrongly admitted by the learned Assistant Sessions Judge.

[27] Section 167, Evidence Act, provides :

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

[28] If we were satisfied that apart from this inadmissible evidence there was sufficient good evidence on the record to justify the verdict of the jury and the conviction, we should not interfere in this case. On the other hand, if we are satisfied that the admission of this evidence might have seriously influenced the minds of the jury and made them return an erroneous verdict, then the Court must set aside the verdict and the conviction and either order a retrial or proceed to decide the case itself upon the evidence on the record in accordance with the decision of their Lordships of the Privy Council in the comparatively recent case of *Abdul Rahim* v. *Emperor*, 73 I. A. 77 : (A.I.R. (33) 1946 P. C. 82 : 47 Cr. L. J. 616).

[29] A case of this kind is a very difficult case for a jury to try as they might well be swayed by sympathy for the deceased young woman and her relatives. The jury might come to the conclusion that even though there was no verbal instigation by Gokul, nevertheless his conduct was the real cause of the suicide and that being so they might erroneously hold him guilty. Cases where the decision might be influenced by sympathy or sentiment are not cases which a Court would readily send back to the lower Court to be tried by a jury if this Court could lawfully decide the question itself. It appears to me that this is a case where this Court is more likely to arrive at a correct conclusion than a jury who are more likely to be swayed by sympathy and pity for the deceased young woman and her near relations. That being so, this Court should, following the decision of *Abdul Rahim* v. *Emperor*, 73 I. A. 77 : (A. I. R. (33) 1946 P. C. 82 : 47 Cr. L. J, 616), proceed to decide this case itself on the admissible evidence on the record.

[30] As I have said the whole case turns on the view the Court takes of the evidence adduced by the prosecution concerning the first incident of 13th March 1948, which took place at or immediately outside Gokul's house and of the second incident which took place on 14th March at Bankura railway station. [His Lordship then discussed evidence and proceeded:]

[31] As a Judge of fact, I find it quite impossible to act upon the evidence of Anadi and Abani with any confidence and it appears to me that the jury were in the same difficulty. The evidence is that Gokul and Biswaranjan both incited this girl; yet the jury convicted Gokul and acquitted Biswaranjan. How they could do that upon the evidence it is quite impossible to say, yet they did so. If the evidence was unsatisfactory against Biswaranjan, it was equally unsatisfactory against Gokul and the jury admittedly thought the evidence unsatisfactory against Biswaranjan. That makes me suspect that the verdict of the jury was to a very large extent influenced by their sympathy for the deceased woman and their verdict is an expression of their abhorrence of the cruel conduct of Gokul in refusing Swarnalata access to her son.

[32] It appears to me that it would be highly dangerous to convict Gokul upon this evidence and that being so he must be acquitted.

[33] I, like my learned brother, have every sympathy with the relatives of this unhappy girl, and we have no sympathy whatsoever with the petitioner. He was guilty of what I think to be inhuman conduct in separating this poor girl from her baby son, but we cannot convict Gokul because we disapprove of his conduct and his attitude towards this young girl. Gokul can only be convicted if there is unimpeachable evidence, which we can rely upon, that he instigated or incited this young woman to throw herself under a train. There is in my view no such evidence and that being so the petition must be allowed; the conviction and sentence are set aside and the petitioner is acquitted. He need not surrender to his bail and his bail bond is discharged.

[34] When the Rule first came on for hearing a Bench issued a Rule for enhancement of sentence. That Rule apparently was issued to make it easier for the Court to consider the facts. However, it is not necessary to consider this Rule any further because we have acquitted the accused. The Rule for enhancement is accordingly discharged.

[35] We are informed that a case under the same section is now pending against Satyabala, Gokul's wife. Having regard to the view which we have expressed in this judgment the prosecuting authorities should consider whether that case should proceed in the absence of other evidence which was not considered in the present case.

Bachawat J.— I agree.

D.H. *Conviction set aside.*

A. I. R. (37) 1950 Calcutta 310 *[C. N. 105.]*

HARRIES C. J. AND BACHAWAT J.

Kailash Nath Shaw and others—*Appellants* v. *The State.*

Criminal Appeal Nos. 213 and 220 of 1949, D/- 22-2-1950.

(a) Criminal P. C. (1898), S. 297—Misdirection—Failure to direct on material particulars is misdirection. [Para 4]

Annotation:(49-Com.) Cr. P. C., S. 297, N. 11 Pt. 12.

(b) Criminal P. C. (1898), S. 297—Defence counsel not noticing that document was suspicious—Court's duty.

It is an elementary principle of criminal administration that counsel can make no admission binding on his client. That being so, his client is not bound by the fact that counsel is not astute enough to discover some obvious flaw in evidence. Further, if such a flaw in the evidence exists and has been overlooked by counsel, that does not exonerate the Sessions Judge from putting the case fairly and properly before the jury. If counsel for the defence does not notice that a document is highly suspicious it is the duty of the Court to point that fact out if the document is suspicious. The Court cannot shelter itself behind a plea that as the attention of the Court was not drawn to it the Court did not look at the document. [Para 20]

Annotation : ('49-Com.) Cr. P. C., S. 297 N. 6.

(c) Criminal P. C. (1898), S. 297 — Non-direction — Failure to draw attention to suspicious character of search list in the case under S. 395, Penal Code is most material non-direction. [Para 22]

Annotation : ('49-Com.) Cr. P. C., S. 297 N. 17.

(d) Criminal P. C. (1898), S. 423 (1) (b) — Re-trial — Evidence unsatisfactory — It is not safe to order re-trial. [Para 24]

Annotation: ('49-Com.) Cr. P. C., S. 423 N. 23 Pt. 7.

Sudhansu Sekhar Mukerji and Chintaharan Roy — for Appellants.

J. M. Banerjee — for the State.

Harries C. J. — These are two appeals from convictions under S. 395, Penal Code. The appellant Kailash Nath Shaw, who is the sole appellant in Appeal No. 213 of 1949 was sentenced to three years' rigorous imprisonment. The seven persons who are the appellants in Appeal No. 220 of 1949 were each sentenced to two years' rigorous imprisonment.

[2] The offence with which these eight persons were charged, was a most serious one of dacoity and if they were guilty of the offence the sentences imposed, namely, three years' and two years' rigorous imprisonment, were far too lenient. As the learned Judge accepted the jury's verdict he was in my view bound to impose very much more severe sentences than those which he did.

[3] The eight appellants were tried by a learned Sessions Judge and a jury upon this charge of dacoity. The jury by a majority of 3 to 2 found all the eight appellants guilty. The learned Judge apparently agreed with the verdict and sentenced the appellants in the manner I have indicated.

[4] Mr. Sudhansu Mukherji who has appeared on behalf of the appellants in both the appeals, has contended that the charge to the jury in this case was grossly inadequate and that it contained such misdirections that the verdict of the jury must be held to be vitiated. What Mr. Mukherji suggests is non-direction rather than misdirection. It is clear however that where a learned Judge fails to direct the jury on material matters such failure to direct amounts in law to a misdirection.

[5] The case for the prosecution is a somewhat astounding one. The occurrence is said to have taken place on 11th May 1948 at about 3 A. M. at or near a railway yard known as Halisahar Railway Yard which seems to be some distance from Halisahar Railway Station.

[6] According to the prosecution two constables, one of whom certainly was armed, if not both, saw a lorry approaching the railway yard from a distance of about a quarter of a mile. The lorry had its headlights on and apparently was approaching towards the constables. According to Constable Biswanath, P. W. 6 who was the principal witness in the case, he walked forward about half a mile when he found the lorry stationary alongside the siding but with its headlights full on. He noticed, so he says, a number of people loading railway wagon springs into the lorry and he advanced with a view to preventing what in his view was obviously theft. It may be observed that there were a number of condemned railway wagon springs lying at the siding which had been sold to a private firm. According to Biswanth, as he approached somebody came from the lorry and threatened him with the result that he retreated. He withdrew, so it is said, a matter of 20 or 25 cubits and remained under a tree. After a short lapse of time Biswanath says that somebody tried to start the lorry which was still standing with its headlights full on. Fearing that the lorry might escape Biswanath fired one shot and then, according to him, remained at the spot under the tree for about eight to ten minutes. Others then came up and the party advanced towards the lorry and found the driver sitting in his seat apparently dead. Alongside him was the appellant Kailash Nath Shaw and in the lorry itself were the seven other appellants.

[7] According to the prosecution, after the shot some people apparently ran away. It is said by some witnesses that 20 or 30 people ran away, but the appellants, for reasons best known to themselves, are said to have remained quietly in the lorry for a period of eight to ten minutes to await arrest and they were in due course arrested. According to the prosecution there were at that time a large number of springs in the lorry.

[8] A first information report was not made until 12 noon and in that report it is stated that when Biswanath and the constable who accompanied him, Chittaranjan Dutta, saw the lorry there were about 30 or 40 men loading the lorry. Biswanath is said to have shouted to them to stop whereupon one man threatened him at the point of a revolver to remain silent. Biswanath finding himself in danger fired a round which killed the driver who was attempting to start the lorry. On hearing the firing it is said that other constables came up and managed to arrest the eight appellants, but the other culprits made good their escape.

[9] The investigating officer appeared and according to the prosecution there were 45 wagon springs in the lorry. A search list was prepared of what was found in the lorry and on the persons of the appellants who were found in it. That search list was witnessed by two persons. But that list contains no reference whatsoever to springs in the lorry but to one spring lying near where the lorry was standing. However a second search list is said to have been drawn up and this is also said to be witnessed by two persons, one of whom is said to have witnessed the first search list. Why the same persons did not witness the second list was not explained by the prosecution and indeed

none of the search witnesses were called at all. The learned Judge in his charge to the jury dealt at very great length with the law and with the evidence given by each of the witnesses and the defence must concede that the learned Judge pointed out to the jury very serious discrepancies in the evidence for the prosecution. No point can be made by the appellants on that aspect of the case. The learned Judge, for example, pointed out quite fairly the conflict between Biswanath's evidence and the evidence of other witnesses, and the conflict between Biswanath's evidence in the Sessions Court and the first information report. In the Sessions Court Biswanath did not state that somebody came forward and threatened him with a revolver. All he said was that they threatened him with something that looked like a revolver. Quite obviously at the Sessions trial the story of threat by pointing a revolver had to be abandoned as no revolver was found on any of the appellants. In fact no weapon of any kind was found on any of the appellants and what is stranger still Kailash Nath Shaw, who according to the prosecution had come to commit a dacoity, had come with a sum of Rs. 500 in his pocket.

[10] Learned advocate for the appellants however has stressed the fact that the learned Judge in his charge to the jury makes no reference whatsoever to the suspicious circumstances surrounding the bringing into existence of two search lists to which I have made reference.

[11] The essential fact which the prosecution had to prove in this case was the presence of these railway springs in the lorry. Unless there was evidence that the persons in the lorry had moved or attempted to move property into the lorry then no case of dacoity could possibly be made out. It must be remembered that the case for the defence was that this lorry was travelling along a kutcha road where it was eventually found stationary and was brought to a standstill by shots being fired by somebody nearby. According to the defence this lorry which belonged to Kailsh Nath Shaw, had been delivering materials to purchaser earlier in the evening and was returning with Kailash Nath Shaw in it when it was stopped by this firing. Whether the defence version was true or not would depend largely on whether or not railway springs were found in this lorry when Biswanath and the persons who had joined him rushed up.

[12] That there were railway springs in the lorry at a later stage there can be little doubt. But it seems clear that whereas there were 45 springs in the lorry when the investigating officer is said to have counted them, there were only 35 when another Sub-Inspector counted them a little earlier. That Sub-Inspector in the Court of the committing Magistrate stated that there were 35 when he counted them, but in the Court of Sessions he tried to resile from that position as obviously the evidence did not fit in with the evidence of the investigating officer who had counted 45. If the number of springs had increased that would suggest that somebody was putting railway springs into that lorry in order to create evidence. The learned Judge pointed out this aspect of the case to the jury and no complaint can be made against the summing up on that ground. What however is said against the summing up is that it makes no reference whatsoever to the two search lists beyond the fact that they were produced as evidence in Court.

[13] Why two search lists were prepared it is impossible to say and why 45 springs should not have been included as the first item in the first search list only the police can explain. The 45 springs were the essential piece of evidence in this case. Yet we find that a search list was laboriously drawn up and the only mention of wagon springs in that search list is the mention of one spring found near the lorry.

[14] That search list appears to have been attested by two search witnesses who must be respectable persons of the locality. The learned Judge did not point out to the jury that neither of these search witnesses were called. The prosecution stated that they could not be found. But there is no evidence at all that any attempt was made to find them and it is difficult to believe that two respectable persons of the locality can disappear completely without the possibility of being traced. The jury should have been told that if they were not satisfied with the explanation that these witnesses could not be found they might infer that the witnesses would not have supported the prosecution if they had been called. The learned Judge, as I have said, makes no reference at all to the fact that neither of these search witnesses were called, and to the further fact that in that search list there is no reference at all to springs in the lorry, but there is reference only to a spring lying on the ground near the lorry.

[15] The second search list is a most suspicious document and a most cursory glance at it must inevitably raise suspicions. Whether the learned Judge or the jury ever looked at this document it is impossible to say, and it appears to me that learned advocate for the defence could not have looked at it either, because certain features would have inevitably impressed themselves on him if he had done so.

[16] The second list merely contains one item, namely, 45 wagon springs found in the lorry. Two search witnesses are named, one only of

them being a witness to the first search list. Why the second witness to the first list did not attest the second list no explanation is given and it would appear as if these lists were made and drawn up at a different time. But why that should be so it is impossible to say if the springs were in the lorry at the time the first search list was drawn up. If the wagon springs were in the lorry when the first search list was drawn up, why were they not included in the first list and why was it necessary to obtain a different witness, and in any event why was not this other witness, the new witness in the second list, called ? He should have been a respectable person of the locality, but apparently he also disappeared from this locality leaving no trace. It is indeed astounding to find that three search witnesses should disappear in this most amazing fashion leaving no trace whatsoever behind them. The rather astounding nature of this disappearance I think should have been mentioned to the jury as the latter might have drawn a quite different inference from the failure of the prosecution to call these witnesses.

[17] A glance at this second search list also shows that the signatures of the two witnesses appear to be in the same hand. Whether the two signatures were written by the same person would of course be a matter for the jury, but I think the jury should have been warned about it and asked to consider whether these signatures were genuine at all, particularly having regard to the fact that neither of the persons who are supposed to have signed is called as a witness. Further, the names of these search witnesses which have to be inserted at the head of search list appear to have been inserted by the same hand as that which wrote the signatures in the search list. Of course, it would be for the jury to say whether the writing was in the same hand, but the similarity is such that that point should have been made to the jury in the summing up and they should have been asked to consider whether the names of the witnesses at the head of this document and their signatures at the foot were or were not all written by the same person.

[18] Further, a comparison of these documents makes it quite clear that the person who wrote the names of the witnesses in the first search list could not possibly have written their names in the second search list because even to a person without the slightest knowledge of handwriting, the handwriting is entirely different. Why was it necessary to obtain the services of some other person to write the names of the witnesses in the second search list ? Why could not the officer, who wrote the headings of the first search list, have written the headings of the second search list ? The prosecution offered no explanation and the jury were never asked to consider these facts.

[19] Mr. Banerjea has contended that the police were not bound in law to draw up a search list. But I need not enter into that question. Search lists are said to have been drawn up and were put in evidence and one of those documents appears on the face of it to be a highly suspicious document. Further, the persons who are supposed to have witnessed both these documents were never called. If those documents are genuine and were supported by the search witnesses the prosecution would have gone a long way to proving that there were springs in the lorry. But the jury should in my view have been carefully directed to consider whether the second search list was not an entirely bogus document. If the jury had come to the conclusion that it was, it might well then have come to the conclusion that the case for the prosecution, that springs were found in this lorry, was false. Mr. Banerjea also contended that as learned advocate for the defence had not noticed the suspicious features in this second search list the Judge was under no duty to make any point about the search list to the jury.

[20] It is an elementary principle of criminal administration that counsel can make no admission binding on his client. That being so, is his client bound by the fact that counsel is not astute enough to discover some obvious flaw in evidence ? Further, if such a flaw in the evidence exists and has been overlooked by counsel, does that exonerate the learned Judge from putting the case fairly and properly before the Jury ? If counsel for the defence does not notice that a document is highly suspicious it is the duty of the Court to point that fact out if the document is suspicious. The Court cannot shelter itself behind a plea that as the attention of the Court was not drawn to it the Court did not look at the document. It appears to me in the present case that the learned Judge should have most carefully warned the jury about these search lists and have warned them further that a serious inference could be drawn against the prosecution by their failure to call any of these search witnesses, if the explanation that the search witnesses had miraculously disappeared was not accepted by the jury. Nothing whatsoever was said upon this matter.

[21] There is one other feature which is rather striking and which the learned Judge omitted to notice in his charge to the jury. Biswanath in his evidence stated that he fired only one shot. But a Sub-Inspector who came on to the scene fairly soon afterwards stated in the Court of the committing Magistrate that he found a number of cartridges near the lorry, though he tried in.

the Court of Session to resile from that statement. The first information report only mentions one shot and there is only one cartridge mentioned in the first search list. There were however three wounds on the deceased driver, a graze on the forehead, a serious wound on the neck which was obviously a gunshot wound and the gunshot had fractured the vertebrae and there was also what was obviously a gunshot wound on the left side of the chest. The doctor who was called as a witness stated in the Court of the committing Magistrate that all these three wounds could have been caused by one bullet, but how one bullet could cause a graze on the forehead, a serious deep wound on the neck, and a fractured vertebrae and a wound which appeared to have been bone deep in the chest, is wholly impossible to understand. I cannot believe that the doctor really meant that these three wounds could possibly have been caused by one bullet, but that is what he is recorded as having said. The wounds would suggest that there was a number of shots which would leave a number of cartridges lying near the lorry as spoken to by a witness in the Court of the committing Magistrate. The learned Judge says nothing about this very odd piece of medical evidence. He did mention that the Sub Inspector had stated in the Court of the committing Magistrate that he had found cartridges and had later resiled from that statement, but he never asked the jury to consider whether the wounds did not show that there must have been more than one shot and that the evidence of Biswanath was obviously untrue.

[22] If there is any truth in the defence version, a number of shots might well have been fired to stop this lorry. Biswanath might have suspected that this lorry was after no good although admittedly it was standing on a kutcha road which was a public road and it might well have been there for purposes which were entirely innocent. If a constable suspected that the occupants of the lorry had some criminal designs he might well have fired to stop the lorry and accidentally hit the driver and he might well have fired a number of shots. This aspect of the case was never brought to the attention of the jury although it is not of such importance. The failure however to draw the attention of the jury to the suspicious character of at least one of the search lists and the suspicious nature of the evidence accounting for the failure to call any of these search witnesses was to my mind a most material non-direction which might well have led to a gross miscarriage of justice in this case.

[23] In my view, the summing up in this case was so defective that the verdict of the jury which was a majority verdict of guilty by 3 to 2, cannot possibly be sustained and must be set aside.

[24] The question then arises what should the Court do ? Mr. Banerjea on behalf of the prosecution has asked us to order a retrial. But it appears to me that the evidence in this case is so unsatisfactory that it would not be safe to order a retrial. [His Lordship considered the evidence and proceeded :]

[25] In my view the evidence in this case is not such that would warrant a Court ordering a retrial and that being so I would allow these appeals, set aside the convictions and sentences and acquit the appellants of the offence of dacoity.

[26] The two persons who are on bail need not surrender to their bail and their bail bonds are discharged. The remaining appellants must be released forthwith unless required by the authorities on any other charge.

Bachawat J.—I agree.

V.R.B. *Appeals allowed.*

A. I. R. (37) 1950 Calcutta 314 *[C. N. 106.]*

SEN J.

Corporation of Calcutta — Petitioner **v.** *Krishna Chandra Sil and another — Complainant—Opposite Party.*

Criminal Revn. No. 949 of 1949, D/- 30-11-1949.

Municipalities—Calcutta Municipal Act (III [3] of 1923), S. 535 — Order under, behind back of party.

Though S. 535 does not provide for any notice an order awarding costs against the Corporation and directing it to pay compensation to the complainant must not be passed without giving the Corporation an opportunity of being heard. [Para 1]

Sunil Kumar Basu—for Petitioner.

Ankush Chandra Basu—for Opposite Party 1.

Order.—This Rule has been obtained by the Corporation of Calcutta against an order passed by Sri P. Basu, Municipal Magistrate, Calcutta, awarding costs against the Corporation and directing the Corporation to pay compensation to the complainant. The proceedings were under S. 535, Calcutta Municipal Act of 1923. One Krishna Chandra Sil filed a petition before the Magistrate complaining that a nuisance was being caused by a *Dal* mill. This matter was gone into by the learned Magistrate and he directed the Corporation to close down the mill within one month from the the date of his order and in the same order he passed the order for costs and compensation. This was done behind the back of the Corporation as no notice was served upon the Corporation before the order was passed. It is true that S. 535, Calcutta Municipal Act does not provide for any notice being served but in my opinion it would be entirely

unfair and unjust and against all principles of law to pass an order penalising a party without giving the party an opportunity of being heard. The principle *audi alteram partem* is applicable to a case of this description.

[2] I therefore set aside the order of the learned Magistrate as regards costs and compensation and direct that notice be served the on Corporation to show cause why the costs and compensation should not be paid by the Corporation. Thereafter the learned Magistrate shall hear the parties and pass orders according to law.

D.H. *Revision allowed.*

A. I. R. (37) 1950 Calcutta 315 *[C. N. 107.]*

HARRIES C. J. AND CHATTERJEE J.

Commissioner of Income-tax Central, Calcutta — Applicant v. *Messrs. Dudwala and Co., Calcutta — Respondent.*

Income-tax Ref. No. 10 of 1949, D/- 31-8-1949.

Income-tax Act (1922), S. 26A — Karta of Mitakshara joint family entering into partnership with stranger — Dissolution of joint family — Registration of firm.

The partners of a firm were *N* representing a Mitakshara joint family and *A*. A suit for partition instituted by one of the members of the joint family resulted in a compromise and a consent decree which stated the shares of each of the members of the family after the partition. It was further stated that in the firm the parties had twelve annas share, that it would remain joint and that the parties would be entitled thereto according to the shares mentioned in the decree. An application under S. 26A having been made on behalf of the firm it was refused on the ground that as the joint family had come to an end it could not form a partnership with a stranger as such until and unless the separate members of the family along with the stranger formed themselves into a partnership and asked for registration :

Held that the fact that there was a dissolution of the joint family had no effect at all on the constitution of the firm and that, therefore, the firm should be registered. [Paras 14 and 21]

Annotation : ('46-Man.) I. T. Act, S. 26A N. 1.

S. K. Gupta and J. C. Pal — for Income-tax Dept.
Atul C. Gupta and Hemanta Bose — for Respondent.

Chatterjee J.—At the instance of the Commissioners of Income-tax, the question of law which has been referred to this Court for its opinion by the Tribunal is in these terms :

"Whether on the facts and in the circumstances of this case the Tribunal was right in holding that the partnership firm of Dudwala & Co. should be registered under S. 26A of the income-tax Act."

[2] The facts shortly are as follows. The partners of the firm were Rai Bahadur Rameshwar Nathany, representing the Mitakshara joint family under the name and style of Baldeodas Rameswar, one Mannalal Musuddi and one Ramkumar Agarwal. Mannalal Musuddi went out of the partnership in November 1942 and a fresh deed was executed by which the two partners carried on the business of the firm, in which the share of Rameswar Nathany (representing Baldeodas Rameswar) was twelve annas and Ramkumar Agarwala three annas. The remaining one anna share was devoted to charity. The deed was dated 10th February 1946.

[3] A suit for partition was instituted by one of the members of the Hindu undivided family. That suit was instituted on the original side of this Court and was marked No. 1436 of 1943. That litigation resulted in a compromise and a consent decree was passed. The relevant clauses are set out in para. 4 of the referring order.

[4] By Cl. 1 of the terms of Settlement, the joint family came to an end on 21st September 1943. In Cl. 3 the shares of each of the members of the family after the partition are stated. Clauses 7 and 10 are important and they are set out below.

Clause 7. "The business carried on under the names and Styles of Rai Bahadur Baldeodas Rameswar and Rameswar Nathany & Co. shall be stopped from the date hereof but this is not to affect the partnership carried on under the name and Style of Messrs. Dudwala & Co. in which Messrs Baldeodas Rameswar are the partners and the said partnership shall be continued as provided in Cl. 10 hereof."

Clause 10. "In the firm of Dudwalla & Co. the parties hereto have twelve annas shares and it shall remain joint and the parties shall be entitled thereto according to the shares mentioned in Cl. 3 thereof."

[5] An application was made in this case under S. 26A, Income-tax Act. That section is in the following terms.

(1) Application may be made to the Income-tax officer on behalf of any firm, constituted under an instrument of partnership, specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to Income-tax or super-tax.

(2) The application shall be made by such person or persons, and at such times and shall contain such particulars and shall be in such form and be verified in such manner, as may be prescribed; and it shall be dealt with by the Income-tax officer in such manner as may be prescribed."

[6] Dr. S. K. Gupta, learned counsel for the revenue authorities, drew our attention to the rules bearing on the subject under R. 2.

"Any firm constituted under an Instrument of partnership specifying the individual shares of the partners may under the Provisions of S. 26A, Income-tax Act register with the Income-tax officer the particulars contained in the said Instrument on application made in this behalf."

[7] Such application shall be signed by all the partners.

[8] In the schedule to the form set out in R. 3 there is a note which says that the application must be signed by all the partners (not being minors) in the firm as constituted at the date on which the application is made and it must

specify the names of the partner, the address, the date of admittance to partnership, interest on capital or loans, salary or commission from the firm and share in the balance of profit or loss.

[9] Dr. Gupta also drew our attention to R. 4 which states that if on receipt of application referred in R. 3 the Income-tax officer is satisfied that there is a firm in existence constituted as shown in the Instrument of Partnership, and that the application has been properly made we shall grant a certificate stating that the instrument of partnership has been registered with him under Section 26A, Income-tax Act.

[10] The application under S. 26A was refused by the Income-tax Officer on the ground that (as?) the joint family had come to an end it could not form a partnership with a stranger as such until and unless the separate members of the family along with the stranger Ram Kumar formed themselves into a partnership and asked for registration.

[11] On appeal the Assistant Commissioner took the same view. But the Tribunal held, and in our opinion rightly that the application ought not to have been refused and that the application was maintainable under S. 26A.

[12] Inasmuch as the Tribunal allowed the appeal of the assessees and ordered that the firm of Dudwala and Company should be registered the revenue authorities wanted the above question to be referred to this Court.

[13] In our opinion, the Appellate Tribunal was justified in taking the view that S. 26A did apply to this case. All that the section requires is that there should be a firm constituted under an instrument of partnership and that the deed of partnership must specify the individual shares of the partners and that an application should be made in the prescribed form and should comply with the Rules.

[14] Dr. Gupta's point is that in the application form it was stated that Nathany was the Karta or manager of a Hindu undivided family. If so it was a mere surplusage. The fact that there was a dissolution of the joint family which was governed by the Mitakshara School of law had no effect at all on the constitution of the firm. It was rightly conceded by Dr. Gupta that the members of the Joint family were not partners of the firm of Dudwala and company. Where A, the karta or managing member of a Hindu joint family enters into a partnership with B, a stranger, then A alone can be taken to be a partner and B is entitled and bound to treat only with A as a co-partner. In a suit for dissolution only A and B would be parties. To enable the members of A's family to intervene in the affairs of the firm would introduce confusion into partnership law and would paralyse trade and business. Coparcenary is the result of status but partnership is constituted by contract and the members of A's family have no contractual relations with B. The Karta, Rai Bahadur Rameswar Nathany, was thus one of the partners and the fact that there was a disruption of the coparcenary to which he belonged did not affect his status as a partner of the firm.

[15] It was urged by Dr. Gupta that a Hindu undivided family governed by the Mitakshara school of Hindu law ceased to exist as such on the institution of the suit and in any event on the consent decree being passed therein. According to the true notion of an undivided Mitakshara family, it is settled law that no individual member can predicate of the joint property, that he as a member of a joint family, has a certain definite share. Partition, therefore, consists in ascertaining and defining the shares of the coparceners in the joint properties and the actual division of the properties by metes and bounds is not necessary.

[16] Dr. Gupta argues that under Cl. 10 of the decree, it was stated that in the firm of Dudwala and Company the parties had twelve annas share and it was stated that it shall remain joint. But he points out that the consent decree further provided in that clause that the parties shall be entitled thereto according to the shares mentioned in Cl. 3 thereof which defines the shares of each of the members of the family in the joint family assets or properties.

[17] In our opinion, even if Cl. 10 did not state that the parties would be entitled to the 12 annas in the partnership according to the shares mentioned in Cl. 3 of the terms of settlement, the effect would be the same. After the shares have been defined the members of the Mitakshara joint family may divide the property by metes and bounds or they may continue to live together and enjoy the property in common. Yet, that would effect the mode of enjoyment but not the tenure of the property. Therefore, the mere mention that the parties would be entitled to twelve annas share of the firm of Dudwala and Company according to the shares specified in the terms of settlement did not make any alteration as to the real character of the property. The family ceased to be joint and the shares were defined, and the necessary consequence is that any property, e. g., the twelve annas share in that firm would be held by the members of the family as tenants in common.

[18] But that has no effect whatsoever on the rights of the Rai Bahadur as a member of

the firm. It cannot be contended that the firm was dissolved because the consent decree had been passed in the suit brought by one of the Nathanys in this Court. The revenue authorities are really refusing to register the firm so as to exact higher tax on the basis that they were an unregistered firm. It is not really their case that Dudwalla & Co., ceased to be a firm. Only the nature of the liability of the Rai Bahadur *vis-a-vis* his coparceners was changed as a result of that decree in the partition suit. Before the disruption he as Karta was liable to account in a very limited sense. A co-parcener seeking partition is not entitled to require the Karta to account for his past dealings in the family property. All that he is entitled to is an account of the family property as it exists at the time he demands a partition. That law was settled in this High Court in the case of *Parmeshwar Dube* v. *Gobind Dube*, 43 Cal. 459: (A. I. R. (3) 1916 Cal. 500). After the partition decree was passed, the Rai Bahadur would be liable to render account in respect of the twelve annas share on a different basis. But still he would continue to be a member of that firm and the partnership would not be in any way affected by the passing of that decree in the partition suit.

[19] In my opinion the Tribunal was right when it took the view that the partnership continued and S. 26A was applicable.

[20] *Vis-a-vis* the members of the family of the Rai Bahadur might be liable to account, as I said before, on a different footing. But he did not cease to be a partner of the firm and as such the application was rigbtly made under S. 26-A on behalf of the firm which was constituted under a proper instrument of partition which specified the individual shares of the partners.

[21] The answer to the question put to us must therefore be in the affirmative. The assessees are entitled to their costs of this Reference. Certified for two counsel.

Harries C. J.—I agree.

V.B.B. *Reference answered.*

A. I. R. (37) 1950 Calcutta 317 *[C. N. 108.]*

J. P. MITTER J.

King v. ***Alfred D'Cruz and others.***

Criminal Case decided on 12-12-1949.

Criminal P. C. (1898), S. 282—Jury—Discharge of—Inherent powers of Court.

So far as the Code of Criminal Procedure is concerned, the power of the Court to discharge a jury is confined to Ss. 282 and 283 thereof. The Court has, nevertheless, an inherent power to discharge a jury which is not confined to cases of misconduct as such, but plainly extends to a case where the Judge finds reasons for doubting the impartiality of the jury. Thus where the foreman of the jury expresses his opinion as to the veracity of a prosecution witness in open Court at an early stage, the Judge can discharge the jury and order fresh trial with a new jury: A. I. R. (23) 1936 Oudh 268, *Ref.* [Paras 4, 6]

Annotation ('50-Com.) Cr. P. C., S. 282, N. 2.

J. M. Banerjee.—for the Crown.

Miss Jyotimoyee Mitra.—for the Defence.

Order.— In this case, the three accused persons—Alfreed D'Cruz, Shiral D'Cruz and one Lakhi Dasi—have been charged under S. 363 and 366, Penal Code. The two charges relate respectively to abduction and kidnapping from lawful guardianship of a girl called Teresa Gomes.

[2] The jury were empanelled on the 8th and after the opening of learned counsel for the prosecution, Dr. Kabir Hossain, Professor of Medical Jurisprudence, Medical College, Calcutta, and one Dr. A. K. Chakravarty, radiologist, Calcutta Police Hospital, were examined. The evidence of these witnesses was concerned with the age of the girl in July this year. The next and the third witness for the prosecution was the girl said to have been abducted and kidnapped, that is, Teresa Gomes.

[3] At the conclusion of the last named witness's evidence I asked the gentlemen of the jury if they had any questions to put to the witness, whereupon the foreman of the jury, instead of putting any question, expressed the view that the story told by the said witness was untrue. This expression of opinion in open Court at an early stage of the trial is, in my opinion, calculated to cause a miscarriage of justice.

[4] So far as the Code of Criminal Procedure is concerned, the power of the Court to discharge a jury is confined to Ss. 282 and 283 thereof. The Court has, nevertheless, an inherent power to discharge a jury in a case such as this. That power is not confined to cases of misconduct as such, but plainly extends to a case where the Judge finds reasons for doubting the impartiality of the jury.

[5] There is authority for discharging a jury in circumstances such as these. In a case reported in *Bindeshi* v *Emperor*, 37 Cr. L. J. 749: (A. I. R. 23) 1936 Oudh 268), it was held that if a jury expresses an opinion clearly regarding the guilt or innocence of an accused person before the charge to the Jury has been delivered, the Judge would be well advised in discharging the jury and to hold a fresh trial with a fresh jury.

[6] In this case, the expression of opinion by the foreman of the jury happens to be in favour of the accused persons. But a premature expression of opinion adverse to an accused person would be a very grave matter, and, consequently, as a matter of principle, and having regard to all the circumstances of this case, I feel that this

jury should be discharged and that the accused persons be remanded for a fresh trial before a fresh jury.

[7] This jury is, therefore, discharged. I direct that there be a new trial of the accused persons with a new jury.

D.R.R. *Case remanded.*

***A. I. R. (37) 1950 Calcutta 318** *[C.N. 109.]*

HARRIES C. J. AND BACHAWAT J.

Purnendu Nath Tagore and others—*Appellants* v. *Sree Sree Radha Kanta Jew and others*—*Respondents.*

Civil Appln. arising out of Federal Court Appeal No. 18 of 1949, D/ 1-3-1950,

✠ Civil P. C. (1908) O. 45, R. 7 (1) — Supreme Court Rules (1950), O. 12, R. 3 —Power to accept security other than cash or Government securities.

The High Court has power to accept security in immovable property instead of cash or Government securities, if that is tendered in time permitted by O. 45, R. 7 and if it is an order which the justice of the case requires, though no application was made to the Court for permission to deposit such security in accordance with the proviso to O. 45, R. 7 (1).

[Paras 5, 9, 6, 10]

Annotation: ('44-Com.)Civil P. C. O. 45 R. 7, N. 4, 6,

Nirmal Chandra Chakravarty and Kshetra Mohan Chaterjee —for Appellants.

Benoy Behari Sen —for Respondents.

Harries C. J.— This is a somewhat unusual application. The petitioners were given leave to appeal to the Federal Court and the last day for depositing the security required by O. 45, R. 7, Civil P. C. was 28th February 1950. On 27th February 1950, the proposed appellants tendered security in immovable property which they value at over Rs. 20,000. This security was tendered in this Court within time and the question arises whether this Court can accept that security in lieu of cash or Government securities. Order 45, R. 7, of the Code provides ;

"Where the certificate is granted, the applicant shall, within ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,-

(a) furnish security in cash or in Government securities for the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit . . . .

Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished:

Provided further that no adjournment shall be granted to an opposite party to contest the nature of such security . . . ."

[2] It is to be observed that the amount required to defray the expenses of translating and forwarding the record to Delhi has been deposited in cash and the only question is whether security in immovable property can be accepted in lieu of Rs. 4,000 in cash or in Government securities.

[3] There can be no question that the proposed appellants could have asked for such an order when they obtained leave to appeal. The proviso to sub-r. (1) of R. 7, expressly permits the Court to allow such an application. However, no application was made at the time of granting the certificate for leave to appeal and the question arises whether it can be made now.

[4] I do not think that this is a case where the proposed appellants ask for an extension of time. It is true that time has elapsed, but as I have already said, this security was tendered within time and the only question that we have to decide is whether or not the Court has power to accept security in immovable property instead of cash or Government securities. I may say that learned Advocate for the proposed appellants informed this Bench on 27th February that he had tendered security in immovable property and asked the Bench then to decide the matter. But we could not do so and adjourned the matter to today for decision. The application must therefore be treated as having been made to this Court within time.

[5] We must now consider whether the Court has power to accept security in immovable property, though no application was made to the Court for permission to deposit such security in accordance with the proviso to O. 45, R. 7 (1).

[6] The Privy Council had drafted certain rules relating to orders which this Court could make when the provisions of O. 45, R. 7 had not been complied with. These rules have now been adopted by the Supreme Court. The Privy Council rule was R. 9, of the Privy Council Rules dated 9th February 1920. The rule was in these terms:

"Where an appellant, having obtained a certificate for the admission of an appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the Court for an order admitting the appeal), the Court may, on its own motion or on an application in that behalf made by the respondent cancel the certificate for the admission of the appeal and may give such directions as to the cost of the appeal and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires."

[7] This rule has been adopted by the Supreme Court and appears as R. 3 of O. 12 of the Supreme Court Rules, 1950.

[8] This Court has uniformly held that R. 9, Privy Council Rules of 1920 did not give this Court a right to extend the time to make a deposit and that if deposit was not made as provided by O. 45, R. 7, the Court was bound to cancel the certificate. Other Courts have taken a different view.

[9] This Court however has never been called upon, as far as I can see, to consider whether or not the Court can accept security other than money or Government securities, especially if that security is tendered within the period allowed by O. 45, R. 7. The Bombay High Court has clearly held that a Court can accede to an application to allow a change in the form of security though the time for making the deposit and for furnishing the security has elapsed. The matter was considered in the case of *Revanshidaya Sangava* v. *Gudnaya Ningava*, A. I. R. (18) 1931 Bom. 278: (132 I. C. 488) in which it was held that notwithstanding the proviso to R. 7, O. 45, the Rule 9 prescribed by the Privy Council prevails under S. 112 and the High Court has jurisdiction not only to extend the time for making the deposit and for furnishing the security but also to change the form of security in a fit case.

[10] It will be impossible having regard to the authorities of this Court for this Bench to hold that we could extend the time for making the deposit, but I do not think that the authorities of this Court touch the question whether we could allow a different security, particularly if that was tendered within the time permitted in O. 45, R. 7. It seems to me that we can make such an order if we are of opinion that it is an order which the justice of the case requires.

[11] The proposed appellants are members of a well-known family owning large zemindary properties in East Bengal. The proposed appellants will take their father's property if they take it at all under the terms of a will made by their father. It appears that disputes have arisen and a learned Judge of this Court has appointed the Administrator General of West Bengal as trustee and executor *de bones non* of the estate of the late father of the proposed appellants and at the moment the proposed appellants are only receiving a sum of Rs. 2500 each for maintenance. Learned advocate informs us and we have no reason to disbelieve this statement that the Administrator General is finding it extremely difficult to pay the maintenance. The income must come out of this zemindary property, mainly out of the zemindary property in East Bengal and it is notorious that Zemindars residing in India find it practically impossible to realise the rents of their property in Pakistan. That being so, it appears to me that the proposed appellants are in very serious difficulty about providing the security in cash or in Government securities. Fortunately, however, one of them owns house property in Uttarpara outside Calcutta. It was bought in 1938 for Rs. 8,000 and it is certainly worth three or four times that sum now as the value of property has increased enormously in the industrial suburbs of Calcutta. It seems to me that this is a case where the justice of the case demands that we should accept some security other than cash or Government securities. Owing to partition and the state of feeling between the two countries, for which the proposed appellants are in no way responsible, they find themselves in serious difficulties with regard to cash. They can provide ample security in immovable property and I think we should accept that as security deposited within the period allowed by O. 45, R. 7, Civil P. C.

[12] It might be argued that as this Court has held that R. 9, Privy Council Rules, does not permit the Court to extend the time it cannot be held to permit the Court to change the form of security. It appears to me that the authorities of this Court deal only with the extension of time and where the justice of the case demands that some other form of security should be accepted, I think this Court has jurisdiction to do it. If security in immovable property be not accepted in this case very grievous injustice might be done to the proposed appellants for no fault of their own.

[13] In the result therefore we hold that the security in immovable property deposited must be accepted subject to the learned Registrar of the Appellate Side of this Court satisfying himself as to the title.

[14] The proposed appellants have given an undertaking that they will again within six months deposit four thousand rupees in cash or Government securities in place of the immovable property now deposited as security. If that is done the immovable property given as security will be released. If that is not done, liberty is given to the proposed respondents to apply for further orders.

[15] The costs of this application will be cost in the appeal, hearing-fee being assessed two gold mohurs.

Bachawat J.—I agree.

V.B.B. *Application allowed.*

A. I. R. (37) 1950 Calcutta 319 *[C. N. 110.]*

ROXBURGH J.

Panchanon Shaw — Decreee-holder — Petitioner v. *Satyabandhu Mukherjee—Judgment-debtor—Opposite Party.*

Civil Rule No. 1927 of 1949, D/- 7-3-1950, against order of Munsif, 1st Court, Alipore, D/- 12-9-1949.

(a) Tenancy Laws—Calcutta Thica Tenancy Act (II [2] of 1949), S. 28—Order under—Appeal.

The power given under S. 28 is a special and extraordinary statutory power given by the statute and an appeal against an order under the section would only lie if special provisions were given by the Act for an appeal creating a power. [Para 3]

(b) Tenancy Laws—Calcutta Thica Tenancy Act (II [2] of 1949), Ss. 28 and 31— Pre-Act consent decree—If can be rescinded.

It cannot be said, in view of the provisions of S. 31, that a consent decree, even if in some points it is not in conformity with the Act, is not in a broader sense in conformity with the Act, in the view that pre-Act contracts may exist having the effect of barring the provisions of the Act. [Para 6]

Where in a suit in ejectment a consent decree was passed before the Act came into force on the grounds that proper notice giving at least 15 days' notice had been given to the tenant and that there were arrears of rent and there was no agreement by the tenant to overlook the fact that full one month's notice had not been given to him as required by S. 4 of the Act as there was no such requirement of notice before the Act was passed :

Held, that the consent decree could not be rescinded. [Paras 7 and 8]

Sarat Chandra Jana—for Petitioner.

Amaresh Chandra Roy—for Opposite Party.

Order. — This is a Rule against an order of the Munsif, 1st Court, Alipore purporting to be under S. 28, Calcutta Thika Tenancy Act, 1949, rescinding a compromise decree for ejectment made in the suit before him on 15th July 1948. The petitioner here, as plaintiff, brought a suit on 9th April 1948, for ejectment of the opposite party alleging that five months' rent was due and also that notice under S. 106, T. P. Act, had been served requiring the defendant to vacate on the expiry of the month of October 1947. It may be noted that in his petition the petitioner alleges that the tenant was in occupation on two leases which expired with the month of October, 1947 and that the notice in question was merely issued out of abundant caution. No reference to the fact of the leases, however, was made in the original suit. The suit was compromised and a decree passed in accordance with the terms thereof. These were, briefly: The plaintiff was to get a decree for ejectment with costs and also a decree for Rs. 125 on account of arrears of rent and Rs. 40 as damages, but the defendant was given an option to remain on the land until the 15th October and then give up peaceful possession by removing some of the structures. For the remainder the plaintiff was to pay Rs. 500. Further, if the tenant vacated in accordance with the terms he was to get an extra Rs. 250 as compensation and then the decree was to have no effect. The decretal amount for arrears of rent, damages and costs was to be deemed to be fully satisfied. If the terms were not complied with, the decree was to remain in full force and effect. The tenant did not vacate and comply with the terms of the contract although the plaintiff deposited Rs. 750 in Court. On 28th February 1949, the Calcutta Thika Tenancy Act came into force and thereafter the tenant made an application under S. 28 thereof and the Munsif has allowed the application and rescinded the decree.

[2] The Munsif had power under S. 28 of the Act to rescind the decree if he was

"of opinion that the decree or order was not in conformity with any provision of this Act other than sub-s. (1) of S. 5 or S. 27."

The Munsif has interpreted this to mean that he is to treat the suit as though wholly governed by the provisions of the Act although the Act was not in force either at the time of institution of the suit or at the time of the decree. He has held that although strictly speaking the decree could not be said to have been made on the "ground" of existence of arrears of rent, a ground which, in S. 3 (1) of the Act, has been now made one of the grounds for eviction, nevertheless as there was a claim for arrears and a decree for arrears, he thought that the decree was, even on his interpretation, in this respect in conformity with the provisions of the Act. He has however held that it is not in conformity with the provisions of the Act because the notice given, as appears from the record, was not in accordance with the provisions of S. 4 of the Act which requires at least one month's notice in writing expiring with the end of the month of the tenancy. A notice was sent by ordinary post on 30th September and there was a registered notice, the receipt whereof shows that the notice was refused on 2nd October. Without going into the question further the Munsif has assumed that this shows that at least one month's notice was not in fact given.

[3] A preliminary point was taken against this application in revision on the ground that the order of the Munsif under S. 28 rescinding the decree was itself a decree and was therefore appealable to the District Judge. In my opinion the contention is not sound. The power given under S. 28 is a special and extraordinary statutory power given by the statute and an appeal would only lie, in my opinion, if special provisions were given by the Act for an appeal creating a power.

[4] Many points were canvassed before me which I do not think it necessary to discuss. In my opinion, the special feature of this case is that the decree in question was a consent decree and although S. 31 of the Act specially provides that nothing in any contract between a landlord and a Thika tenant after the commencement of the Act shall take away or limit the rights of the tenant, by implication there is no bar in the case of a contract made, as in the case of this consent decree, prior to the commencement of the Act.

[5] In a proper case, it will be necessary to consider what exact difference was intended by the Legislature between the provisions of S. 28, which deals with rescinding pre-Act decrees

which had not been executed, and S. 29, which deals with pending suits and *proceedings in execution* (necessarily of pre-Act decrees). The latter enjoins the controller on transfer of the pending case,

"to deal with it in accordance with the provisions of this Act as if this Act had been in operation on the date of institution of the suit or proceeding."

Section 29 also specifically makes a provision excluding the operation of S. 4 (requiring notice) whereas no such exclusion is made in S. 28. On the other hand S. 28 excludes sub-s. (1) of S. 5, (which requires proceedings in ejectment to be instituted before the Controller) whereas S. 29 makes no such exclusion. Section 28 again excludes S. 27 which deals with appeal, review and execution. How this section could ever have been thought to have had any bearing on any question of rescinding a pre-Act decree is beyond my comprehension, but the fact that these exceptions were inserted in S. 28 will in due course have to be considered in trying to interpret exactly what S. 28 means.

[6] In any view of S. 28, I cannot see how it can be said, in view of the provisions of S. 31, that a consent decree, even if in some points it is not in conformity with the Act, is not in a broader sense in conformity with the Act in the view that pre-Act contracts may exist having the effect of barring the provisions of the Act.

[7] The question of whether a consent decree could be set aside under S. 9B (3), Calcutta House Rent Control Order, 1943, was considered in the case of *Haji Mohammad Ekramal Haque* v. *Rebati Bhusan Mukherjee*, 53 C. W. N. 859, in which reference was made to previous cases, some of which were dissented from. The wording of that section is of course different from the wording of either S 28 or S. 29, Calcutta Thika Tenancy Act, but the view was held that the consent decree could only be set aside where either the decree or the proceedings in the suit showed that the real ground on which the landlord sought eviction was non-payment of rent by the tenant, that is to say, where the tenant had agreed to a decree being made on a ground which was specifically not a sufficient ground under the new Act if arrears had been paid up. Even applying the principle in the present case it would not operate to upset the decree passed. The decree in the case was passed on the ground that proper notice giving at least 15 days' notice had been given to the tenant. There was also the fact, which has now become a "ground", namely, that there were arrears of rent. There was no agreement by the tenant to overlook the fact that full one month's notice had not been given to him as now required by S. 4 of the Act. The question of one month's notice could never have been present to the minds of the parties for the simple reason that until the Calcutta Thika Tenancy Act was passed there never was any such requirement of notice.

[8] Hence for both these reasons I hold that the learned Munsif was in error in his interpretation of the Calcutta Thika Tenancy Act and should not have rescinded the decree.

[9] It remains to mention one other point arising out of decisions in the cases of *Mohammad Mateen* v. *Baijnath Bajoria*, 54 C. W. N. 287 : (85 C. L. J. 66) and *Murari Mohan* v. *Prokash Chandra*, 53 C. W. N. 610 : (A. I. R. (37) 1950 Cal 280), where it has been held that before a tenant can claim any of the benefits of the Calcutta Thika Tenancy Act, he is required to show that he is a thika tenant within the meaning of S. 2 (5) of the Act which requires him to show that he holds

"under the system commonly known as 'Thika' 'Thika Masik Utbandi', 'Thika Masik' 'Thika Bastu' or any other like system."

The learned Munsif has simply assumed without further investigation that the defendant was such a tenant. It was suggested in argument before me that the use of the word "system" in S. 3 (iv) shows that the wording as used in the Act has a somewhat colourless connotation and that too much stress has been laid in the cases cited on the use of the word in the definition of thika tenant. The practical difficulty seems to be that nobody but the draftsman apparently knows of any real 'system' and therefore it is a matter of some practical difficulty for any thika tenant commonly understood as such, to show that he is a thika tenant within the meaning of the definition It is true that on the other side of the picture, unless some distinction is made, then all monthly tenants of many different kinds of premises which nobody would think of describing as "thika" tenants may bring themselves under the provisions of the Act, provided they put up a suitable shed or two on some open space attached to the premises. These are matters for the Legislature. I see no reason to differ from the view expressed in the cases cited, so that even had I been disposed on other grounds to allow this Rule, it would have been necessary to have sent the case back for the learned Munsif to see if this particular thika tenant could succeed in showing that he belonged to that apparently rare (if at all existent) variety defined in S. 2 (5) of the Act.

[10] The result is that this Rule is made absolute. The order of the learned Munsif rescinding the decree is set aside. The case will go back to him for disposal in accordance with the provisions of S. 28, namely, by transferring it to the

Controller for execution under the Act. I make no order as to costs.

V.R.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 322 *[C. N. 111.]*

DAS GUPTA J.

Hem Chandra Dutta — Auction-purchaser — Petitioner v. *Haran Chandra Mete and others—Judgment debtors—Opposite Party.*

Civil Rule No. 1635 of 1948, D/- 29th March 1949, against order of Munsif, 2nd Court, Alipur, D/- 21st September 1948.

Civil P. C. (1908), O. 21, R. 95 — Demolition of kutcha huts — Power of officer delivering possession.

Order 21, R. 95 does entitle the auction-purchaser to get the property without its being burdened with structures such as kutcha huts and as a part of delivering possession the Court's officer can take down those huts provided he does it with due regard to the rights of the judgment-debtor, even though the writ under O. 21, R. 95 does not particularly mention the removal of the huts : A. I. R. (20) 1933 Cal. 469, *Rel. on* ; 18 W. R. 527 and A. I. R. (21) 1934 Cal. 751, *Disting.*

[Paras 3, 4, 12]

Annotation : ('44-Com.) Civil P. C., O. 21, R. 95, N. 8, Pt. 9.

Rajendra Bhusan Bakshi and Anil Kumar Mitter — for Petitioner.

Bankim Chandra Banerjee and Narendra Nath Banerjee — for Opposite Party.

Order. — This Rule raises the question whether the Court, in ordering delivery of possession under O. 21, R. 95, Civil P. C., can order removal of the huts standing on the land, where the auction-purchaser, who asked for delivery of possession, had purchased the land but had not purchased the huts.

[2] The words of O. 21, R. 95 make provision for removing any person who refuses to vacate the property of which possession is to be given. Specific provision has not, however, been made therein for removal of any structures.

[3] Reliance is placed by Mr. Bakshi, on behalf of the petitioner, on the observations of Rankin C. J. in the case of *The Government of Bengal* v. *Alimaddin*, 57 C. L. J. 41 : (A. I. R (20) 1933 Cal. 469 : 34 Cr. L. J. 826), which though a criminal case, did raise this question of the duties of the Court's officers acting under a writ under O. 21, R. 95, Civil P. C. The question which arose there was whether the accused persons had any right of private defence against the act of the officer in demolishing the huts. The Nazir was sent there to execute a writ under O. 21, R. 95. The learned trial Magistrate had held that the Nazir was not entitled to demolish the structures and so the plea of private defence was available to the accused persons. In considering this question, Rankin C. J. said that it cannot be said for a moment that because the ordinary writ under O. 21, R. 95, Civil P. C., does not particularly mention delivery of huts, or removal of huts, the huts cannot be removed. His Lordship proceeded to observe :

"The auction-purchaser is entitled to get the property without the property being burdened with those huts. As a part of delivering possession, the taking down of those huts does not appear to have done with any disregard to any right of the judgment-debtors which they had under the proper procedure."

[4] Even though this decision was in a criminal case, I have no doubt in my mind that this is a clear and good authority for holding that O. 21, R. 95, Civil P. C, does entitle the auction purchaser to get the property without its being burdened with those huts and that as a part of delivering possession the Court's officer can take down those huts provided he does it with due regard to the right of the judgment-debtor.

[5] Against this, reliance was placed by the learned advocate for the opposite parties on two decisions—one in the case of *Radha Gobind* v. *Brijendro Coomar*, 18 W. R. 527, and the other, a more recent decision, in the case of *Bir Bikram Kishore* v. *Raj Kumar Pal*, 38 C. W. N. 1051 : (A. I. R. (21) 1934 Cal. 751).

[6] In the first case, the plaintiff had obtained a decree in a suit for possession and the question arose whether in executing a decree for khas possession, the executing Court could direct demolition of the building situated on the land. As a result of an agreement between the parties, the actual order passed was that the defendant was allowed two months' time "within which, if he so pleases, he may vacate the land and carry away the material of any buildings thereon." On the question of law, whether the executing Court has a right to direct demolition the opinion was expressed thus :

"In our opinion, it is hardly within the province of the Court executing a decree to direct that the building should be pulled down; that is a matter for the decree-holder to consider after he has obtained possession. Any opposition or resistance for removing out of the way by proceedings under S. 223, it will remain open to do what he thinks proper in the matter."

[7] It is to be noticed that in this case as there was an agreement between the parties the actual decision given was not based on this expression of opinion. It is further to be noticed as already indicated, that this was a decree for khas possession and the decree had not mentioned anything as regards whether the huts should be removed or not.

[8] In the latter case, the head-note runs thus :

"When there are certain structures on land purchased in execution of a decree, such structures not being covered by the sale, there can be no demolition of the structures for the purposes of delivery of possession under O. 21, R. 95 of the Code which only contemplates removal of persons refusing to vacate the purchased properties, i. e. in the present case the land.

The possession which the Court will give will be mere vacant possession but will not be concerned with any act of demolition. Any further action which the purchaser will take will be his own act and must be such as the law will allow."

[9] From the judgment of the Court, however, it appears that the decision was not in as wide a language as indicated in the head-note. In this case the appellant had prayed for delivery of possession by demolition of certain pucca structures. The decision of the Court was that this prayer for demolition of the *pucca* structures cannot be allowed and after discussing the words of O. 21, R. 35 and O. 21, R. 95, their Lordships proceeded to remark :

"Nowhere is it said in the law that the demolition of a pucca structure which is on the land covered by a decree or by a purchase made in execution of a decree is necessary in order to make the possession delivered effective and complete as actual or khas possession. The prayer for demolition of the structure has, therefore, been rightly refused."

[10] Thereafter the Court proceeded to mention the judgment of Rankin C. J., in the case of the *Government of Bengal* v. *Alimaddin*, 57 C. L. J. 41 : (A. I. R. (20) 1933 Cal. 469 : 34 Cr. L. J. 826), as mentioned above, and also the case of *Radha Gobind* v. *Brijendro Coomar*, 18 W. R. 527, and said that the view they were taking found support in the Court's decision in the above Weekly Reporter case.

[11] I am unable to see any observation in this judgment on the question indicating that the observations of Rankin C. J., in the case referred to above were incorrect in law. There is just a statement that "the observations were not pronounced as a decision on any contention to that effect." As I have already pointed out, however, these observations were directly a decision on the claim of the right of private defence which was raised on behalf of the accused.

[12] The position, therefore, is that the decision of the Court in the case of *Bir Bikram Kishore* v. *Raj Kumar Pal*, 38 C. W. N. 1051 : (A. I. R. (21) 1934 Cal. 751) was on the question of demolition of a pucca structure and as I have already pointed out in dealing with the question the Court, at least in two parts of its judgment, laid stress on the word "pucca". The decision of Rankin C. J. was as regards kutcha huts. In the present case, the structures on the land are admittedly kutcha. On consideration of all these circumstances, I have no hesitation in respectfully following the view of law which was laid down by Rankin C. J., in the case of the *Government of Bengal* v. *Alimaddin*, 57 C.L.J. 41 : (A.I.R. (20) 1933 Cal. 469 : 34 Cr. L. J. 826).

[13] Accordingly, in modification of the order of the learned Munsif, I direct that the petitioner will obtain delivery of possession of the land after demolition of the huts, if necessary in case the opposite parties refuse to remove the huts within a reasonable time. The opposite parties are allowed time till 1st October 1949, for removing the huts. If that is not done, the Court will direct removal by the Court's Officers who may be entrusted to give delivery of possession under O. 21, R. 95, Civil P. C. The Court will not direct any delivery of possession to be made before 1st October 1949. If before that date, the opposite parties do not vacate the land, the Court should, in directing delivery of possession under O. 21, R. 95, Civil P. C., pass such orders as may be necessary for removing all persons from the property and also for demolishing the huts.

[14] I make no order as to costs.

D.R.R. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 323 *[C. N. 112.]*

LAHIRI AND GUHA JJ.

Naresh Chandra Ray and others — *Defendants*—*Appellants* v. *Dhirendra Nath Dey*—*Plaintiff*—*Respondent.*

A. F. A. D. No. 2095 of 1945, D/- 3-3 1950, against decree of D. J., Howrah, D/- 5-9-1945,

(a) Transfer of Property Act (1882), S. 100 — Charge for payment of rent.

Where by a *jaminnama* a share of *A's patni* interest is made security for the payment of money to *B* in respect of the *dar-patni* rent, the contract amounts to a charge within S. 100. [Para 6]

Annotation : ('50-Com.) T. P. Act, S. 100, N. 12, Pt. 1.

(b) Tenancy Laws—Bengal Tenancy Act (VIII [8] of 1885), S. 168-A (1) (a)—Charge for payment of rent—Charge, if can be enforced.

Where *A* took settlement of one-sixth of the *patni* of *B* in *dar-patni* right and, having in the said *patni* one-third share, executed a *jaminnama* by which he purported to create a charge upon his one-sixth share in the *patni* for rent of the *dar-patni* and the question was whether in a suit by *B* for recovery of arrears of rent in respect of the *dar-paninama* S. 168A was a bar in the way of *B* in enforcing the charge :

Held, that no attachment of *A's patni* interest being necessary in execution of the decree which would be obtained by *B* with declaration of a charge, S. 168A could not stand in the way of *B* in enforcing the contract upon the *jaminnama*. [Para 7]

Apurbadhan Mukherjee —for Appellants.

Paresh Nath Mukherjee —for Respondent.

Guha J.— This appeal by the defendants arises out of a suit for recovery of arrears of rent in respect of a *dar-patni jama*. By a subsequent amendment of the plaint, the plaintiff prayed for a declaration of a charge upon the defendant's one-sixth share in the superior *patni* in terms of a *Jaminnama* for securing the payment of the *dar-patni* rent.

[2] The facts which are not in dispute are briefly as follows:

[3] The father of the defendants took settlement of one-sixth share of the *patni* of the plaintiff in *dar patni* right upon a *potta* executed in 1326 B. S. In the said *patni* the defendants' father had also one-third share and on the same date as the date of the *dar-patni potta* he executed a *jaminnama* by which he purported to create a charge upon his one-sixth share in the *patni* for rent of the *dar-patni* in dispute. By his amendment of the plaint, the plaintiff wanted to make one-sixth share of the defendants in the *patni* liable for his dues in respect of the present suit.

[4] The defence *inter alia* was that the provisions of S. 168-A, Bengal Tenancy Act, stood in the way of the plaintiff in enforcing the contract entered into between the parties upon the *jaminnama*.

[5] The trial Court decreed the suit in part upon the finding that the plaintiff would get a decree for the amount claimed without any charge upon the *patni* interest of the defendants for the realisation of the dues and that the plaintiff would be entitled to execute the decree against the defaulting tenure only. Against this decision the plaintiff preferred an appeal before the District Judge of Howrah. This appeal was successful. The decision of the trial Court was modified and the plaintiff's suit was decreed in full. In the opinion of the Court of appeal below, S. 168-A, Bengal Tenancy Act, was not a bar to the enforcement of the charge provided for in the *jaminnama*. Against this decision the defendants have preferred this appeal.

[6] It has been contended before us by Mr. A. D. Mukherji on behalf of the appellants that upon a proper construction of the *jaminnama* it did not create a charge and we have been taken in this connection through the various provisions of the *jaminnama*. As regards this contention, it may be observed at the outset that in the Courts below it was conceded on behalf of the defendants that the *jaminnama* did create a charge. Be that as it may, upon considering the terms of the document carefully we have reached the conclusion that a charge was created by the *jaminnama*. The terms of the document come within the clear words of S. 100, T. P. Act. It is clear from the recitals of the document that a certain share of the defendant's *patni* interest was made security for the payment of money to the plaintiff in respect of the *darpatni* rent. The contract accordingly amounted to a charge, as has been found by the Courts below. As the contract amounted to a charge, no attachment would be necessary in execution of the decree, as pointed out by the Court of appeal below. No attachment of the defendants' *patni* interest will be necessary in execution of a decree with declaration of a charge, if any such decree is passed in favour of the plaintiff.

[7] The next point for consideration is whether in these circumstances S. 168A, Bengal Tenancy Act, stands in the way of the plaintiff. It is contended on behalf of the appellants that S. 168A stands as a bar in way of the the plaintiff in enforcing the contract upon the *jaminnama*. Section 168-A (1) (a) lays down that notwithstanding anything contained in any contract a decree for arrears of rent due in respect of a tenure or holding, whether having the effect of a rent decree or money decree, shall not be executed by the attachment and sale of any property other than the entire tenure or holding to which the decree relates. In the present case, as has been observed before, no attachment of the defendants' *patni* interest will be necessary in execution of the decree obtained by the plaintiff with declaration of a charge. Now the question is whether in these circumstances S. 168-A (1) (a) can defeat the right of the plaintiff. In our opinion the answer should be in the negative. As pointed out in the case of *Pratul Chandra* v. *Naresh Chandra*, 50 C. W. N. 655: (A. I. R. (33) 1946 Cal. 498) as S. 168-A is an encroachment on the rights which the landlord decree-holder had under the ordinary law the ambit of that section ought not to be extended beyond what is warranted by its actual language. In S. 168-A (1) (a) the words used are "attachment *and* sale". In the present case there will be no attachment and on a plain reading of the section, therefore, it would appear that it will not stand in the way of the plaintiff. Mr. A. D. Mukherjee on behalf of the appellants has, however, drawn our attention to certain observations of Mukherjea J. in the case of *Anil Kumar* v. *Roy Biman Behari*, 48 C. W. N. 344: (A. I. R. (31) 1944 Cal. 240). He has laid particular stress upon the following passage in the judgment of Mukherjea J:

> "The intention of the Legislature was obviously to prevent the sale of any property belonging to the judgment-debtor other than the tenure in execution of a rent decree. An attachment comes within the prohibition of the section only so far as it is a necessary step to the sale of the property."

Relying upon this passage Mr. Mukerjee contends that the primary intention of the Legislature in enacting S. 168-A being to prevent the sale of any property of the judgment-debtor other than the tenure, in the present case as well, which is one of sale without attachment of the defendants' *patni* interest, S. 168-A will be applicable. This contention appears to us to be without much substance. In the passage in question upon which such strong reliance has

been placed by Mr. A. D. Mukherjee, it appears that the word "sale" was used in a somewhat broad sense, as certain other passages of the judgment will show. It is significant that in S. 168-A the relevant words are "attachment and sale" and not "attachment or sale." As pointed out in the case in *Anil Kumar* v. *Ray Biman Behari*, 48 C. W. N. 344 : (A. I. R. (31) 1944 Cal. 240) referred to above, the words have been taken verbatim from S. 51 (b), Civil P. C., the latter part of the clause, namely, "by sale without attachment of any property" being not reproduced in S. 168-A, Bengal Tenancy Act. The omission of those words "by sale without attachment of any property" is significant and it seemed to imply that it is only that mode of execution, namely, by attachment *and* sale, which is affected by S. 168-A, Bengal Tenancy Act. Section 168-A has to be construed strictly and upon such strict construction the present case does not, in our opinion, come within the mischief of that section. That being so, S. 168-A cannot stand as a bar in the way of the plaintiff in enforcing the contract upon the *jaminnama*.

[8] In the result, the decision of the Court of appeal below is upheld and this appeal is dismissed with costs.

[9] The decree, however, will be drawn up by the Court below according to FORM NO. 5-A of APPENDIX D, Civil P. C., so far as is practicable.

Lahiri J.—I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 325 *[C. N. 113.]*

G. N. DAS AND GUHA JJ.

Ketaki Ranjan Banerjee and others—*Judgment-debtors*—*Petitioners* v. *Bipradas Mukherjee*—*Decree-holder*—*Opposite Party.*

Civil Rule No. 917 of 1949, D/-8th August 1949.

Civil P. C. (1908), O. 41, R. 6—Security — Sufficiency — Determination of, if judicial act — Civil P. C. (1908), S. 145.

Determination of the sufficiency or otherwise of security offered by the parties is a judicial act and such act has to be performed judicially. Mere acceptance of the report of a ministerial officer on the point without applying the judicial mind to the consideration of the various factors bearing on it cannot be said to be a proper or adequate performance of a judicial act.

[Para 2]

Annotation : ('44-Com.) C. P. C., S. 145, N. 4; O. 41, R. 6, N. 4.

Atul Chandra Gupta and Chandra Narayan Laik—for Petitioners.

Apurbadhan Mukherjee and Amiya Kumar Mukherjee—for Opposite Party.

Guha J. — This rule at the instance of judgment-debtors is directed against certain orders passed by the learned Additional Subordinate Judge of Asansol in Title Execution Case NO. 43 of 1948 arising out of Money Suit NO. 30 of 1944 brought by the plaintiff opposite party for recovery of RS. 29,995-10-6 and for certain other reliefs. That suit was decreed by the learned Additional Subordinate Judge of Asansol in part for RS. 26,666-9-3 with proportionate costs and also for half the share of the profits of the "Master Engineering Concern" a partnership business. An appeal (Appeal from Original Decree NO. 334 of 1947) against that decree preferred by the present petitioners is pending in this Court. After the filing of that appeal, the judgment-debtors-petitioners filed an application in this Court for stay of the execution of the decree on the grounds *inter alia* that the plaintiff-opposite party was in embarrassed circumstances and an order was passed on 27th FEBRUARY 1948, by this Court permitting the opposite party to withdraw the money deposited in the lower Court provided that he furnished security to the satisfaction of that Court. Pursuant to that order the opposite party offered to give personal security to the extent of RS. 29,512-14-3 and this was accepted by the learned Subordinate Judge. The judgment-debtors were dissatisfied with that order of the learned Subordinate Judge, their contention being that the order of this Court on 27th FEBRUARY 1948, meant security in immovable property and not personal security and they moved this Court once again (CIVIL RULE NO 803/48). The rule was made absolute by this Court on 10th MAY 1949 on the following term amongst others:

"If the decree-holder opposite party wishes to withdraw the money deposited in Court, he may be allowed to do so on furnishing security in immovable property to the satisfaction of the Court below."

Thereafter the opposite party submitted a draft joint security bond in the lower Court along with one Jagadish Chandra Mukherjee in purported compliance with the above mentioned order of this Court and the Sheristadar was directed to check the bond and report to the lower Court. On 2nd JUNE 1949 the judgment-debtors filed a petition before the lower Court raising various objections to the acceptance of the security bond offered by the decree-holder, one of the objections being that the value of the properties offered as security did not exceed Rs. 5,000. The Sheristadar submitted a report to the Court stating that the sureties were

"quite solvent and fit to stand as such for Rs. 30,000 and recommending that the draft security bond might be accepted.".

Thereupon the learned Subordinate Judge took up the security matter for hearing on 11th JUNE 1949 and overruled most of the objections of the judgment-debtors. It is necessary for our present purposes to quote one passage from the order

(dated 11th June 1949) of the learned Judge. It runs as follows:

"Secondly, it is contended that properties are insufficinet. The Sheristadar tested the properties and he found that they are valued at about Rs. 30,000 which are sufficient for the present purpose."

Ultimately the draft bond was approved by the learned Judge and the decree-holder was directed to get it written on duly stamped paper and registered (*vide* Order No. 28 dated 17th June 1949).

[2] It is against the orders referred to above *viz.*, Order No. 24 dated 11th June 1949 and Order No. 28 dated 17th June 1949 that the present rule has been obtained by the judgment-debtors. It has been contended on their behalf that the learned Judge did not consider properly the objections urged on their behalf and that he has failed to exercise his jurisdiction properly by simply accepting the Sheristadar's report about the valuation of the properties offered as security. On going through the records we are of opinion that the grievance of the petitioners is not without substance. Determination of the sufficiency or otherwise of security offered by the parties is a judicial act and such act has to be performed judicially. Mere acceptance of the report of a ministerial officer on the point without applying the judicial mind to the consideration of the various factors bearing on it cannot be said to be a proper or adequate performance of a judicial act. The judgment-debtors had in their petition dated 2nd June 1949 before the lower Court raised various objections to the acceptance of the security bond. Reference may, in this connection, be made specially to Paras. 4, 5, 6 and 7 of that petition. There is some reference to these objections in the Sheristadar's report dated 30th May 1949. These objections were elaborated further in Paras. 16 and 19 of the revision petition filed in this Court on 22nd June 1949. The order of the learned Judge makes it abundantly clear that he did not deal with these objections in a manner which can be said to be adequate or proper and as such we are unable to uphold that order.

[3] In the result, this rule is made absolute, the orders in question are set aside and the case is remitted to the lower Court. The learned Judge is directed to come to a proper decision on the question of the adequacy or otherwise of the security offered by the decree-holder. His attention is drawn specially to Paras. 4, 5, 6, and 7 of the objection petition filed by the judgment-debtors on 2nd June 1949 as also to Paras. 16 and 19 of the revision petition filed in this Court on 22nd June 1949. The parties should be given reasonable opportunity to adduce such evidence, oral or documentary as they desire.

[4] There will be no costs of this rule. It is desirable that the security matter should be disposed of as speedily as possible.

[5] Let the records be sent down as soon as possible.

G. N. Das J. — I agree.

V.R.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 326 *[C. N. 114.]*

HARRIES C. J. AND SARKAR J.

Aswini Kumar Bhandari—*Petitioner* v. *Anukul Chandra Bhandari and others* — *Opposite Party.*

Civil Revn. Appln. No. 582 of 1949, D/- 3rd February 1950, made by Sub J., 2nd Court, Howrah, D/- 19th April 1949.

Civil P. C. (1908), O. 16, R. 1—Application for issue of summons—Stage for.

A party is entitled as of right to a summons so long as the application is made after the institution of the suit and before it is decided. It does not matter that the application is made at a late stage of the proceedings. The Court must grant the application though it need not adjourn the hearing for the attendance of the witness summoned. [Paras 5, 8]

Annotation: ('44-Com.) Civil P. C., O. 16, R. 1, N. 5, Pts. 1, 2, 3.

Rabindra Nath Bhattacharjee—for Petitioner.
Sarat Chandra Janah and Binode Behari Haldar —for Opposite Party.

Harries C. J.—This is an application for revision of an order made by a learned Subordinate Judge refusing to allow certain signatures to be examined by an expert and further refusing to summon the expert to give evidence at the cost of the petitioner.

[2] The plaintiff desired that the genuineness of certain signatures should be considered and he applied that an expert should be summoned by the Court to examine the signatures and report thereon. This petition was refused as it was a belated one.

[3] The plaintiff then applied that a summons should be served by the Court on a Mr. Bennet of Calcutta who is a hand-writing expert to appear in Court and give evidence as to the genuineness or not of the signature or signatures in question. The plaintiff asked for the summons to be issued at his expense; but the Court refused to issue the summons on this witness because the application was made at such a late stage:

[4] The power of a Court to issue summonses to witnesses to attend to give evidence is dealt with in O. 16, R. 1. The rule is as follows:

"At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents."

[5] It has been held that a party is entitled as of right to a summons so long as the applica-

tion is made after the institution of the suit and before it is decided. It has further been held that it does not matter that the application is made at a late stage of the proceedings. The Court must grant the application though it need not adjourn the hearing for the attendance of the witness summoned.

[6] In the case of *Krishna Churn* v. *Protab Chunder*, 7 Cal. 660, it was held by a Bench of this Court that in all cases in which parties apply for a summons to compel the attendance of witnesses, or a summons to produce documents, or apply to have a document sent for under S. 137, Civil P. C., the Court ought not to refuse such application, merely because in its opinion the witnesses cannot be present, or the documents cannot be produced, before the termination of the trial.

[7] In *Bhagwat Das* v. *Devi Din*, 16 ALL. 218: (1894 A. W. N. 45), a Banch came to the same conclusion. In that case they held that where a person making an application to a civil Court for witnesses to be summoned has negligently or with intention to delay the hearing postponed the making of his application for a summons until a time when it would be impossible to obtain the attendance of the witnesses at the hearing, the Court might properly refuse to adjourn the hearing, but nevertheless it would be the duty of the Court to order the summons asked for to issue.

[8] From these authorities it is clear that the Court below should have issued the summons though it was not bound to adjourn the date of the hearing which had been fixed for 25th April 1949. Unfortunately, however, the Court refused to issue the summons.

[9] In the result, therefore, this petition must be allowed and the order of the learned Judge set aside. The records must be returned forthwith to the lower Court and the parties should attend before that Court on Wednesday, 8th February 1950, when the learned Subordinate Judge should issue the summons asked for by the plaintiff and fix a date for hearing.

[10] The rule is made absolute in these terms with costs.

[11] Let the counter affidavit filed in Court to-day be kept on the record.

Sarkar J.—I agree.

D.R.R. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 327 *[C. N. 115.]*

CHUNDER AND GUHA JJ.

Bhupati Ghosh—Appellant. v. *The King.*

Criminal Appeal No. 139 of 1949, D/- 23-11-1949.

(a) Criminal P. C. (1898), S. 367—Appreciation of evidence—Evidence Act (1872), S. 157.

The evidence of witnesses who came several hours after the occurrence has ordinarily got to be excluded, being of no corroborative value. [Para 3]

Annotation: ('49-Com.) Criminal P. C., S. 367, N. 6; ('46-Man.) Evidence Act, S. 157 N. 4.

(b) Criminal P. C. (1898) S. 297 — Non-direction.

Where the judge tells the jury what the public prosecutor and the pleader for the defence had said without any direction as to what the Judge had to say the charge is bad. [Para 4]

Annotation: ('49 Com.) Cr. P.C. S 297 N. 9, 10, 11, 12.

S. S. Mukherjee.— for Appellant.

N. K. Sen. —for the Crown.

Chunder J.—This is an appeal against the conviction and sentence of the appellant under S. 395, Penal Code. Briefly, the facts are that there was a dacoity in the house of the complainant Jiten. There were three other inmates in the house, of them P. W. 2 is said to have fainted and P.W. Nos. 3 and 4 were two ladies. P.W. Nos. 6, 7 and 8 are three neighbours who came the next morning some hours later.

[2] As the learned Magistrate's order sheet seems to show, he considered that the public prosecutor had good reason to think that P. Ws. Nos. 6, 7 and 8 will not be witnesses of truth, but as the defence wanted them to be tendered for cross-examination, he directed that they should be so tendered, purporting to follow a decision of this Court, and at the same time when calling upon the public prosecutor to do so he gave him an opportunity to cross-examine these witnesses later.

[3] Mr. Mukherjee, appearing for the defence, has rightly pointed out that the learned Magistrate could have saved himself all the trouble and the complication he had later created in his charge if he had excluded all this evidence. It is clear that his charge as to how the evidence of hostile witnesses should be valued is not at all happy. What the learned Judge did not notice was that the evidence of these witnesses was really not relevant. To be evidence of corroborative value "It must be at or about the time of the occurrence" which means that the evidence should be by persons who had heard the occurrence before there was sufficient time for concoction. That is the criterion. The evidence of witnesses who came several hours after the occurrence may be very interesting as village gossip, but is not ordinarily proper evidence over which a Court should spend its time. Such evidence has ordinarily got to be excluded.

[4] In the re-trial we are going to order, the learned Judge will exclude the evidence of all these three witnesses. Mr. Mukherjee has rightly controverted about the hopeless way in which the learned Judge has dealt with the evidence of identification and, if we may add, really the whole case in his charge. What he

has done is he has begun telling the jury in sentences after sentences of what the Public Prosecutor had said and then after exhausting their patience he must have exasperated them by repeating to them in a succession of sentences of what the learned pleader for the defence had said and then left the jury without any direction as to what the learned Judge has to say. As a charge, the charge is hopeless and could not under any possible circumstances have given any help to the jury in deciding the case. It is, therefore, necessary that the case should be retried and in view of this we refrain from passing any opinion whatsoever on the merits of the case, excepting to point out that there should be some explanation for the non-examination of Lakshmi Narayan who appears to have been examined by the committing Magistrate.

[5] The conviction and sentence of the appellant are set aside and the case is remanded for retrial by some other Judge selected by the Sessions Judge.

[6] The appellant will continue in the same bail.

Guha J. — I agree.

D.H. *Retrial ordered.*

A. I. R. (37) 1950 Calcutta 328 *[C. N. 116.]*

R. P. MOOKERJEE AND LAHIRI JJ.

Shaikh Mongal — Plaintiff—Appellant v. *Pure Dishargarh Colliery Co. and others—Respondents.*

A. F. A. D. No. 462 of 1944, D/- 8th February 1950, against decree of Sub-Judge, Zillah Burdwan at Asansol, D/- 7th December 1943.

Civil P. C. (1908), S. 100—Mixed question of law and fact—Nature of possession.

The question whether the acts of the defendants complained of by the plaintiff amount to dispossession of the plaintiff or constitute mere isolated acts of trespass is a mixed question of law and fact which cannot be decided without fresh evidence and hence a new plea involving such a question cannot be allowed to be raised for the first time in second appeal. [Para 7]

Annotation: ('44-Com) Civil P. C., Ss. 100-101 N. 57 Pt. 1.

Dr. Nares Chandra Sen Gupta, Mahendra Nath Mitra and C. F. Ali for Azizul Islam—for Appellant.

Amarendra Nath Bose and Jagadish Chandra Ghose—for Respondents.

Lahiri J.—This is an appeal by the unsuccessful plaintiff in a suit for recovery of damages and mesne profits for mischief and wrong done to his land by the defendants. The plaintiff's case in the plaint is that under defendant 3, Apcar Collieries Limited, who are the taluqdars of mouza Sitarampur, the plaintiff is an occupancy raiyat in respect of 14 plots of land enumerated in the plaint. Defendant 3 gave a mining lease of the under-ground rights to defendant 2, New Birbhum Coal Company Limited and defendant 2 in its turn granted a sub-lease in favour of defendant 1 Pure Dishargarh Colliery Company. The plaintiff's case is that the defendants for the purpose of carrying on their colliery work erected a bungalow on one of the plots, laid tram lines on other plots, for the purpose of carrying coal and made roads by throwing cinders. The plaintiff further alleges that the defendants carried on their mining operations in such a way as to cause subsidence of one of the plots. The plaintiff filled up the subsidence with earth but defendant 1 opened an airshaft on that plot by removing the earth. The plaintiff accordingly claimed damages to the extent of Rs. 600 for the purpose of reconditioning the land and making the land fit for cultivation, and also a sum Rs. 195 as mesne profits.

[2] The suit was contested by defendants 1 and 2 *inter alia* on the allegation that the suit was barred by limitation, that the plaintiff had no title to the suit lands, and that the defendants did not encroach upon the plaintiff's land, nor rendered it unfit for cultivation, and that the defendants never agreed to pay any compensation to the plaintiff for any wrong, as alleged in the plaint.

[3] The learned Munsif who tried the suit found that the plaintiff had title as an occupancy raiyat to all the plots of land enumerated in the plaint and that the acts alleged by the plaintiff were done by the defendants, but the trial Court dismissed the suit upon the finding that the acts complained of were committed beyond the period of limitation. The trial Court took the view that the Article of the Indian Limitation Act applicable to the facts of this case would be Art. 36 under which the period of limitation was two years from the date when malfeasance, misfeasance or nonfeasance took place.

[4] On appeal by the plaintiff, the lower appellate Court has affirmed the decision of the Court of first instance upon the findings that the tram lines, pathway, bungalows and other offices were on the land since the time of the defendant and that defendant 2 made the air-shaft at least ten years ago.

[5] It is in evidence in this case that defendant 3 granted the lease to defendant 2 in the year 1893, and defendant 2 granted the sub-lease to defendant 1 in the year 1924. So upon the above mentioned findings arrived at by the Court of appeal below, it is quite clear that the wrongful acts alleged by the plaintiff took place long before the period of limitation prescribed by Art. 36.

[6] Against that decision of the lower appellate Court, the present second appeal has been filed by the plaintiff and Dr. Sen Gupta appearing in support of the appeal has argued that the acts complained of by the plaintiff in the plaint come under S. 23, Limitation Act, because they are in the nature of continuing wrongs In support of this contention, Dr. Sen Gupta has placed before us various authorities showing what are said to be continuing wrongs within the meaning of S. 23, Limitation Act. Amongst other authorities, Dr. Sen Gupta places before us the decision of the Full Bench of the Lahore High Court in *Khair Mahammad Khan* v. *Mt. Jannat*, 191 I. C. 42: (A. I. R. (27) 1940 Lah. 369) where it has been said that in considering whether a particular act complained of constitutes a continuing wrong, it is necessary to keep in mind the distinction between an injury and the effects of that injury; where the injury complained of is complete on a certain date, there is no continuing wrong even though the damage caused by that injury might continue; if however the act is such that the injury itself is continuous, then there is a continuing wrong and the case is governed by S. 23. This principle was also laid down by this Court in *Brajendra Kishore* v. *Abdul Razac*, 22 C. L. J. 283 at p. 289 : (A. I. R. (3) 1916 Cal. 751), where it has been stated that there is a real distinction between continuance of a legal injury and the continuance of the injurious effects of a legal injury.

[7] The point raised by Dr. Sen Gupta was not raised by the plaintiff in any of the Courts below, and although Dr. Sen Gupta now makes out the case that the acts complained of constituted isolated acts of trespass, they did not amount to dispossession of the plaintiff and themselves constituted a continuous legal injury, it is impossible to say in the absence of any evidence whether the acts complained of were really of that nature. Moreover, the lower appellate Court has found that according to the admission of the plaintiff, he has been dispossessed from the plaint lands; the plaintiff admits at p. 18 of his deposition that he recovered possession in all the plaint plots, except plot No. 100, after the institution of this suit. Upon this finding, it is difficult to hold that the acts complained of by the plaintiff did not amount to dispossession, but merely to isolated acts of trespass. In this view of the matters as the point raised by Dr. Sen Gupta is a mixed question of law and fact it cannot be decided without fresh evidence, and we cannot allow the appellant to raise this mixed question of law and fact for the first time in second appeal.

[8] This appeal is accordingly dismissed with costs.

R. P. Mookerjee, J.—I agree.

D.R.R. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 329 *[C. N. 117.]*

ROXBURGH J.

Shree Kissen Khettri—*Accused*—*Petitioner* v. *The State.*

Criminal Revn. No. 5 of 1950, D/- 23rd February 1950.

Motor Vehicles Act (1939), S. 112—Motor Vehicles Rules, R. 174 (d)—Cab with defective meter produced for renewal of certificate—Producer if can be convicted for use of defective meter.

Mere production of a cab with a meter attached for renewal of a certificate of fitness does not amount to an user within the meaning of R. 174 (d). Hence where the evidence merely shows that the defective meter was produced on the cab at the time the cab was brought for renewal of the certificate, conviction for user of a defective meter cannot be substained.

[Paras 4, 5]

Annotation: ('46-Man.) Motor Vehicles Act, S. 112, N. 1.

J. M. Banerjee—for Petitioner.

Bibhuti Bhusan Das Gupta—for the State.

Order.— This is a rule against an order of conviction under S. 112, Motor Vehicles Act, read with R. 180 (d), Motor Vehicles Rules, 1940, and sentence to pay a fine of Rs. 20, in default seven days' rigorous imprisonment. The appropriate rule is in fact not 180 (d) but 174 (d).

[2] The facts are that the taxi B. L. T. 669 was produced before the Motor Vehicles Department for renewal of the certificate of fitness as required by S. 38, Motor Vehicles Act. On test, the taxi meter was found to be defective, registering one anna per mile in excess. The police thereupon prosecuted the owner and the driver. The driver was acquitted and the owner has been convicted and has moved this Court.

[3] The driver was acquitted on the ground that it was not proved who had produced the car, an omission which surely the Magistrate himself ought to have noted and should have been remedied. However the owner now objects that he ought not to be convicted, on the evidence, for a breach of the rule which runs as follows: "No taxi-meter which is in any way defective shall be used upon a motor cab."

[4] It seems to me that it cannot be said that mere production of a cab with a meter attached for renewal of a certificate of fitness amounts to an user within the meaning of the rule. Any owner of an old cab who may be doubtful as to whether it will really pass the test of fitness is surely entitled to take his cab to the authorities for the certificate and it is for them to pass it or not after test. Mere taking is not user of the

cab or a meter as such within the meaning of the rule in my opinion.

[5] It might have been possible to found a conviction in this case on the grounds that from the nature of the circumstances, the nature of the taxi meter, the nature of the defect, the defect could not have occurred suddenly as the car drove through the gates of the Motor Vehicles Department and that the defect must have been present for sometime previous, and if evidence had been given that the car had been used as a taxi cab, shall we say, within an hour or two prior to its being brought to the department. On these facts a conviction might have been founded, but I do not think that in the circumstances in this case, the evidence merely being that the defective meter was produced on the cab at the time the cab was brought for renewal of the certificate, conviction for user of a defective meter can be sustained.

[6] The rule is accordingly made absolute. The conviction and the sentence are set aside. The fine, if paid, shall be refunded.

V.B.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 330 *[C. N. 118.]*

SEN J.

Jatindra Nath—Accused—Petitioner v. *Manindra Nath and another — Complainant — Opposite Party.*

Criminal Revn. No. 808 of 1949, D/- 21st November 1949.

(a) Penal Code (1860), Ss. 268, 290 — Public nuisance—Clandestine prostitution.

Before any finding can be arrived at that a public nuisance has been committed the elements contained in S. 268, Penal Code, must be established. Common injury, danger or annoyance mentioned in the section must be to the public at large dwelling in the vicinity and not to a particular individual. If prostitution is carried on in a clandestine or hidden manner, there can be no public nuisance although persons who come to know of the immoralities committed in the house may feel their moral sense outraged. [Para 4]

Annotation : ('46 Man.) Penal Code, S. 268 N. 1; S. 290, N. 1.

(b) Criminal P. C. (1898), S. 342—Examination of accused—Nature of.

The duty of the Court in an examination under S. 342, Criminal P. C., is to explain to the accused the facts appearing against him. Where therefore all that the accused was asked was this: "You have heard all the evidence. Have you anything to say?' and the accused replied that he was not guilty :

Held that this sort of perfunctory examination does not constitute a proper examination under S. 342. [Para 5]

Annotation : ('49 Com) Criminal P. C., S. 342 N. 14 Pt. 10, N. 15 Pt. 5.

Amaresh Chandra Roy for Bireswar Chatterjee —for Petitioner.

Order.—This rule has been obtained by an accused person who has been convicted for having committed an offence punishable under S. 290, Penal Code and sentenced to pay a fine of Rs. 100, in default to undergo simple imprisonment for one month.

[2] The facts alleged against the petitioner briefly are as follows: He is the tenant in respect of certain premises in Nabadwip. In these premises live a number of young women of immoral character. Men of bad character come to the house and disturb the neighbourhood by singing obscene songs and having drunken brawls. The occupants of the premises also throw dirty rags on the road and near the premises occupied by the neighbours. The defence taken is that the petitioner is the Secretary of an institution known as the Nari O Shishu Ashram. The Society carried on philanthropic work by rescuing unfortunate women and giving them protection in the premises where it is alleged by the prosecution this public nuisance has been committed. The petitioner is the Secretary of this Association and he lives at Calcutta. He goes to the house occasionally. He denies that there was any public nuisance committed and in any event he states that he cannot be made liable for committing any public nuisance upon the evidence adduced.

[3] The trial Magistrate convicted the petitioner and this conviction has been upheld by the Sessions Judge of Nadia. Against the order of conviction and sentence the present rule has been obtained. Learned advocate on behalf of the petitioner contends firstly that the evidence does not establish that any public nuisance has been committed and secondly that the commission of such public nuisance cannot be brought home to the petitioner inasmuch as he does not reside in the aforesaid premises but is an occasional visitor therein. Lastly, he argues that the petitioner was not properly examined in accordance with the provisions of S. 342, Criminal P. C., inasmuch as the salient points alleged against him were not brought to his notice.

[4] In my opinion all these grounds should prevail. The evidence adduced is contradictory and in my opinion does not lead to any reasonable conclusion of the commission of a public nuisance. It seems to me that the Courts below have constituted themselves not only as Courts of law but also as Courts of morals. It may be (I do not say that this is so) that in the premises some immoral acts may have been committed but although that may offend the susceptibilities of the neighbours it certainly does not constitute a nuisance. The learned Magistrate in the opening part of his judgment indicates that he has no clear idea of what a public nuisance is. He says that the allegation is that *clandestine* prostitution is being carried on in this house.

If the prostitution is carried on in a clandestine or hidden manner, there can be no public nuisance although persons who come to know of the immoralities committed in the house may feel their moral sense outraged. 'Public nuisance', has been defined in S. 268, Penal Code, and before any finding can be arrived at that a public nuisance has been committed the elements contained in that section must be established. Common injury, danger or annoyance mentioned in the section must be to the public at large dwelling in the vicinity and not to a particular individual. In my opinion the evidence is discrepant and the conviction cannot be based upon such evidence. Further, I would point out that the petitioner has been found guilty of a public nuisance by virtue of an illegal omission. That is the finding of the Court below. I cannot understand how the petitioner can be found guilty of any illegal omission. There is no evidence given that he has failed to do something which he was lawfully bound to do. Again, it is established from the evidence that the petitioner is not a resident of the premises but he visits it occasionally. I do not see in these circumstances how he could be found guilty of committing a public nuisance unless it is found also that he engaged the premises for such purposes as would inevitably result in a public nuisance. There is evidence to prove that the premises were engaged for a very laudable purpose. If in the absence of the petitioner there were irregularities or misconduct on the part of the occupants I cannot see how the petitioner can be found guilty.

[5] As regards the complaint that the provisions of S. 342, Criminal P. C., have not been observed I am of opinion that it is well founded. All that the petitioner was asked was this: "You have heard all the evidence. Have you anything to say ?' The petitioner replied that he was not guilty. This sort of perfunctory examination does not constitute a proper examination under the provisions of S. 342, Criminal P. C. It was not explained to the accused what the circumstances against him were. The duty of the Court in an examination under S. 342, Criminal P. C, is to explain to the accused the facts appearing against him. This is very necessary in a case of the present description. The defence suggestion is that the landlord of the premises wishes to eject the petitioner and that this case has been got up by the landlord with the help of certain neighbours. In my opinion this suggestion of the defence is not without foundation.

[6] In the circumstances I set aside the order of conviction and sentence and make this rule absolute. The fine, if paid, shall be refunded.

D.R.R. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 331 *[C. N. 119.]*

ROXBURGH AND LAHIRI JJ.

Based Sheikh—Appellant v. *The King.*

Criminal Appeal No. 81 of 1949, D/- 4th November 1949.

Evidence Act (1872), S. 80—Confession of accused induced by police by torture—Recording of, by Magistrate satisfied of its voluntariness—Admissibility—Inclusion of such confession in charge to jury—Criminal P. C. (1898), Ss. 297, 164.

Where having regard to the evidence the Sessions Judge was of opinion that the confession of the accused was induced by torture by the police but admitted it in evidence under S. 80 as having been properly recorded by a Magistrate who had stated that he was satisfied that the confession was made voluntarily, and the Sessions Judge included this confession in his charge to the jury though he had done his best to tell them that it was worthless:

Held, that the Sessions Judge had to some extent misunderstood the effect of the provision of S. 80. His duty in the circumstances was not to leave the confession to the jury at all but to exclude it entirely from the evidence. Leaving the confession for the jury's consideration was a patent error of law. [Para 4]

Annotation: ('50-Com.) Criminal P. C., S. 297, N. 6; S. 164, N. 14, 14a; ('46-Man.) Evidence Act, S. 80, N. 2, 3, 5.

S. S. Mukherjee—for Appellant.

Bireswar Chatterji—for the Crown.

Judgment.—This is an appeal by one Based Sheik who has been convicted of dacoity under S. 395, Penal Code, on a majority verdict of 4 to 1 and has been sentenced to four years' rigorous imprisonment.

[2] The evidence against the accused may be briefly summarised as follows: There were two eye-witnesses who identified him; they had also previously identified him at a test identification parade. There was some evidence of association with his co-accused both before and after the occurrence and there was evidence of a confession made by the accused Based.

[3] The learned Sessions Judge has not properly dealt "with the last piece of evidence, namely, the confession. He admitted the confession as evidence on the ground that he had accepted it as admissible as having been properly recorded by a Magistrate who had stated that he was satisfied that the confession was made voluntarily. The accused made a statement alleging torture by the police to extort the confession and there was some evidence of injuries found on him which the learned Judge considered supported this contention. The learned Judge thus placed the matter before the jury :

"The confession was therefore admitted in evidence under S. 80, Evidence Act. The section is explained. As the confession was taken in accordance with law the Court shall presume it to be genuine and therefore

I admitted the document in evidence as prima facie; it looked as having been made voluntarily. But nevertheless it is for you, gentlemen of the jury, to consider the weight to be attached to it and to decide whether it is true or not and in doing so you should also consider whether it was made as a result of any torture, inducement or threat. The voluntary character of a confession is a mixed question of law and fact. You will exclude it altogether from consideration if it appears to you not to have been made voluntarily, when you consider the question in connection with the truth or otherwise of the confession. You will consider the volitional character of the confession as detached from its credibility and in deciding its truth, you can as a part of it consider whether it was voluntary. The first thing that struck me was that the Magistrate who recorded the confession did not question Based as to whether he was being ill-treated or tortured or whether anybody had offered any inducement or threat to him. So the Magistrate did not duly caution the accused before he recorded the confession. Based had made a somewhat long statement before you and it is fresh in your mind. He stated that the Investigating Sub-Inspector Moni Babu entered the lock-up with two police constables and asked him to implicate Guljar, Nirode, Kalu and Hedayet and four or five others, but he denied. Then he was abused and under the orders of Moni Babu the two police constables fisted him and assaulted him with ruler mercilessly as a result of which he sustained an injury on the upper pina of the left ear. Then he was given capsicum smoke to inhale and he was hung up with his head downwards tied by his leg to a rod. Then he consented to say whatever he was wanted to say. Then he again retracted. Then a constable pierced an iron nail inside the sole of his left foot. Then he consented to confess. On the following morning he was again given capsicum smoke to inhale and he was almost senseless and then even after he was taken to Court room, Moni Babu threatened him from outside and during the temporary absence of the Magistrate came into the Court room and exhorted him to confess just as he had been tutored. Gentlemen, you should remember that the statement of the accused is not made on oath but it is a mere statement. Nevertheless you should consider for what it is worth. It contains serious allegations against the investigating Sub-Inspector. It is very difficult for an accused person in dock to prove torture. But on a petition filed by his mother on 3rd June 1948 after her interview in the sub-jail with Based in which she complained about injuries on Based, the S.D.O. directed a medical examination and P. W. 16 Dr. Pal examined him on 3rd June 1948 and found (1) one prick mark at the inner aspect of the sole of the right foot through which a little pus came out on squeezing, (2) one little swelling mark 1/3 × 1/6" on the upper margin of the pina of the left ear, (3) one ulcerated abrasion on the inner side of the lower part of the right leg 1½" above the ankle joint. The doctor also said that Based complained of pain in the back and chest. He added that the duration of the wounds were 5/6 days and so these might be caused on 28th May night. He said that injury No. 1 might be caused by a pointed weapon and others by a blunt substance. So the medical evidence corroborates the statement of the accused. Based had also pain in the chest and back. According to the Magistrate he insisted on making confession which shows that he was unable to wait in the court room. Lyons in his Jurisprudence and Modi in his Jurisprudence have both stated that capsicum smoke is a common form of torture in India and this is a great irritant. You will consider whether the pain in the chest and back were not due to the inhalation of capsicum smoke. It is true that he did not complain of any torture before the Magistrate on 29th May 1948; nor did he make any complaint in the time of the T. I. Parade on 2nd June 1948 or to the Jail doctor before he was medically examined. But the facts in this case are telling. Based stated that he was pricked on his left foot. But the medical evidence is that there was a prick mark on his right foot. You will consider whether Based was not mistaken in making the statement.

Gentlemen, I have placed before you all the facts bearing upon the volitional nature of the confession. The confession is read out. You will consider whether it was true and in deciding its truth you will take into consideration its volitional character. Under S. 24, Evidence Act, a well founded conjecture reasonably based upon circumstances disclosed in the evidence is sufficient for you to exclude the confession because it is idle to expect the accused to prove torture, threat or inducement and in most cases it is difficult. If there is any conflict or doubt as to the manner in which the confession was obtained the accused should be given the benefit of that doubt and in the present case I have no hesitation in directing you that you should hold the confession to have been extorted by the police by severe torture and threat and in that view of the matter you should totally exclude it from your consideration. Supposing you disagree with me, which I do not think you will, it would be my duty also to say what value you will attach to a retracted confession. As against Based who made the confession and then retracted it, it should not be acted upon unless it is corroborated in material particulars, that is, unless you can hold that he has been properly identified by Subodh and Panchurani at the T. I. Parade and unless you can hold that he was seen in the locality immediately before and after the occurrence. As against his co-accused Kalu, Guljar and Hedayat, its value is nil and the word means what it says; and unless there is other evidence which can stand on its own legs the retracted confession of a co-accused should not in any way be used to support a conviction. It comes to this therefore that as against the other accused, if you cannot believe the recognition of Kaly by Subodh and of the identification of Guljar and Hedayat by Panchurani, there is an end of the matter and the accused persons must be acquitted. I have cautioned you that you should be very slow to accept the identification of Kaly by Panchurani for, if Kaly had snatched away the necklace from her neck, Subodh would have been able to recognise him. So unless you can belisve the recognition of Kaly by Subodh, he too must be acquitted."

[4] It appears from this that the learned Judge has to some extent misunderstood the effect of the provisions of S. 80, Evidence Act. It is clear that his own opinion was, having regard to all the evidence, that the confession had been induced by torture. His duty, therefore, in the circumstance was not to leave the confession to the jury but to exclude it entirely from the evidence, it is true that the learned Judge while leaving the confession to the jury for consideration, has done his best to tell them that it is worthless, but there is a patent error of law in his procedure in leaving the confession for the jury's consideration at all.

[5] From the rest of the charge it is evident that the learned Judge himself was not satisfied with the evidence of identification as regards the present accused. The matter was complicated by the fact that the accused had a defective eye and there was also evidence that he was a man well-known in the locality. The learned Judge was clearly impressed by these facts because the complainant in the case had failed to name the present accused in the first information report although he did state therein that one of the dacoits was a man with a defective eye. The evidence is that there are two such men well-known in the locality.

[6] The only question that remains for us to consider then is whether we should order a re-trial, or deal with the matter ourselves on the evidence as it stands. If we take the latter course we should see no reason to differ from the view of the learned Judge that the evidence was in the circumstances not reliable to support the conviction. On the whole we think that the proper course in the case is not to order a re-trial.

[7] We accordingly allow the appeal, set aside the conviction and sentence passed on the accused and acquit him of the offence and direct that he be set at liberty at once.

G.M.J. *Appeal allowed.*

A. I. R (37) 1950 Calcutta 333 *[C. N. 120.]*

P. B. MUKHARJI J.

Sashi Bhusan Dey and others—Plaintiffs v. Rai Chand Bural and others—Defendants.

Suit No. 1741 of 1947, D/- 16-3-1949.

(a) Transfer of Property Act (1882), S. 55 (1) (e) —Duty of seller to protect property.

A vendor who has agreed to sell his property being a trustee for the purchaser is bound to protect the property from injury or wrongful occupation by trespassers. If he fails in any of these duties the purchaser will be entitled to an allowance by way of compensation to be deducted from the purchase money. [Para 14]

Annotation : ('50-Com.) T. P. Act, S. 55 N. 6.

(b) Transfer of Property Act (1882), S. 55 (1) (f) —Agreement to sell house—Duty to give vacant possession.

Ordinarily, in the absence of a contract to the contrary, if the agreement is to sell a house in which the seller has the sole and absolute interest, the possession that its nature permits delivery of, is vacant possession. The presence of tenants or trespassers in the house cannot affect the nature of the property inasmuch as the words 'its nature' in S. 55 (1) (f) mean an incident which is inherent in the property which can be called as its nature: 1932 M. W. N. 122, *Rel. on.* [Paras 15, 16]

Annotation : ('50-Com.) T. P. Act, S. 55, N. 7, Pt. 6.

(c) Transfer of Property Act (1882), S. 55 (1) (g) —Incumbrance—Occupation by trespassers.

Where property is agreed to be sold 'with all rights and free from all incumbrances' the seller is bound to give vacant possession of the property which is occupied by trespassers. The reason is that trespasser's possession or occupation is a liability or impediment within the ordinary meaning of the word 'encumbrance' and it would impede the important right of occupation of the purchaser. [Paras 17 and 18]

Annotation : ('50-Com.) T. P. Act, S. 55 N. 8.

(d) Transfer of Property Act (1882), S. 55 (1) (f) —Duty to give possession to buyer's nominee.

Under S. 55 (1) (f) the seller is bound to give possession to the buyer or 'such other person as he directs'. Hence a suit for specific performance of an agreement to sell and to hand over possession to such person can be brought by the buyer along with such person. [Para 27]

Annotation : ('50-Com.) T. P. Act, S. 55 N. 7.

(e) Civil P. C. (1908), O. 2, R. 4 (c) —Suit for specific performance and damages.

A suit for specific performance of an agreement to sell with a claim for damages based on delay in completion of sale and for failure to deliver vacant possession is maintainable under O. 2, R. 4 (c) inasmuch as they arise out of the same cause of action, namely, breach of the agreement for sale. [Para 29]

Annotation : ('44-Com.) C. P. C., O. 2 R. 4, N. 6.

(f) Specific Relief Act (1877), S. 19—Suit for specific performance of an agreement for sale of house — Claim for compensation for breach of agreement on ground of delay on part of vendor and also for turning out trespasser—Compensation for period of delay allowed at a rate of rent which the house would fetch—Claim for compensation for turning out trespassers held could not be allowed as it was indeterminate and as the plaintiff could sue the trespasser for damages for period he was kept out of possession. [Paras 31, 32 and 33]

Annotation : ('46-Man.) Specific Relief Act, S. 19, N. 2.

A. C. Mitter—for Plaintiffs.

H. Banerjee—for Defendants.

Judgment.—This is a suit by the plaintiffs for specific performance of an agreement for sale dated 12th March 1946 in respect of premises No. 21, Madan Gopal Lane, Calcutta, and for compensation for the delay in executing the conveyance and for turning out the trespassers. The agreement is in writing signed by Rai Chand Bural, Kissen Chand Bural and Bissen Chand Bural. They are the vendors and plaintiff Rai Bahadur Soshi Bhusan Dey is the purchaser. The agreement provides that the vendors shall sell the said premises to the Rai Bahadur free from all encumbrances at a price of Rs. 45,000 and that the vendors shall within 15 days deliver all documents of title and shall at their expense make out a marketable title and cause the property to be freed from all encumbrances. The agreement also provides that the conveyance is to be executed in favour of Rai Bahadur or his nominee or nominees. The sum of Rs. 1,000 was paid as earnest money and in part-payment of the purchase price on the execution of the agreement.

[2] The plaintiffs in their plaint referred to a deed of trust dated 15th March 1939 alleged to have been executed by defendant Rai Chand Bural whereby he appointed Kissen Chand Bural and Bissen Chand Bural the other two defendants as the trustees and conveyed this property to such trustees upon trust. Rai Chand Bural was the absolute owner of the premises. The deed of trust was declared void and inoperative and not binding on the defendant Raichand Bural by decree made in suit No. 986 of 1946 of this Court made on 19th December 1946. It is alleged in the plaint that in those circumstances Rai Chand Bural is the owner of the premises and defendants 2 and 3 Kissen Chand Bural and Bissen Chand Bural are joined only as pro forma defendants and no relief is claimed against such pro forma defendants. Plaintiffs 2 and 3 are the relations and nominees of plaintiff 1 Rai Bahadur Soshi Bhusan Dey. The title was approved and the draft conveyance was also approved subject to the objections of the Attorney of Rai Chand Bural as pleaded in para. 5 of the plaint.

[3] The defendants' attorney cancelled the agreement for sale on 14th May 1947 and forfeited the earnest money. The plaintiffs contend that such cancellation and forfeiture are unjustified and unlawful.

[4] The central dispute in this suit relates to the question of vacant possession. In the plaint it is alleged that one Karim Bux Mullick is a tenant of the said premises under the defendant Rai Chand Bural and that the defendant Rai Chand Bural received rents up to July 1946 from such tenant. That tenant died some time ago and that tenant's nephew one Sadek Ali Mullick was alleged to be in occupation as a tenant of the said premises but no counterfoil of any rent bills have been produced in spite of demands. There was another person by the name of Dunia Lal Das who also, it is alleged in the plaint, was in wrongful occupation of the said premises. The plaintiffs' grievance is that the defendants should have turned out these trespassers from the said premises and given over vacant possession to the plaintiffs and that the delay in completion of the sale was due to the fault of the defendants.

[5] A joint written statement has been filed by the defendants where it is admitted that Rai Chand Bural was and is the owner of the premises No. 21, Madan Gopal Lane Calcutta. It is denied the title was duly approved or that the only objection was as alleged in para. 5 of the plaint and that the plaintiffs wrongfully refused to complete the transaction. The defendants further contend that the demand of the plaintiffs for ejectment of the trespassers and for delivery of vacant possession was wrongful and unjustified. It is also denied that the plaintiffs were ready and willing to perform the said contract. The written statement also admits that Dunia Lal Das has been in wrongful possession of a portion of the said premises as trespasser. The defendants justify cancellation of the agreement and forfeiture of the earnest money.

[6] The following issues were raised by Mr. H. Banerjee appearing for the defendants:

"(1) Were the plaintiffs entitled to demand vacant possession of the said premises under the Agreement dated 12th March 1946?

(2) Have the plaintiffs been ready and willing to perform their part of the Agreement dated 12th March 1946?

(3) Were the defendants justified in cancelling the Agreement and forfeiting the earnest money?

(4) Is the suit maintainable having regard to the fact that the Agreement was not with plaintiffs 2 and 3?

(5) Is the suit bad for misjoinder of causes of action on the ground that relief in respect of immovable property was combined with the relief for compensation.

(6) Are the plaintiffs entitled to any compensation? If so, what?"

[7] No issue was raised by Mr. Banerjee on the question of title or approval of title because as he said that the plaintiffs were now willing to take the title as it is in the sense that they were prepared to take over with the trespassers and his clients were willing to hand over such possession and the only question on that point was whether the plaintiffs were entitled to claim any compensation. Issue of compensation has been raised as I have indicated above. On behalf of the plaintiffs the learned counsel also accepts this position, and he says that the plaintiffs were prepared to take the premises with the trespassers.

[8] Plaintiffs have not led any evidence. The junior counsel for the plaintiffs called plaintiff Prosad Das De on the first day of the hearing on 3rd March 1949 but the leading counsel Mr. Mitter on the following day did not wish to proceed with the examination-in-chief of such witness and submitted that the agreed brief of correspondence which is marked as Ex.-A in this suit was enough and he did not call any witness. In the result the evidence which was only partly given in chief by the plaintiff Prosad Das De and whom the defendants had no chance to cross-examine will be expunged from the record. On behalf of the defendants two witnesses have given evidence.

Issue No. 1

[9] Clause 1 of the agreement for sale provides for sale of the said premises "free from all encumbrances", and "with all rights". Clause 2 of the agreement for sale provides that the vendor shall cause the said premises to be

freed from all encumbrances. It is argued by Mr. Banerjee on behalf of the defendants that there is no stipulation in the said agreement that his clients have to deliver vacant possession. Therefore demand for vacant possession on behalf of the plaintiff was unjustified. In support of this argument Mr. Banerjee has relied on a passage in Gour's latest edition of the Law of Property at p. 772 para 1228 where it is said that the term possession is open to great variety of meanings and delivery of possession as the nature of the property admits may be satisfied by handing over the title deed when the property is in occupation of the tenant. Mr. Banerjee also relied on a decision of lower Burma Chief Court. *Suliman* v. *Palaneappa*, 8 I. C. 605: (3 Bur. L. T. 29).

[10] This question depends on the construction of S. 55 (1) (f). T. P. Act, and the meaning to be given to the words "as its nature admits". There is very little authority on this point. Where a buyer has notice of a tenancy he cannot have actual possession but is only entitled to symbolic possession. On the evidence here I find that the plaintiff had no notice whatever at the time of the execution of the agreement for sale that there were tenants in the premises. [After discussion of the evidence the judgment proceeds as follows :]

[11] The question on the facts of this case therefore is not whether a vendor is liable to deliver possession with or without tenants under the agreement for sale. The question is has the vendor any liability for the two trespassers Dunia Lal Das and Amar Nath Sein who are now occupying the said premises. The defendants admit that Dunia Lal Das is a trespasser in para. 11 of their written statement as well as in the evidence of Gopal which I have noticed above. The defendants treated Sein also as a trespasser in the sense that the defendants have refused to have any relationship of landlord and tenant between him and them by either demanding rent or accepting it. On the evidence, therefore, the question of delivering possession with or without tenants does not arise because there are no tenants of the defendant in the premises in fact. The question is only whether the defendants are liable for the trespassers and if so, to what extent.

[12] On a construction of the words "as its nature admits" in S. 55 (1) (f), Transfer of Property Act, and of the agreement for sale in this case I am of the opinion that the defendants were not justified in saying that they had no liability for the trespassers. Mr. Banerjee has argued on the evidence that such trespassers came to the premises after the agreement for sale and therefore his clients the vendors have no liability in respect of the occupation of such trespassers. It is, however, clear from the evidence that no attempt was made by the defendants either to prevent the trespassers from entering the house or for turning them out.

[13] I propose to deal with Mr. Banerjee's argument that the trespassers came after the agreement for sale. Under S. 55 (1) (e), Transfer of Property Act, the vendor has the duty and is bound to take as much care of the property as an owner of ordinary prudence would take of such property between the date of the contract of sale and the delivery of the property. During this period between the contract for sale and the delivery of property the vendor is in the position of a trustee as pointed out by Lord Selborne in *Phillips* v. *Silvester*, (1873) 8 ch. A. 173 at p. 177 : (42 L. J. ch. 225). In my judgment the seller must do what a prudent owner ought to do and must protect the property from injury by trespassers and that an owner of ordinary prudence would take this care to see that trespassers do not occupy his property. If the vendor is a trustee for the purchaser, as I consider him to be so under the law, his duty as such trustee is not fulfilled when at the time of the delivery of possession it is found that trespassers are having a free run and occupation of the property. In the case of *Royal Bristol Permanent Building Society* v. *Bomash*, (1887) 35 Ch. D. 390: (56 L. J. Ch. 810), the learned Judge after discussing the law on this point at p. 398 says as follows:

"Therefore I regard the vendors in this case as trustees for the purchaser from the date of the contract. I think they ought to have taken that reasonable care of the property which would have prevented it being damaged ..... by any one who removed the fixtures *or by vagrants or other persons coming in.*"

The evidence proves that the vendors did not take the least interest in the property far from taking the standard of care enjoined by the statute. Sir Dinshaw Mulla in his commentary on the Transfer of Property Act, 1933 Edn. at p. 268, approves of the proposition that under S. 55 (1) (e) the seller must protect the property from injury by trespassers. Injury by trespassers does not consist merely of damage done to fixtures or other parts of the property by such trespassers but also includes wrongful occupation by the trespassers.

[14] In my judgment the correct legal position is clearly stated in Williams on Vendor and Purchaser, 4th Edn , Vol. 1, p. 533 in the following terms :

"He (vendor) must eject disseisors and others wrongfully in possession of the property sold or any part of it *(Engell* v. *Fitch* L. R. 4 Q. B. Cases 659*)* and take proper precautions against injury to the lands by trespassers *Clarke* v. *Ramuz*, (1891) 2 Q. B. D. 456*)*.

and if he fails in any of these duties, the purchaser will be entitled to an allowance by way of compensation to be deducted from purchase money."

[15] On a construction of S. 55 (1) (f), Transfer of Property Act, I am of the opinion that if the property is the house (and not a joint property) the possession that its nature ordinarily admits is vacant possession and in the absence of any agreement to the contrary the transfer contemplated is transfer of vacant possession and it is not enough to prove that there was even a tenant in occupation actually to the knowledge of the purchaser. In the facts however of this case no knowledge of the purchaser about the existence of the tenant at the time of execution of the agreement is proved. The word 'its nature' in the section mean in my judgment an incident which is inherent in the property which could be called as its nature. For example if the property is a joint and undivided property the possession can only be as its nature admits and therefore symbolic and not actual physical possession. Again the property might be intangible as for instance the right of easement, the possession which its nature will admit is also necessarily symbolic, and not actual and physical. It is in this sense that the word 'nature' has to be construed. Ordinarily therefore in the absence of any contract to the contrary if the agreement is to sell a house in which the seller has the sole and absolute interest the possession contemplated under S. 55 (1) (f), Transfer of Property Act, is in my judgment vacant possession. The decision of Madhavan Nair and Jackson JJ. in *Panchapagesa Ayyar* v. *Arunachala Mudaliar*, 1932 M. W. N. 122, supports the view of construction that I have taken.

[16] Presence or absence of tenants in the house agreed to be sold in that sense does not in my judgment affect the 'nature' of property. It may very well be that the parties intended that the tenants could be removed before possession is given. 'Nature' is something which in this context is irremovable. But whatever may be the position of a house with tenants, a house with trespassers can never in my judgment be said to be a property whose 'nature' does not admit actual and physical possession.

[17] Besides the words "free from all encumbrances" in the agreement have to be construed. The stipulation under the agreement was that the vendor shall cause the property to be freed from all encumbrances. A lease or tenancy is in my opinion an encumbrance. (*See* Williams 'Vendor and Purchaser' 4th Edn. Vol. 2 App. C clause 1). A house in the occupation and possession of a trespasser and wrongdoer cannot be said to be free from all encumbrances. As pointed out in *Wallace* v. *Love*, 31 Com. L. R. 156 at p. 164.

"The word 'encumbrance' in its ordinary connotation means that the estate is burdened with debts, obligations or responsibilities. The word is in law *specially used* to indicate a burden on property."

A trespasser's possession or occupation is in my view a burden on property although a trespasser may have no lawful title to remain in such possession. Romer J. in *Jones* v. *Barnett*, (1899) 1 Ch. D. 611 says at p. 620 that 'encumbrance' means 'a claim, lien or liability attached to property'. In my view trespasser's possession or occupation is a liability on the property. Removal of trespassers ordinarily involves litigious proceeding and such litigation is a liability or impediment within the ordinary meaning of the word 'encumbrance'.

[18] As I have indicated above Cl. 1 of the agreement for sale provides that the said property is agreed to be sold 'with all rights'. I consider right of occupation and possession as a very important right of the purchaser under such an agreement. Such right is in my view certainly impeded and obstructed by the wrongful occupation or possession of the trespassers.

[19] I hold that under the agreement dated 12th March 1946 and on the construction thereof and on the facts of the case plaintiffs are entitled to vacant possession and I accordingly answer Issue No. 1 in the affirmative.

Issue No. 2

[20] The agreement for sale was made on 12th March 1946. On 14th March 1946 the solicitors of the purchaser requested the defendant Rai Chand Baral to send the title deeds. On 18th March 1946 the vendors' solicitor sent the title deeds. Requisitions on title were made by the purchaser's solicitors who sent a reminder to vendor's solicitor on 30th May 1946 to answer them. From June to December 1946 the delay was entirely due to defendants trying to clear the title of the trust I have mentioned before. Actually a suit was filed in this Court for that purpose being Suit No. 996 of 1946 and a decree was made on 19th December 1946. But the certified copy of the decree was not sent to the purchasers' solicitors until 26th February 1947.

[21] The question of vacant possession and whether the house was tenanted or not was raised by the purchasers' solicitors on 19th March 1947. Correspondence followed between the respective solicitors on this point about vacant possession until 14th May 1947 when the vendor's solicitor refused to comply with the requisition for vacant possession and cancelled the agreement for sale and forfeited the earnest money. This suit was filed within about six weeks thereafter on 30th June 1947.

[22] I find at these different stages that the plaintiffs were all along ready and willing to perform their part of the contract. If they insisted on vacant possession that was, I think, justified having regard to the view that I have taken of the construction of the agreement for sale and having regard to my findings under issue 1.

[23] On 18th April 1947 the purchaser's solicitors sent the draft conveyance for approval of the vendor's solicitor. On 25th April they sent a reminder. On 1st May 1947 the vendor's solicitor returned the draft conveyance duly approved as altered in red ink and asked for an early date for execution and registration of the conveyance. The draft conveyance in Ex. B is this suit. The deletion of the words 'ancestors and predecessors in title' was one of the points in controversy in respect of the covenants in the conveyance and on 2nd May 1947 the purchasers' solicitors returned the draft conveyance to the vendor's solicitor for re-approval. On 4th May 1947 the vendor's solicitor objected to the words 'ancestors and predecessors in title' on the ground that the purchasers were taking the property after thorough search and enquiry. I do not consider the vendor's objection on this score to be at all justified. As I construe the agreement it was for sale of the house with all rights, privileges, easements and appurtenances and free from all encumbrances and the vendor's obligation under cl. 2 of such agreement was to make a marketable title. The title after searches and enquiry was approved by the purchaser's solicitors and I do not see any reason, why this usual covenant should not be made by the vendor when under the agreement the premises are agreed to be sold 'free from all encumbrances'. It is a common covenant and is found in all standard forms and precedents for conveyances whenever property is sold under the agreement of the nature as described in this suit. If the property was sold subject to encumbrances then the vendor would have been entitled to qualify his covenant but not in my opinion in a case like where there is an unqualified agreement to sell free from 'all' encumbrances. *See* Williams on Vendor Purchaser 4th Edn. Vol. I pp. 662-3. In any event this was no lack of readiness or willingness on the part of the plaintiffs. The insistence on a covenant like this by the purchaser's solicitor is not, in my opinion, disapproval of title. On the contrary I think because they had approved the title they were justified in calling upon the vendors to make this usual covenant.

[24] On the facts as stated above which are amply borne out by the admitted brief of correspondence which is marked as Ex. 'A' in this suit I hold that the plaintiffs have been ready and willing to perform their part of the agreement. In fact by the letter of 28th March 1947 the purchasers' solicitors were even ready to take the house with tenants who would be prepared to attorn and pay rent to the plaintiffs on the completion of the purchase. But then as I indicated and as it transpired in evidence there is in fact no tenant but trespassers in the house.

[25] I accordingly answer Issue 2 in the affirmative.

Issue 3 :

[26] On my findings on Issues 1 and 2 on the same facts I hold that the defendant's cancellation of the agreement and forfeiture of the earnest money were not justified. I answer accordingly Issue 3 in the negative.

Issue 4 :

[27] The objection of the vendors on this point was that the purchaser was only the plaintiff Rai Bahadur Soshi Bhusan Dey under the agreement for sale and not the other two plaintiffs. This objection I consider to be completely without substance under S. 55 (1) (f), Transfer of Property Act, which provides that the seller shall give possession to the buyer 'or such other person as he directs'. Besides by letters dated 4th May 1947, 7th May 1947 and 9th May 1947 the defendants finally accepted the position that the other two plaintiffs could come in as nominees of plaintiff 1 or as persons directed by plaintiff 1. In Williams Vendor and Purchaser 4th Edn. vol. 1, p. 642, it is said that the purchaser is entitled to require a conveyance to be made to some other persons or to himself and others and the vendor is bound to assure the property sold accordingly.

[28] Under Ss. 55 (1) (f), Transfer of Property Act, and on the correspondence I have mentioned above I hold that the suit is maintainable.

Issue 5 :

[29] Mr. Banerjee has argued that this suit is bad by reason of the provisions contained in O. 2 R. 4, Civil P. C. His contention is that the claim for damages and compensation and claim for immovable property are hit by that provision in the Code of Civil Procedure. I am unable to accept that argument I consider the suit is protected by O. 2 R. 4 (c), Civil P. C. I am of the opinion that it is the same cause of action inasmuch as the law allows specific performance of a contract with or without compensation. In my view the claim for damages is based on (a) delay in completion of sale and (b) for failure to deliver vacant possession and such claim arises out of the same cause of action and on the breach of the agreement for sale by the defendants.

[30] I, therefore, hold that the suit is not bad for misjoinder of cause of action and I accordingly answer issue 5 in the negative.

Issue 6:

[31] Section 19, Specific Relief Act, permits a suit for specific performance with a claim for compensation in addition to or in substitution of such performance. In fact paragraph 3 of that section definitely lays down that if in any such suit the Court decides that specific performance ought to be granted but that it is not sufficient to satisfy the justice of the case and that some compensation for breach of the contract should also be made to the plaintiff it shall award him such compensation accordingly and the statutory illustration of para. 3 makes it abundantly clear. Compensation awarded under this section may be assessed in such manner as the Court may direct. The authority in *Royal Bristol Permanent Building Society* v. *Bomash*, (1887) 35 Ch. D. 390: (56 L. J. Ch. 840)as also the observations of both Cotton and Lindley L. JJ. in *Marsh* v. *Jones* (1889) 40 Ch. D. 563 : 60 L. T. 610) are also on the point.

[32] The first ground on which compensation is asked is the ground of delay. It is clear that from June to December 1946 when the defendants were clearing the title of the trust the defendants alone were responsible for the delay. The defendants concealed the fact of such trust in the agreement for sale. The existence of such trust was disclosed by the vendor's solicitors' letter dated 1st June 1946. Under cl. 3 of the agreement for sale the purchasers' obligation was to complete the sale—within 2 months as specified therein. That clause provides that upon the title being approved by the purchasers' solicitors which I hold was done on 18th April 1947 when the purchasers' solicitors sent the draft conveyance for approval. the purchaser was to complete the purchase within two months from the date of the delivery of the document of title. The documents of title were first delivered on 18th March 1946 but were returned on 25th April 1947. Later on the title deeds were sent again by the vendors solicitors to the purchasers solicitor on 26th February 1947 along with the certified copy of the decree in Suit No. 996 of 1946. From 1st June 1946 (when the defendants started to clear the title of the trust) until 26th February 1947 (when the certified copy of the decree declaring the trust void was sent to the purchasers' solicitors) the defendant Rai Chand Bural alone is responsible for the delay. Of this period plaintiffs were agreeable to allow time till the end of June 1946. I, therefore, would have awarded compensation to the plaintiffs for the loss as contemplated in the statutory illustration of Para. 3 of S. 19, Specific Relief Act, from 1st July 1946 but I find that the purchasers solicitors approved title by sending draft conveyance only on 18th April 1947. In my opinion the proper date from which I should award compensation is from 26th April 1947 which is within a week from the date when draft conveyance was sent and which is within two months from 26th February 1947 being the date of delivery of title deeds. The evidence of Gopal in answer to Qs. 44 to 47 is that the house fetched a rent of Rs. 100 per month in 1946 but will now fetch something like Rs. 200 per month. I assess the compensation on this evidence at Rs. 150 per month payable from 26th February 1947 until execution of the conveyance, on the ground of dealy.

[33] The plaintiffs claim compensation also for turning out the trespassers. I do not consider that it is possible to make any assessment on that point and the claim is at present indeterminate. Besides after the conveyance the plaintiffs will be entitled to sue the trespassers for damages for the period they are kept out of possession after the conveyance. Plaintiffs therefore suffer no injustice. I do not, in my discretion, therefore, make any separate assessment of extra compensation on this ground, as I do not consider the justice of the case so requires under Para. 3 of S. 19, Specific Relief Act.

[34] Accordingly I answer Issue No. 6 in the affirmative and I award and assess compensation at the rate of Rs. 150 per month from 26th February 1947 until registration of the conveyance that I propose to direct.

[35] There will be a judgment for the plaintiffs for specific performance of the agreement for sale dated 12th March 1946 in terms of prayers (1), (2), (3) and (4) of the prayers in the plaint. The draft conveyance shall be in the form approved by the respective solicitors in Ex. B in this suit except that the usual covenant with the "ancestors and predecessors in title" as required by the purchasers' solicitors should be given. Plaintiffs will take delivery of possession with the trespassers. There will also be a decree for compensation at the rate I have indicated above and for costs against the defendant Rai Chand Bural. The plaintiffs shall deposit the balance of the purchase price in Court within a week from date and will be entitled to be paid the compensation out of such purchase money and the balance of purchase price will be handed over to the defendant Rai Chand Bural on the execution and registration of the conveyance. I direct also that the defendant Rai Chand Bural do execute the conveyance within a week after the balance of the purchase price is deposited by the plaintiffs in Court and notice given to such defendant. In default of such defendant executing and registering the conveyance the Registrar of this Court will do the same on his behalf.

[36] The decree for specific performance and for compensation as aforesaid and for costs is made against the defendant Rai Chand Bural. No relief and no costs are claimed against defendants 2 and 3 and no decree or order is made against them.

[37] Certified for two counsel.

[38] The defendants applied for stay of execution but as counsel for the defendants was not prepared to give any security for costs and any undertaking not to dispose of the property pending proposed appeal the stay is refused.

K.S. *Suit decreed.*

A. I. R. (37) 1950 Calcutta 339 *[C. N. 121.]*

HARRIES C. J.

Lalmohan Singh—Accused—Petitioner v. *The King.*

Criminal Revn. Petn. No. 744 of 1949, D/- 7-11-1949.

Penal Code (1860), S. 499, Exception 1—Scope and applicability

To say something of a person which holds him to contempt is defamatory. If what is said is true then that is a defence of justification under the exception. On the other hand, if there is a doubt as to whether it is true or not, there is no defence at all and as the matter tends to bring the person defamed into contempt it is defamatory under S. 500. [Para 7]

Annotation : ('46-Man.) Penal Code. Ss, 499-500 N 6.

Ajit Kumar Dutta and Satis Chandra Ray—for Petitioner.

Dwijendra Krishna Dutt—for Complainant.

Order.—This is a petition for revision of an order of the learned Chief Presidency Magistrate convicting the petitioner of an offence under S. 500, Penal Code, and sentencing him to pay a fine of Rs. 200 and in default of payment of the fine, to simple imprisonment for one month.

[2] The charge arose out of a letter which the petitioner wrote to the Editor of the Newspaper Swaraj, for the purpose of publication. To understand the allegations in the letter it will be necessary shortly to set out the facts of the case.

[3] The complainant was the owner of a certain premises NO. 24, Hyat Khan Lane, Calcutta. It appears that one Amar Guha had somehow obtained possession of part of these premises, but it is common ground that later he was treated as a tenant. Amar Guha was an evacuee from East Bengal. Later, one Sitanath with the assistance of Amar Guha came into these premises and took possession of part of them, but it is clear from the findings of the learned Magistrate that the complainant never recognised Sitanath as a tenant. Eventually Sitanath and Amar Guha fell out and an incident took place in these premises which gave rise to the letter to which I have referred. It seems that in the absence of Sitanath, Amar Guha with a number of other persons tried to occupy by force the part of the premises occupied by Sitanath and that they manhandled Sitanath's wife and daughter and caused considerable damage to movable property of Sitanath.

[4] That some such incident did take place seems to be clear. But the suggestion in the letter which the petitioner wrote to the Swaraj Newspaper is that the landlord, the complainant in the case, was behind this attack by Amar Guha on Sitanath, and that the attack was made as a result of a conspiracy between them. This was a serious allegation against the complainant.

[5] Attempts were made in the Court of the Presidency Magistrate to prove that the complainant must have been a party to this attack on Sitanath's premises, but the learned Chief Presidency Magistrate has, I think, rightly held that the evidence does not show that the complainant was a party to these proceedings at all. In other words, the evidence which went to show that the allegations in this letter to the Swaraj were true, utterly failed.

[6] The first defence put forward was the defence raised in Exception 1 to S. 499 which is the defence of justification. As I have said, the learned Magistrate held that the evidence which went to justify the allegations failed. Mr. Dutta has argued that his client would still be entitled to an acquittal even though his evidence failed to prove the truth of the allegations, if the evidence had raised a reasonable doubt as to the truth of the allegations. He has relied upon the well known Full Bench case of the Allahabad High Court dealing with the onus of proof in the case of Exceptions.

[7] It is to be observed that Exception 1 requires that the allegation is true and if Mr. Dutta's argument is accepted Exception 1 should read : "It is not defamation to impute anything which may or may not be true." I do not think that the principle of the Allahabad Full Bench case can be made to apply in the present case. To say something of a person which holds him to contempt is defamatory. If what is said is true then that is a defence. On the other hand if there is a doubt as to whether it is true or not, there is no defence at all and as the matter tends to bring the person defamed into contempt it is defamatory under S. 500, Penal Code. It seems to me quite clear that the plea of justification wholly failed in this case and no reliance can be placed on Exception 1 to S. 499.

[8] It was then suggested that Exception 9 to S. 499 afforded a defence. That Exception reads :

"It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good."

[9] Assuming that these allegations were made in good faith which is at least doubtful, they were certainly not made for the protection of the petitioner who wrote the letter. How could they be said to have been made for the protection of Sitanath? And it certainly was not for the public good that such a charge should have been made. I do not think that Exception 9 could have any application at all. This letter was clearly written to try and force the landlord's hands and if that is so there can be no question that Exception 9 can ever apply.

[10] It seems to me that this is a clear case and the petitioner was rightly convicted. The sentence is by no means severe and I would affirm the conviction and sentence and discharge the rule. The order staying the fine is vacated.

G.M.J. *Conviction and sentence affirmed.*

A. I. R. (37) 1950 Calcutta 340 *[C. N. 122.]*

SEN J.

Yakub Sheikh and another—*Accused*—*Petitioner* v. *The King.*

Criminal Revn. No. 506 of 1949, D/- 8th September 1949.

(a) Criminal P. C. (1898), S. 190 (1) (a)—Complaint filed before Magistrate—Magistrate, if has option to take cognizance.

When a complaint is filed before a Magistrate, unless there is any legal bar to the entertainment of the complaint such as is mentioned in S. 195 of the Code and any other section, the Magistrate is bound to take cognizance of the offence. He has no option in the matter. He has, therefore, no jurisdiction to refer the matter to the police directing the police to take cognizance and investigate. [Para 4]

Annotation : ('49-Com.) Criminal P. C., S. 190 N. 17 Pt. 1.

(b) Criminal P. C. (1898), S. 190 (1)—"May"—Meaning of.

The word 'may' in S. 190 (1) means "must". The word 'may' is used because there are three separate sets of circumstances laid down upon which cognizance may be taken. [Para 4]

Annotation : ('49-Com.) Criminal P. C., S. 190 N. 17.

(c) Criminal P. C. (1898), S. 156 (3) — Applicability.

Section 156 (3) has no application whatsoever in a case where cognizance is taken upon a complaint. [Para 4]

Annotation : ('49-Com.) Criminal P. C., S. 156 N. 5 Pt. 2.

(d) Criminal P. C. (1898), Ss. 200, 537—Failure to examine complainant on oath.

When a Magistrate takes cognizance upon a complaint he is bound under the provisions of S. 200 to examine the complainant on oath at once. The failure to do this is fatal. [Para 5]

Annotation : ('49-Com.) Criminal P, C. S. 200 N. 13; N. 16 ; S. 537 N. 17 Pt. 1.

(e) Criminal P. C. (1898), Ss. 537 (a), 190 (1) (a)—Complaint filed before Magistrate—Instead of taking cognizance of offence Magistrate referring matter to police in order that they might take cognizance of offence—Case tried upon charge-sheet—Errors held were illegalities not curable under S. 537. [Para 6]

Annotation : ('49-Com.) Criminal P. C., S. 537 N. 6 Pt. 9.

Amiyalal Chatterjee—for Petitioners.
M. Asir—for the Crown.
Sudhansu Kumar Sen—for Complainant.

Order.—This rule has been obtained by the two accused who have been convicted of having committed theft. The first accused Yakub Sheikh has been sentenced to pay a fine of Rs. 200 in default to undergo rigorous imprisonment for three months. The second accused Malek Sheikh has been dealt with in accordance with the provisions of S. 562, Criminal P. C. and released after due admonition. Half of the fine has been directed to be paid to Kalu Santal as compensation.

[2] The case for the prosecution is that Kalu Santal was in possession of certain land as the *adiar* of one Charan Das Chatterjee. He grew paddy on the land and reaped it. On the date of occurrence the two accused persons came there and removed paddy and straw in spite of protests. The defence taken is a denial of the occurrence and it was contended on behalf of the defence that the land on which the paddy was grown belonged to the accused Yakub. The learned Magistrate has disbelieved the defence case and convicted the accused. On appeal the Additional District Magistrate has after criticising the judgment of the learned trial Magistrate somewhat adversely upheld the decision and dismissed the appeal.

[3] The point raised before me is a pure point of law. It is said that the learned Magistrate has committed certain illegalities in the trial which are fatal and that therefore the entire proceedings are without jurisdiction. The facts which give rise to this contention are these: Kalu Santal lodged a petition of complaint before the Magistrate making the allegations which are the substance of the prosecution. The learned Magistrate passed an order upon the complaint in these terms :

"Send this to O/C Kalna p. s. for taking cognizance under S. 379/147, Penal Code, and finishing investigation early."

Upon this order being communicated to the police they investigated the case and returned

a charge sheet. Thereafter the accused were tried. I may mention here that on the petition of complaint being filed the complainant was not examined on oath.

[4] It is contended that the learned Magistrate has erred in law in sending the matter to police and asking the police to take cognizance. He has also erred in law in not examining the complainant on oath. In my opinion both these grounds are substantial. The law is quite clear on the point. When a complaint is filed before a Magistrate, unless there is any legal bar to the entertainment of the complaint such as is mentioned in S. 195, Criminal P. C., and any other section, the Magistrate is bound to take cognizance of the offence. He has no option in the matter. Section 190 (1), Criminal P. C., is quite clear. It says that a Magistrate may take cognizance of an offence (a) upon receiving a complaint of facts which constitute such offence, (b) upon a report in writing of such facts made by any police officer, and (c) upon information received from any person other than a police officer. The word 'may' here means must. The word 'may' is used because there are three separate sets of circumstances laid down upon which cognizance may be taken. This is the view I held in the case of *A. C. Samaddar* v. *Suresh Chandra*, 53 C. W. N. 270 : (A. I. R. (36) 1949 Cal. 197 : 50 Cr. L. J. 368) relying upon the case of *Kashmiri Lal Garga* v. *Ismail*, an unreported decision which is Cri. Ref. No. 40 of 1940. In this case the Magistrate should have taken cognizance of the complaint as there was no legal bar against taking such cognizance. That being so, he had no jurisdiction to refer the matter to the police directing the police to take cognizance and investigate. The learned Magistrate apparently relied upon the provisions of S. 156 (3), Criminal P. C. That sub-section has no application whatsoever in a case where cognizance is taken upon a complaint. This view was also expressed by me in the abovementioned case and I find that the same view has been taken in the case of *Pulin Behari* v. *The King*, by the Chief Justice and Das J. The case is reported in 53 C. W. N. 653.

[5] Next, the learned Magistrate when he takes cognizance upon a complaint is bound under the provisions of S 200, Criminal P. C., to examine the complainant on oath at once. The failure to do this is fatal. This was held in the abovementioned two cases. It is thus clear that the Magistrate has committed several illegalities in this case.

[6] It was argued by learned advocate appearing for the Crown that although the facts disclosed that the Magistrate had committed certain irregularities, they were curable by virtue of the provisions of S. 537, Criminal P. C., inasmuch as the accused were not prejudiced by these irregularities. In my opinion this argument cannot be accepted. These are not mere irregularities but illegalities which affect the question of jurisdiction of the Magistrate. The learned Magistrate really had no jurisdiction to try the case upon a charge sheet once the petition of complaint was filed, nor did he have any jurisdiction to refer the matter to the police in order that the police might take cognizance of the offence. These errors relate to jurisdiction and are not mere irregularities.

[7] In my opinion the trial has been without jurisdiction and, therefore, the order of conviction and sentence must be set aside. The case shall be retried by some other Magistrate to be appointed by the District Magistrate for this purpose. He shall try the case according to law and in the light of the observations made above. The rule is made absolute.

V.R.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 341 *[C. N. 123.]*

HARRIES C. J. AND BANERJEE J.

Kedar Nath Mukherjee and others—*Appellants* v. *Sree Sree Iswar Kalimata of Kalighat and others* — *Respondents.*

F. C. Appeal No. 15. of 1949, D/- 20-12-1949.

Civil P. C. (1908), S. 110 — Appeal allowed in part —Decree, if one of affirmance.

Where the value of the suit and the value of the appeal exceed Rs. 10,000 and the appeal is allowed in part and a portion of the decree of the trial Court is vacated, the decree is not a decree of affirmance, but is a decree varying the decree of the Court below and hence the appellant is entitled as of right to a certificate under S. 110. [Paras 1 and 2]

Annotation : ('44-Com.) C. P. C. S. 110 N. 13.

Hiralal Chakravarty and Saroj Kumar Maity — for Appellants.

Pannalal Chatterjee — for Deputy Registrar and Respondent 1.

Nagendra Kumar Dutt, Satya Charan Pyne, Ajoy Kumar Bose, Nalini Ranjan Bhattacharjya and Subodh Chandra Basak — for Respondents.

Harries C. J.—In this case it is conceded that the value of the suit and the value of the appeal exceed Rs. 10,000. The appeal was allowed in part and portion of the decree of the trial Court was vacated.

[2] In these circumstances it appears to us that the decree of this Court is not a decree of affirmance but is a decree varying the decree of the Court below. That being so the appellants are entitled as of right to a certificate and accordingly we grant leave to appeal and grant a a certificate under S. 110, Civil P. C.

[3] Costs of this application will be costs in the appeal the hearing fee being assessed at two gold mohurs.

[4] Let the supplementary affidavit filed in Court today be kept on the record.

Banerjee J. — I agree.

V.R.B. *Leave granted.*

A. I. R (37) 1950 Calcutta 342 *[C. N. 124.]*

HARRIES C. J. AND SINHA J.

Reliance Development and Engineering Ltd. — *Petitioner* v. *Bhabani Charan Banerjee and others* — *Opposite Party.*

Civil Rule No. 1562 of 1949, D/- 22-12-1949, to revise order of Sub-J., Hooghly, D/- 16-7-1949.

Civil P. C. (1908), O. 38, R. 8 and O. 21, R. 58 — In investigating claims to property attached before judgment, the Court cannot go into the question of benami. [Paras 6, 7]

Annotation : ('44-Com.) Civil P. C., O. 21 R. 58 N. 20; O. 38 R. 8 N 1.

Paresh Nath Mookerjee and Chandra Nath Mookerjee — for Petitioner.

Debabrata Mookerjee and Ajay Kumar Basu — for Opposite Party.

Harries C. J. — This is a petition for revision of an order of a learned Subordinate Judge, made in a claim case.

[2] Certain property had been attached before judgment and the property was claimed by the petitioners in this case. They made their application under the provisions of O. 38, R. 8, Civil P. C. That rule provides that where any claim is made to property attached before judgment the claim is to be investigated in the manner provided for the investigation of claims to property attached in execution of a decree for the payment of money. In other words, the claim is to be investigated under the provisions of O. 21, R. 58, Civil P. C.

[3] The learned Judge came to the conclusion that the company were not in possession of certain bricks which had been attached before judgment. The company claimed to be in possession of these bricks under a document which purported to transfer the bricks to them. The learned Judge, however, was not satisfied that this document really transferred the bricks to them and he winds up his judgment in these words:

"I dilate no more on the merits of these papers and writings because I have already said that I am not impressed that the Company hold these bricks on their own account."

[4] In short, he held that the company were mere benamidars of the defendant Girija Prosad Pal and, therefore, they could make out no claim to these bricks.

[5] Mr. Paresh Nath Mokerjee on behalf of the petitioners has contended that it was not open to the learned Judge to decide—whether or not the company were mere benamidars of the defendant. He has pointed out that it has been repeatedly held in this Court and in other Courts that in proceedings under O. 21, R. 58 a Court is not entitled to go into the question as to whether a transaction is benami or not. The Court is solely entitled to deal with the question of who is in possession and the Court is prohibited from entering into a question of title.

[6] It is true that the words of O. 21, R. 58 would suggest that the Court could go into a question such as benami. But as I have said the authorities of this and other Courts forbid the investigating Court so to do. The very same question came before me in the case of *Protiva Sundari* v. *Reliance Bank Ltd.*, 52 C. W. N. 56, in which I had to hold that the Judge in that case could not go into the question of the benami nature of a transaction. In the judgment I have cited certain cases of the Patna High Court and of this Court and it is quite clear that this Court has over a considerable length of time consistently held that in a claim case the Judge cannot go into the question of benami. The learned Subordinate Judge in this case did go into this question and decided that the company was a mere benamdar and that they did not hold the bricks on their own account, but on account of the true owner, the defendant.

[7] Having regard to the authorities we are bound to hold that the decision of the learned Judge cannot be sustained and must be set aside. The case should, in my view, be sent back to the learned Subordinate Judge for him to decide it upon the evidence relating to possession which was before him and on that evidence alone. If he can decide the matter he must do so, but he cannot go into the question of benami and hold that the petitioners are mere benamdars. If there is nothing to suggest that the possession of the petitioners is other than genuine he will have to find for the petitioners. He cannot find for the opposite parties on a finding that the petitioners are benamdars.

[8] In the result, therefore, this petition is allowed, the order of the learned Subordinate Judge is set aside and the case is remanded to him to be decided in accordance with the observations made in the judgment and according to law. The costs of these proceedings will abide the event before the learned Subordinate Judge. The rule is disposed of in these terms.

[9] The interim order of attachment continues pending the disposal of the application before the learned Subordinate Judge.

[10] Let the counter-affidavit filed in Court today be kept on the record.

Sinha J. — I agree.

V.B.B. *Petition allowed.*

A. I. R. (37) 1950 Calcutta 343 *[C. N. 125.]*

SEN J.

Radha Govinda Dutta and another—*Accused*—*Petitioners* v. *Saila Kumar Mukherjee*—*Complainant* — *Opposite Party.*

Criminal Revn. No. 655 of 1949, D/- 22-11-1949.

(a) Penal Code (1860), Ss. 499, 500—Repetition of defamatory statements in question form.

Where after certain leaflets are distributed containing imputations against the complainant which are clearly defamatory, the editor of a newspaper publishes them in the form of questions without any direct imputation against the complainant and asks the complainant to clear himself by answering the questions, it amounts to a re-publication of the defamatory statements in the leaflets and the editor is guilty of defamation. [Para 3]

Annotation: ('46-Man.) Penal Code, Ss. 499 and 500 N. 1, 2.

(b) Penal Code (1860), S. 499, Exception 1—"Anything which is true."

It is sufficient if the accused can show that the statements are substantially true in regard to the material portion of the allegation or insinuation. [Para 4]

Annotation: ('46-Man.) Penal Code, S. 499 N. 6.

Ajit Kumar Dutt and Basanta Kumar Panda —for Petitioners.

A. C. Mitra and Satya Charan Pain— for Opposite Party.

Order.—This rule has been obtained by two persons who were tried for having defamed the Chairman of the Howarh Municipality. They were convicted and sentenced to pay certain fines, in default to undergo simple imprisonment for certain terms. Out of the fines compensation was directed to be paid to the complainant. The decision of the trial Court was upheld in appeal by the Sessions Judge and it is with respect to the last decision that the present rule has been obtained.

[2] The facts briefly are as follows: The accused Radha Gobinda Dutta was the Editor and the accused Lakshmi Kanta Bhattacharjee was the printer of a Bengali daily newspaper known as the Paschim Banga Patrika. On 8th July 1948 an article was published in that paper in the form of a questionnaire. This is Ex. 1. It is the case for the prosecution that this article defamed the complainant Saila Kumar Mukherjee, the Chairman of the Howarh Municipality and that the accused committed an offence punishable under S. 500, Penal Code. The defence taken is that the questionnaire which admittedly was published in that newspaper did not contain any defamatory matter, that is to say, it did not contain any matter which may be described as making any imputation regarding the complainant which would harm his reputation. Next, the defence was that the accused were protected by Exceptions 1, 2, 3, and 9 mentioned in S. 499, Penal Code, which defines the offence of defamation. As I have stated before both the Courts below have rejected the defences.

[3] Learned advocate for the petitioners gives up the defence of Exception 2, and he relies upon all the other defences taken in the Courts below. The learned Sessions Judge in a very detailed and able judgment has discussed all the points raised by the defence and he has come to the conclusion that the statements contained in Ex. 1 are defamatory and that none of the Exceptions can be availed of by the accused. In my view this decision is perfectly correct. I shall first deal with the question whether the statements published in Ex. 1 come within the mischief of S. 499, Penal Code. In this connection certain surrounding circumstances must be considered. A few days prior to the publication, leaflets were distributed in Howarh containing imputations against the complainant which are clearly defamatory and indeed on this point there was no dispute. This leaflet is Ex 2. Now, the leaflet and the so-called questionnaire published in the Paschim Banga Patrika should be considered together and if they are considered together it becomes abundantly clear that the questions contained in the Paschim Banga Patrika, although they were in the form of mere questions, were defamatory in character. I reproduce below the leaflet Ex. 2 leaving out certain paragraphs therein which are not relevant to the case and also the questionnaire Ex. 1:

Exhibit 2. "A few questions about the Howrah Municipality.

Will the Chairman Saila Babu reply?

Sri Saila Kumar Mukherjee, the Congress Chairman of the Howrah Municipality tries to extort cheap praise by speaking at intervals in throatful voice about laudable long range and short range schemes for the betterment of the Howrah Municipality. But the following few facts will clearly manifest his depth of feeling for the betterment of the Municipality. We hope Saila Babu will have sufficient moral courage to refute the facts, if groundless, by his replies.

1. After the self-immolation of Mahatma Gandhi arrangements were made for a Sradha Basar at the Howrah Town Hall. Newspapers and handbills published by the Municipality indicate that it was held under the auspices of the Municipality and the Chairman of the Municipality Sri Saila Kumar Mukherjee himself raised about Rs. 13,500 (Thirteen thousand and a half) for this function from wealthy persons, rich marwaris and the public. But he has not as yet submitted any account to the Municipal Meeting Questioned he says this function has no connection with the Municipality and thus he evades. Will he, without any further delay, submit an account to the public?

2. It is known to us that the expenses of the case of the Commissioners of the Howrah Municipality against Mr. Nomani appointed by the late Government of Bengal that rolled up to the Privy Council were by the citizens of Howrah and some Commissioners personally. Government lost the case and about Rs. 11000 (Eleven thousand) was allowed as costs. But we have been astonished to hear that Saila Babu has misappropriated the said amount of Rs. 11000 (Eleven thousand). What is the reply of Saila Babu to this?

3. It is true that for some special reason he appeared at the appeal Committee at the time when the question of assessment of the Allenberry Workshop run by Messrs. Dalmia Jain was being decided and reduced the valuation of only the Allenbery Company from Rs. 83,065 to Rs. 61,936. What is the reason of reducing the three monthly income by Rs. 1000? It is heard that just after this Saila Babu purchased a motor car cheap. Is it true?

4. Why was the contract for Rs. 60,000 of the Road Board given to the lowest tenderer Sri Kumar Pal without the consent of the Commissioners? Is it true that a large sum of money has been paid to the said contractor Sri Kumar Pal though the work has not been finished up to the sixteenth part? It is heard that just after getting this contract the said contractor was engaged for repairing the house of Saila Babu and wicked people are saying that it is for this reason that Saila Babu has special favour for this contractor: What does Saila Babu say?

5. Will Saila Babu say why he has got the lease of the Municipal tank given to B. K. Sarkar & Co. at a low rate or at a nominal rate disregarding the resolution and direction given in a general meeting of the Commissioners? Is it true that the contract for bran has been given to the said B. K. Sarkar & Co. disregarding the clear direction of the Commissioners? Why was the contract for the supply of bran given to the said Contractor at the rate of Rs. 14-4-0 although the market rate is Rs. 13? Besides this, why was the charge at the rate of 0-8-0 for bags of bran allowed separately? Though no price is ever paid for the bags of bran. Why did Saila Babu allow this extra price of bags at the rate of Rs. 0-8-0 over-riding this practice? Will Saila Babu say whether this contractor B. K. Sarkar & Co. is his benamdar and whether a large sum of his money has been laid out in the work of this contractor?

6. It is true that the value of land in Ward III where are situate Saila Babu's paternal house and landed property assessed at a rate lower than what has been done in respect of Wards VI and II of the Municipality during the revision of assessment. According to which reason or principle has the value of the land on which Saila Babu's house stands assessed at Rs. 300 (Three hundred rupees) per cottah and that in Ward VI at Rs. 600 (six hundred rupees) per cottah? Will our Chairman who has a soft corner for the public throw light on this matter?

7. Will Saila Babu inform why was the valuation sketch of his own house increased by penning through and why was the valuation sketch done by one of his friends Jyotish Chandra Mitra erased and re-written?

8. In the house of Saila Babu at 21 Ramla Mukherjee Lane, there are 7 rooms and 4 bath rooms in the 2nd story, 12 rooms and 2 halls and one bath room in the 1st story and 26 rooms, 4 halls, one puja dalan and 3 tin sheds in the ground floor and attached with the house is a land measuring 2 bighas 3 cottahs and 3 Ch. Why was the valuation of this building fixed at Rs. 3100?

9. Has there been a shortage of money of Saila Babu after he became the Chairman of the Municipality? We are awaiting Saila Babu's reply in this matter.

10. On this shortage of money we are whispering a small question to Saila Babu. Is the pay of the driver of Saila Babu's personal motor car paid from the Municipal fund?

11. Why has (*sic*) Saila Babu is the leader of the Municipal Party disregarding the written instruction of the Congress Municipal party from the words "Howrah Municipality from the Howrah Municipality jeep car." Has it been removed lest it might stand in the way of its arbitrary use by him or least it might lower his prestige to the people of High Court? The people demand an explanation from Saila Babu in this respect.

In the end we want to speak of a small matter to Saila Babu. The Howrah Municipality is the property of the citizens of Howrah. It would have been better if the relatives and friends were nourished from his own property rather than from the money of the rate-payers. May he not forget this knowledge."

Sd. Sri Sital Chandra Kundu,
The 2nd July, 1948.
Circular Road, Howrah.

Ex. 1:

"PASCHIM BANGA PATRIKA — Dated 8th July, 1948 page 3.

Questions for the Chairman, Howrah Municipality to answer.

We have received number of complaints against Sri Saila Kumar Mukhopadhyay, Chairman, Howrah Municipality. We hope he will remove all doubts in the minds of the public by stating as to whether such complaints are correct.

1. Did Sri Saila Kumar Mukhopadhyay collect from wealthy persons, rich Marwaris and from the members of the public a sum of about Rs. 13,500 in connection with Gandhi Sradhha Basar? Is it correct that he has not as yet furnished before any meeting of the Municipality any account for such sum?

2. Is it not correct that the cost of the litigation between the Commissioner for the Howrah Municipality and Mr. Nomani appointed by the then Government of Bengal up to the Privy Council had been borne indivIdually, by the citizens of Howrah and certain Commissioners? Is it not true that the Howrah Municipality won the case and got about Rs. 11,000 as damages? Who has taken the money?

3. Is it true that for certain special reasons he, by being present in the Appeal Committee meeting had the assessment of only Allen Berry and Co., run by Messrs. Dalmia Jain reduced from Rs. 83,065 to Rs. 61,936?

4. Is it true that a Road Board contract for Rs. 60,000 was denied to the party who quoted the lowest tender and was given without the consent of the Commissioners, to one Srikumar Pal whose tender was third from the lowest? Is it true that large sums have been paid to the said contractor Srikumar Pal although one-sixteenth of the work has hardly been completed?

5. Did he cause a lease of a Municipal tank to be granted to B. K. Sarkar Co., at a small or nominal value, by ignoring the resolution and direction of Commissioners in a General Meeting? Is it true that a contract for gram has been given to the said B. K. Sarkars Co, notwithstanding specific instructions of the Commissioners to the contrary? Was the said contractor allowed Rs. 14-4-0 for supply of gram although the market rate was Rs. 13?

6. Is it true that in connection with re-assessment, valuation of the land has been made at a reduced rate in Ward No. III where Saila Babu's ancestral home and properties are situate, compared to the valuation of land in Wards Nos. II and VI?

7. Has the valuation of his residential house been increased by tampering with sketch book? Has the valuation Sketch Book of the house of his friend Babu Jyotish Mitra, a Commissioner, been erased and re-written? Saila Babu's residential house at 21, Ram Lal Mukherjee Lane consists of 7 rooms and 4 bath rooms in the second floor, 12 rooms, 2 halls and one bath room in the first floor and 26 rooms, 4 halls, 1 Puja Dalan and 3 rooms in the ground floor. The said house is on a plot of land 2 bighas 2 cottas 8 chattacks in area. Has this palace been valued at Rs. 3100?

8. Is the driver of Saila Babu's private car paid out of the funds of the Municipality?

9. Have the words "Howrah Municipality" been deleted from the Jeep Car of the Municipality ?

A comparison of these two documents makes it quite clear that the questionnaire was referring to the defamatory allegations made in the leaflet. They virtually amounted to a re-publication of the defamatory statements contained in the leaflet. It is quite a common ruse to make defamatory statements in the form of questions. What the Editor is saying in Ex. 1., is this? "We have received a number of complaints against you and we hope you will clear yourself by answering the following questions." Thereafter he puts the questions in a sly manner omitting from the questions any direct imputation. It is quite clear however that the questions and the preface to the questions indicate that the Chairman was being charged with having done dishonest things and he is asked to answer the charges. A statement of this nature would amount, in my opinion, to defamation and the publishers of such statements would be guilty of the offence of defamation unless he is protected by the Exceptions mentioned in S. 499, Penal Code. A simple illustration will, I think, prove the point. Suppose a newspaper published the following statement ? "To Mr. A : We have heard that people are saying that you commit theft and dacoity. We give you this opportunity of clearing yourself by answering the following questions." Would not that amount to defamation ? In my opinion it certainly would. It really amounts to a re-publication of the defamatory statements which the person is called upon to answer. Merely because the publisher of the defamatory statements asks the person defamed to exonerate himself, that does not in any way protect the publisher.

[4] The next question for determination is whether the accused are protected by any of the Exceptions. Exception I is in the following terms ? :

"It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact."

To get the benefit of this Exception the accused must prove that the statements contained in the questionnaire are true and that they are made for the public good. Learned advocate for the petitioners contends that it is sufficient if the petitioners can prove that the statements made in the questionnaire are substantially true. He relies upon an unreported decision of this Court in Criminal Revision Case No. 1143 of 1947 (*Prabhat Chandra Ganguly* v. *A. H. R. S. Doha*). There can be no quarrel with this proposition, but the words "substantially true" mean true in regard to the material portion of the allegation or insinuation. As an example I would take the first question. "Did Sri Saila Kumar Mukhopadhyay collect from wealthy persons, rich Marwaris and from the members of the public a sum of about Rs. 13,500" etc. It is true that some money was collected in connection with the Gandhi Sraddha Basar. The truth regarding that allegation cannot make the insinuation contained in paragraph I substantially true. The insinuation there is that the complainant acted on behalf of the Municipality and collected this sum on behalf of the Municipality and neglected to furnish accounts. Now, it has been established that the money was not collected on behalf of the Municipality at all and that there was no duty upon the complainant to furnish any account to the Municipality. It is thus clear that the accused have not succeeded in showing that the insinuation contained in the first question is substantially true. The same may be said with respect to all the questions. Certain facts therein are no doubt substantially correct, but the insinuation underlying these facts is not substantially correct. Exception I therefore has no application.

[5] As regards Exceptions II and III I am of opinion that they have no relevancy. They deal with expressions of opinions in respect of the conduct of a public servant or in respect of the conduct of any person touching any public question. In the present case we are not concerned with the expression of any opinion at all. The case relates to defamatory imputations which are allegations of fact and not expressions of opinions. I need not therefore consider these two Exceptions.

[6] The last (Ninth) Exception is in the following terms :

"It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good."

To get the benefit of this Exception the accused must prove that he acted in good faith and for the public good. He must establish both these points. There is certainly no good faith established in this case. The question has been dealt with very well by the learned Judge. If the accused were acting in good faith, one would have expected them to go to the Chairman of the Municipality and ask him for an explanation. Nothing of the kind was done The accused relying upon anonymous leaflets drew up a sort of a charge sheet against the Chairman. Such conduct is clearly not in good faith. For this reason I hold that Exception IX has no application.

[7] In my opinion the charge has been fully proved and I discharge this rule.

D.H. *Rule discharged.*

*A I. R. (37) 1950 Calcutta 346 [C. N. 126.]

SEN J.

On difference of opinion between

R. P. MOOKERJEE AND DAS GUPTA JJ.

Paresh Chandra Bhowmick — Complainant —Petitioner v. *Usharanjan Ghosh and others — Accused—Opposite Party.*

Criminal Revn. No. 784 of 1948, D/- 20-7-1949.

✠ (a) Criminal P. C. (1898), S. 439 (1)— Order of discharge—Revision -Power of High Court to pass limited order of remand.

Where an order of discharge comes up before the High Court in revision the jurisdiction of the Court is not fettered in any way. The High Court has ample jurisdiction to send the case back on remand for the retrial of any particular offence while upholding the decision of the Court below with respect to other offences. [Para 3]

If the Court finds that the charge of forgery cannot be established but that there are materials for investigating a charge of cheating, the Court may remand the case for the trial of the charge of cheating only on an application against an order of discharge. [Para 3]

Where such a limited order of remand is passed on revision, the order is binding on the lower Court and on the High Court until it is set aside in appropriate proceedings. It is not open to the High Court to sit on appeal on such an order and say that it is a bad order. [Para 4]

(b) Criminal P. C. (1898), S. 439—Revision against acquittal.

The High Court is averse to interfere in revision with orders of acquittal, but where the order of acquittal is the result of serious error of law, the order should be set aside. [Para 6]

Annotation : ('49-Com.) Criminal P. C., S. 439, N. 12.

Nalin Chandra Banerjee and Chintaharan Roy — for Petitioner.

Moni Mukherjee—for Opposite Party.

Sen J.—This rule came up for hearing before Mookerjee and Das Gupta JJ. As there was a difference of opinion between them the matter has been placed before me for disposal by my Lord the Chief Justice.

[2] The facts giving rise to this rule briefly are as follows. The Maharaj Kumari Binodini Devi of Manipur deposited the sum of Rs. 5,000 (rupees five thousand only) as a fixed deposit for six months in the Calcutta Mercantile Bank Limited at the Nabadwip Branch. Six months expired on 5th February 1947. On 6th of that month Maharaj Kumari Binodini Devi send her agent, Paresh Chandra Bhowmik, who is the complainant in this case, to get back the money deposited as the date of maturity had passed. Bhowmik appeared at the Nabadwip Branch of the Bank but he was told that there was no money there and he was asked to come to Calcutta to take money. On 7th February 1947. Bhowmik came to the Calcutta Head Office and he was put off for a week. He went to the bank from time to time and payment was deferred. Finally, on 25th February 1947, he went to the Bank and insisted on payment saying that he would not leave the bank until he was paid. The fixed deposit receipt was taken from him by Prova Ranjan Ghose, one of the accused, who went into a room where the other two accused Usha Ranjan Ghose and Suresh Ghosh were seated. Thereafter Bhomik was called into the room and the receipt in a folded condition was returned to him. He was asked to wait for a few days as some Government papers had to be cashed and he was promised payment. On 28th February 1947 a letter was received by Maharaj Kumari Binodini Devi which was dated 10th February 1947, informing her that her Fixed Deposit had been automatically renewed as per rubber stamp on the receipt as she had not applied to receive payment within three days of the date of maturity. The case for the prosecution is that there was no rubber stamp on the receipt at all on 25th February 1947. and that the rubber stamp was put on the receipt on that date when the receipt was taken away from Bhowmik by Probha Ranjan Ghose. It is also the case for the prosecution that the letter was fraudulently ante-dated. When this letter was received criminal proceedings were initiated by Paresh Chandra Bhowmik alleging that the three accused persons were guilty of forgery, of using a forged document, of cheating and of forgery for the purpose of cheating. Upon this complaint being made summonses were issued against the three persons only with respect to the allegation of cheating, that is to say, summonses were issued stating that the accused had been charged with having committed an offence punishable under S. 420, Penal Code. The accused appeared and were tried by Mr. H. K. Bose, Honorary Presidency Magistrate. He discharged the accused with respect to the offence punishable under S. 420, Penal Code. He did not make any investigation regarding the other charges alleged in the petition of complaint in any detail and passed no specific orders with respect to those offences. Against this order of discharge this Court was moved and a rule was issued which was heard by Roxburgh and J. N. Mujumdar JJ. The complainant who obtained this rule stated that the learned Magistrate was wrong in discharging the accused on the charge of cheating and he also complained that the Magistrate had not investigated the case with respect to the other allegations made charging the accused with forgery, the forgery consisting in putting in the rubber stamp entry on the receipt. Their Lordships remanded the case to the trial Court for rehearing and in the order of remand certain observations were made which are of great importance for the decision of this rule. I shall therefore quote those

observations which were made in the remand order:

"The learned Magistrate in discharging the accused has taken the main prosecution case to be one of cheating for non-payment of money and he holds that the case is really one of debtor and creditor and not a criminal case. He briefly refers to the rubber stamp question but says that as the prosecution could not say who was responsible for it no prima facie case had been made out.

So far as the first reason given by the learned Magistrate is concerned, we have nothing to say.

In so far as the matter of the rubber stamp is concerned, we note that on the back of the printed application for fixed deposit account, Ex. 5 which was submitted by the Maharaj Kumari when the amount was deposited, cl. 6 is in very similar terms to those in the rubber stamp and now challenged. The only material difference being that the period is seven days and not three days. *In those circumstances, it would be difficult for a charge of forgery to succeed in our opinion.*

But there remains the prosecution case that the accused have fraudulently dealt with the Maharaj Kumari in obtaining the receipt from the complainant on the pretext of paying the money and then sending an antedated letter alleging that the receipt had been automatically renewed. Without wishing to express any opinion on this point, we think that this aspect of the case requires further enquiry. With these comments we therefore set aside the order of discharge and remand the case for disposal by the Chief Presidency Magistrate or some other Presidency Magistrate to whom he may transfer it other than Mr. H K Bose."

[3] The case sent back on remand was heard by Mr. A. Mukherjee, Additional Presidency Magistrate, Calcutta. He interpreted the order of remand of this Court as limiting the scope of his enquiry to the charge of cheating only. This is what he says:

"By orders passed by the Hon'ble High Court in previous proceedings relating to this case the scope of enquiry was limited to fraud and no other offence. It was seen from the evidence adduced by the prosecution . . . . ."

He thereafter proceeded to try the accused on a charge of cheating punishable under S. 417, Penal Code, and holding that this charge has not been made out, he acquitted the accused. Against this order of acquittal this Court was again moved and the present rule was issued. As I have stated before it was heard by Mookerjee and Das Gupta JJ. They have differed. Mookerjee J. says that as the order passed by Mr. Bose was an order of discharge, this Court in remanding the case had no power to limit the trial In this view he held that the order of remand must be construed an order remanding the entire case for retrial, that is to say, the order imposed a duty on the learned Magistrate to investigate not only the charge of cheating but also the charge of forgery and the other allied offences. He supports this view by saying that an order of discharge is different from an order of acquittal and that a person discharged could not take the benefit of S. 403, Criminal P. C., which lays down the doctrine of *autrefois acquit* and that he was liable to be tried again for the same offence on a fresh petition. In support of this view he cites two Full Bench decisions, namely, the cases of *Dwarkanath* v. *Benimadhab*, 28 Cal. 652: (5 C. W. N 457 F. B.) and *Emperor* v. *Chinna Kaliappa*, 29 Mad. 126: (3 Cr. L. J. 274). His view is that these decisions are authority for the proposition that when an order of discharge is set aside by the Court on revision the entire case is open to the Magistrate and he has the jurisdiction to hear the entire matter, and that it was not open to this Court to set aside the order of discharge and remand the case for a re-hearing with respect to any particular charge. In my opinion this view of Mookerjee J. is wrong. It is true that an order of discharge is different from an order of acquittal and such an order does not protect a person discharged from being subject to fresh proceedings in regard to the offence with respect to which he was discharged, but it does not follow from this that where an order of discharge comes up before this Court in revision the jurisdiction of this Court is fettered in the way suggested by Mookerjee J. This Court has ample jurisdiction to send the case back on remand for the retrial of any particular offence while upholding the decision of the Court below with respect to other offences. In my opinion this view is clearly supported by the provisions of S. 439 (1), Criminal P. C. That section says that this Court on revision may exercise in its discretion any of the powers conferred on a Court of appeal by ss. 423, 426, 427 and 428 of the Code. Now, it is quite clear that when there is an appeal the Court may remand the case with respect to one of several offences and accept the lower Court's decision with respect to the other offences. A limited order of remand is clearly allowed to an appellate Court and there are innumerable decisions where this power has been exercised. This Court in its revisional jurisdiction has all these powers and perhaps something more. In this connection I may refer to S. 423, Criminal P C., which mentions some of the powers of the appellate Court. Section 423 (1) (a) of the Code states what the Court of appeal may do in the case of acquittal. Sub-section (b) of S. 423 (1) states what the Court may do in a case of conviction. Sub section (c) deals with an appeal from any other order and says that the appellate Court may alter or reverse such order. Sub-section (d) says that the appellate Court may make any amendment or any consequential or incidental order that it may think just and proper. The case falls under sub-s. (d) of S. 423 (1) of the Code. The order here is a consequential or incidental order. If the Court finds that the charge of forgery cannot be established but that there

are materials for investigating a charge of cheating, the Court may remand the case for the trial of the charge of cheating only on an application against an order of discharge.

[4] Again even if the order passed by Roxburgh and Majumdar JJ. be not an order according to law, this Court cannot sit on appeal on such an order and say that it is a bad order. The order is binding on the lower Court and also binding on this Court until it is set aside in appropriate proceedings. For these reasons I hold that Mookerjee J.'s view in respect of the above matter is not correct.

[5] The next point for consideration is whether the order passed by Roxburgh and Majumdar JJ. was an order of the limited nature contended for on behalf of the bank. This question has caused me a certain amount of trouble, but after careful consideration I am of opinion that the order of remand was not a 'limited' order. I have quoted the order in extenso. It was argued that the learned Judges mentioned above came to a definite conclusion that a charge of forgery was not maintainable and that they directed the Court below not to deal with any charge of forgery but to confine the trial to a charge of cheating. In Para. 2 of the order of Roxburgh and Majumdar JJ. as reproduced by me there is no final decision on the question of forgery. What their Lordships said is that it appeared to them having regard to the circumstances that a charge of forgery would be difficult to establish. It was merely an expression of opinion regarding the difficulty in establishing a charge of forgery upon the materials then before their Lordships. Their Lordships nowhere say that the charge of forgery had failed and that therefore the learned Magistrate should not investigate that charge. When the case was sent back for retrial it was tried *de novo* and fresh evidence was taken. Upon that fresh evidence the charge of forgery may well have been established. This contingency may have been in the minds of the learned Judges and it is for this reason perhaps they did not express any definite opinion that the charge of forgery had failed and did not expressly limit the retrial to the charge of cheating only. In this connection I would draw attention to the last paragraph of the order of remand. Their Lordships do not use the word 'cheating.' They used the words 'fraudulently dealt with.' Now, a person may be fraudulently dealt with by the commission of forgery or by some other offences. It seems to me therefore that the Court below was directed to rehear the entire matter and to decide whether on the evidence it could be said that the Maharajkumari had been fraudulently dealt with. If that is the correct interpretation, then it was open to the Magistrate to consider the allegations of forgery and of the use of a forged document. He has the power to investigate any other allied offences which the evidence might disclose as showing fraudulent dealing. In my opinion the order of remand did not limit the Magistrate's scope of enquiry to one of cheating but it directed the Magistrate to consider all the evidence and to decide whether the evidence disclosed that the Maharajkumari had been fraudulently dealt with and whether such fraudulent dealing would amount to an offence punishable under the Penal Code. As I have said before the interpretation of the order of remand has presented some difficulty to me but I think that this is what their Lordships intended. That being so, I hold that the learned Magistrate was quite wrong in limiting the scope of his enquiry to one of cheating only. By reason of this error the whole trial has been vitiated.

[6] It was next argued by learned advocate appearing for the bank that this Court in revision should not easily interfere with an order of acquittal, and he has cited a case decided by me which lays down this proposition, *Harendra Nath* v. *Bejoy Krishna*, A. I. R. (36) 1949 Cal. 171 : 50 Cr. L. J. 241. I am always averse to interfering with orders of acquittal but in the present case I consider that this order should be set aside. There has been no real trial because the learned Magistrate has erred in interpreting the order of remand. The order of acquittal passed in such circumstances is really no order at all and in my opinion a serious error of law of this description which results is an order of acquittal should be taken notice of and such an order should be set aside. Further, the case is one of public importance. If the case be true, then it shows that a bank which is entrusted with public money has by forgery and cheating deprived its client of her dues. It is of utmost importance that banks should conduct their business in a scrupulously honest manner and when charges like these are brought against a bank there should be a proper investigation. For this reason the order of acquittal which is bad because of an error of law should be interfered with.

[7] Mookerjee J. has not expressed any opinion on the question whether the evidence established the charge of cheating or not, Mr. Das Gupta J. has expressed the view that the evidence adduced does not establish the charge of cheating. Having regard to the decision at which I have arrived I do not think that I should give expression to any opinion on

the matter as it may impede a free decision of the matter by the learned Magistrate.

[8] I accordingly set aside the order of acquittal and remand the whole case for rehearing by the learned Magistrate in accordance with law and in the light of the observations made above. The rule is made absolute.

V.B.B. *Case remanded.*

A. I. R. (37) 1950 Calcutta 349 *[C. N. 127.]*

SEN AND K. C. CHUNDER JJ.

Dwarika Prosad and others — Petitioners v. Dr. B. K. Roy Choudhury and others — Opposite Party.

Criminal Revn. No. 1106 of 1949, D/- 3-2-1950.

(a) Criminal P. C. (1898), S. 133 (1), para. 3 — Community —Meaning of —Public nuisance —Penal Code (1860), S. 268.

The word 'community' cannot be taken to mean residents of a particular house. 'Community' means something wider than that. It means the public at large or the residents of an entire locality. [Para 5]

Where the finding was that the noise of the icecream making machinery constituted a nuisance to the residents of the building whose flats were adjacent to the place where the machine was running :

Held that this was not a finding that a public nuisance existed and consequently, S. 133 had no application. [Paras 5 and 6]

Annotation : ('49-Com.) Cr. P. C., S. 133, Notes 11 and 16; ('46-Man.) Penal Code, S. 268, N. 1.

(b) Interpretation of Statutes —Title of Chapter — Value of.

The title of a Chapter is not a determining factor regarding the interpretation of the provisions of a section in the Chapter but the title certainly throws considerable light upon the meaning of the section and where it is not inconsistent with the section one should presume that the title correctly describes the object of the provisions of the Chapter. [Para 5]

S. S. Mukherjee and Priti Bhusan Barman — for Petitioners.

N. K. Sen and J. M. Banerjee — for the State.

Chintaharan Roy — for Opposite Party.

Sen J.—This rule was obtained by the petitioners against whom an order has been passed in proceedings under S. 133, Criminal P. C., by the Sub-Divisional Magistrate of Asansol directing the petitioners to refrain from working in icecream making machine between the hours of 11 P. M. and 5 A. M.

[2] The case against the petitioners briefly is as follows: The petitioners have a shop in certain premises where they make icecream. The icecream is made in a refrigerator. It is said that the noise created by the working of the refrigerator constitutes a public nuisance. The defence taken is that the noise made is not a public nuisance. The learned Magistrate, as I stated before, has passed an order restraining the petitioners from working this machine for a certain period. A motion was taken from this order to the Sessions Judge and he has confirmed it.

[3] The first point raised by learned advocate appearing for the petitioners is that the alleged nuisance, if it be a nuisance at all is not a public nuisance and therefore proceedings under S. 133, Criminal P. C., to abate the nuisance are not permissible. His contention is that proceedings under S. 133, Criminal P. C., relate to public nuisance and not to private nuisance. Next, he points out that the finding of the learned Magistrate is not sufficient to show that the petitioners are creating a public nuisance.

[4] Learned advocate appearing for the State contends that the evidence discloses that a number of persons occupying the other portion of the premises where this business is carried on are disturbed by the noise and that therefore the Court below was right in holding that there was a public nuisance.

[5] In our opinion the contention urged on behalf of the petitioners must prevail. Section 133, Criminal P. C., appears in Chap. X of that Code which is entitled "Public Nuisance." We realise that the title of a Chapter is not a determining factor regarding the interpretation of the provisions of a section in the Chapter but the title certainly throws considerable light upon the meaning of the section and where it is not inconsistent with the section one should presume that the title correctly describes the object of the provisions of the Chapter. As we have said before the Chapter is headed "Public Nuisances." Section 133 deals with various matters which constitute a public nuisance within the legal meaning of that term. We are concerned in this case with para. 3 of sub-s. (1) of S. 133, Criminal P. C., which is as follows :

"That the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated, or."

It is quite clear from this paragraph that the section aims at preventing any conduct which would be injurious to the health or physical comfort of the community. The word 'community' is used and that word has a definite meaning. The word 'community' cannot be taken to mean residents of a particular house. Community means something wider than that. It means the public at large or the residents of an entire locality. If we look at S. 268, Penal Code, we find the definition of 'public nuisance.' It defines 'public nuisance' as an act or illegal omission which causes any common injury, danger or nuisance to the public or to the people in general who dwell or occupy property in the vicinity. The words "public", "in general" and "vicinity"

clearly indicate that there can be no public nuisance unless the general public of the locality is affected by the nuisance. In this case there is really no evidence to show that anybody was affected by the sound of this machine except some persons living in the same house. The evidence of some witnesses that the noise constituted a public nuisance is really evidence of opinion and as such is not admissible. We find further that the learned Magistrate in the last paragraph of his judgment does not find that the persons in general of the locality have been affected by the sound emanating from the machine. This is what he says :

"Taking all these various facts into consideration together with the impression I got when I made a local inspection I am of the opinion that the working of this icecream making machine at night in a congested area does constitute a nuisance to the residents of the building whose flats are adjacent to the place where the machine is running and hence order that the orders passed by the learned Magistrate under S. 133, Criminal P. C., on 20th April 1949, be made absolute with this exception that the second party should be restrained from working the machine after the hours of 11 P. M. till 5 A. M. Let my orders stand."

He finds that the noise constitutes a nuisance to the residents of the building whose flats are adjacent to the place where the machine is running. He does not even find that the noise of the machine constitutes a nuisance to all the residents of the building. He says that it constitutes a nuisance to the residents of the building whose flats are adjacent to the place where the machine is running. Now, a finding of this description is clearly not a finding that a public nuisance exists.

[6] In these circumstances we are of opinion that S. 133, Criminal P. C., has no application and that the order of the learned Magistrate is bad.

[7] We accordingly set aside the order and make the rule absolute.

K. C. Chunder J.—I agree.

V.R.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 350 *[C. N. 128.]*

K. C. CHUNDER AND GUHA JJ.

Anila Bala Devi—Petitioner v. *The Chairman, Kandi Municipality—Opposite Party.*

Criminal Revn. No. 543 of 1949, D/- 21st November 1949.

Criminal P. C. (1898), S. 205—Pardanashin lady summoned under S. 349/500, Bengal Municipal Act—Appearance by pleader.

Where a pardanashin lady belonging to a very respectable family being summoned under S. 349/500, Bengal Municipal Act, applied to the Magistrate for permission to appear by pleader but the permission was refused :

Held, that the conduct of the Magistrate in insisting upon dragging a respectable lady to Court in a petty case cannot but be seriously condemned. [Para 5]

Annotation : ('49-Com) Criminal P. C S. 205 N. 6.

C. F. Ali and S. B. Chaudhuri—for Petitioner.

Order.—This rule was issued at the instance of Anila Bala Devi, who is a Purdanashin lady belonging to a very respectable family and is called the Rani of Jemo Rajbati Madhyam Taraf. On the complaint of the Chairman of the Kandi Municipality, she was summoned under S. 349/500, Bengal Municipal Act (Act XV [15] of 1932, Bengal).

[2] Section 349 gives power to the Commissioners of a Municipality to require cleansing of sources of water used for drinking or culinary purposes. Section 500 deals with non-compliance with the orders of the Commissioners. The punishment in the present case at the maximum was a fine of Rs 50.

[3] This respectable Purdanashin lady applied before the Sub-Divisional Magistrate of Kandi for permission to appear by a pleader. What has surprised us most is why the Sub-Divisional Magistrate did not exercise his powers under S. 205, Criminal P. C., and allow the lady to do so. It seems various proceedings took place including an examination under orders of the Court by the Assistant Surgeon and allegations also against the Assistant Surgeon.

[4] The Sessions Judge was of opinion that the order of the Magistrate in not allowing the lady to appear by pleader was an improper order, but as it was not an illegal order he had no power to interfere with the same. The petitioner then moved this Court and obtained the present rule.

[5] Obviously, the learned Magistrate is not aware of two decisions of this Court, one in the case of *Raj Rajeswari Debi* v *Emperor*, 15 Cri. L. J. 281 : (23 I. C. 489 Cal.) and the other *In re Mrs. Sukhalata Gupta*, 21 C. W. N. 168, in which, even in stronger cases than this, Divisional Benches of this Court have allowed Purdanashin ladies to appear by pleader. In the first case mentioned the charges were very serious ones under Ss. 307, 308, 325 and 326, Penal Code, and the ladies were even permitted to appear through pleader in the Court of Sessions should the cases be committed. The other case was one under S. 420, Penal Code, and the lady was allowed to appear by pleader till her conviction. We have not been able to understand at all why in a petty case involving at the most a fine of Rs. 50 the Magistrate insisted upon dragging a respectable lady to Court. Such conduct cannot but be seriously condemned.

[6] We make the rule absolute. The petitioner will be allowed to appear before the Magistrate by her pleader and in view of the unseemly wrangling that had gone on in the Magistrate's Court, the case should be tried by some other Magistrate selected by the District Magistrate.

G.M.J. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 351 *[C. N. 129.]*

R. P. MOOKERJEE J.

Rajlakshmi Dasi w/o Tulsi Charan Das *—Defendant 4—Appellant* v *Sm. Susilabala Dasi and others —Respondents.*

A. F. A. D. No. 1627 of 1945, D/- 9-2-1949, against decree of Addl. Dist. Judge, Second Court, Alipore, D/- 22-3-1945.

Evidence Act (1872), S. 115— Estoppel by silence —Estoppel by record and estoppel in pais— Applicability —Held, on facts, that plaintiff was estopped by his conduct, from raising plea that defendant was not subordinate tenant—Decision of Small Cause Court as to under-raiyati tenancy of defendant in defendant's suit held not res judicata— Civil P. C., (1908), S. 11.

In proceedings for execution of a rent decree, one *A* purchased the holding in suit and after obtaining possession created under-raiyati tenancy in favour of *B*. In execution of another rent decree one *C* purchased the interest of the tenant. In subsequent execution of a rent decree the holding was purchased by the decree-holders landlords. In these proceedings *A* and *C* were made parties. After the purchase by the landlords, *B* made an application for setting aside the sale. In the presence of *A* and *C* the sale was set aside and *C* got back the property. *B*'s suit for contribution against *A* and *C* for realising a portion of the amount deposited by her to have the sale set aside was decreed by the Small Cause Court holding that under-rayati existed in favour of *B*. *C* filed a suit for declaration of title and for khas possession alleging that *B* had neither any title nor any right to possess a portion of the holding :

Held **(1) that as the suit for contribution was brought in the Small Cause Court, the decision in that suit would not be *res judicata* in subsequent proceedings; [Para 2]**

(2) the presence of the silent party *C*, the plaintiff, in the proceedings for setting aside the sale made out a much clearer case for estoppel than if he had been absent. The plaintiff had by his conduct induced *B* to proceed on the basis of a particular position deliberately taken up in the previous proceedings and he could not be allowed to approbate and reprobate. This conduct on the part of *C* may be taken to lead to a species of estoppel which may be described to be an intermediate one between estoppel by record and estoppel *in pais*. This doctrine applies not only to successive stages of the same suit but also to suits other than the one in which the position had been taken up; [Para 6]

(3) it must, therefore, be held that the plaintiff was estopped from raising the plea in the present suit that *B* was not a subordinate tenant as claimed by him. [Para 6]

Annotation : ('46-Man.) Evidence Act, S. 11 N. 2 (b), 6, 26; ('44-Com.) Civil P. C., S. 11, N 75 Pt. 4.

Amrita Lal Mukherji **—for Appellant.**

Shyama Charan Mitra **—for Respondents.**

Judgment.—This is an appeal on behalf of defendant 4 in a suit brought by the plaintiff for declaration of her title to the disputed lands and for recovery of khas possession thereof.

[2] The only material question in issue in this appeal is whether Rajlakshmi Dasi, defendant 4, has got a subsisting right of tenancy or not. It will not be necessary to go into the series of litigations in respect of this holding but we may limit ourselves to the relevant facts pertinent for a decision of the only point which is raised in this appeal. The holding in question originally belonged to three brothers Krisha, Rakhal and Tulsi. The plaintiff Sushilabala is the daughter-in-law of Krishna. Defendant 2, Sashi, is the son of Rakhal and defendant 4, the appellant before this Court, Rajlakshmi, is the wife of Tulsi. In 1929, the landlords obtained a rent decree against the three brothers in respect of arrears of rent due in respect of this holding. In the execution proceedings which followed one Bishnupada Chakravarty purchased the holding in July 1931 and ultimately took possession. The next year, it is alleged by defendant 4, Bishnupada Chakravarty had created an under-raiyati tenancy in favour of Rajlakshmi, defendant 4. The creation of this subordinate tenancy is denied by the plaintiff. There had been successive suits for the realisation of arrears of rent and in one of those, namely, Rent Suit No. 244 of 1938, brought by one set of landlords, namely, the Banerjis, impleading the other co-sharer landlords, a decree was obtained. In execution of the said decree the decree-holders, the Banerjis, purchased the holding. In these proceedings Sushila who is alleged to have purchased the interest of the tenant in execution of an earlier rent decree as also Bishnupada were made parties. After the purchase by the Banerjis an application for setting aside the sale was filed by Rajlakshmi under S 174, Bengal Tenancy Act, alleging that she was interested in the propety sold. In the presence of Sushila and Bishnupada among others the sale was set aside and Sushila got back the property. Subsequently, Rajlakshmi brought a suit for contribution against Sushila and Bishnupada for realising a portion of the amount deposited by her to have the sale set aside. Rajlakshmi's suit had been brought before the present suit was filed on 11th December 1943 in the Court of 2nd Munsif Baruipore. The suit out of which this appeal arises was filed by the plaintiff for declaration of her title and for khas possession on the allegation that Rajlakshmi had neither any title nor any right to possess a portion of the holding. While this suit was pending in the trial Court, the suit for contribution brought by Rajlakshmi

was decreed. One of the issues raised in the said suit for contribution was whether the under-raiyati as claimed by Rajlakshmi actually existed or not. That point was decided in favour of Rajlakshmi. As the suit was brought in the Court of Small Causes, the decision in that suit would not be res judicata in the present proceedings. It was, therefore, necessary for the Court to go into that issue once again and to come to a decision on the facts and materials available.

[3] The trial Court dismissed the plaintiff's claim as regards khas possession on the ground that the plaintiff was estopped from raising the plea that defendant 4 Rajlakshmi was not a tenant under her as she had not raised any objection to Rajlakshmi filing the application for setting aside the sale which had been brought about by the Banerji landlords in execution of the decree in Rent Execution Case 368 of 1939 while executing the decree obtained in Rent suit No. 244 of 1938. The learned Munsif further held that on the evidence Rajlakshmi had been able to prove that the tenancy as alleged by her had been created by Bishnupada while his interest subsisted and the said tenancy had not been terminated legally.

[4] An appeal was taken to the Court of the Additional District Judge, 24-Perganas, by the plaintiff. The learned Additional District Judge came to the conclusion that on the facts of this case there could be no estoppel against the plaintiff and on the merits also he came to the conclusion that the dakhilas which had been produced by Rajlakshmi could not be believed. The decision on the question of the factum of the creation of the tenancy was rested solely on the point as to whether these dakhilas could be believed or not. In this view, the plaintiff's suit was decreed in full. The plaintiff's title was declared and she was held to be entitled to get khas possession of the suit-lands.

[5] The present appeal is on behalf of defendant 4, Rajlakshmi, and the questions to be considered in this appeal are (1) whether the plaintiff is estopped from questioning the subordinate tenancy and (2) whether on the facts, the tenancy has been proved to exist or not.

[6] As regards the question of estoppel, the relevant facts as regards the conduct of the parties in Miscellaneous Case No. 101 of 1941 for setting aside the sale in Rent Execution Case No. 368 of 1939 have already been stated. The application on which the miscellaneous case was started was one under S. 174, Bengal Tenancy Act. The judgment-debtor or any person whose interests are affected by the sale are the only persons who are entitled to make an application. The claim put forward by Rajlakshmi was that she had a subordinate tenancy which would, if the sale were to be effective, be liable to be destroyed or affected. Sushila, the present plaintiff, was the person who was the judgment-debtor in that suit and it was her tenancy right which had been lost by the sale. Sushila had notice of the application. She did not object to the claim put forward by Rajlakshmi and got the fullest advantage of the result of the proceedings initiated by Rajlakshmi. It was not merely a case where Sushila had simply remained silent but in addition she had got a substantive benefit as a result of the action initiated by Rajlakshmi. In *Thomas Barclay* v. *Hossain Ali Khan*, 6 C. L. J. 601, it was held that no general rule could be formulated as to when silence might be unlawful in transactions between men at arms length. The presence of the silent party, when the transaction takes place, makes a much clearer case for estoppel than when he is absent. Where a party fails to make his rights known (as in the present case, the right of Sushila to claim that Rajlakshmi held no subordinate tenancy in respect of this holding giving her a right to initiate the proceedings for setting aside the sale), where fairness and good conscience require that the party should do so to protect the interest of others that party cannot be heard as against them to assert such rights. The case on behalf of defendant 4 becomes the stronger as the plaintiff Sushila had obtained the benefit under the proceedings which had been started by the Rajlakshmi. While considering the effect of silence, the Court has further to consider whether there was any occasion for words and reasonable explanation of the silence. Here was a landlord who did not challenge the title of the applicant under S. 174, Bengal Tenancy Act, and the presence of the silent party when the transaction took place made out a much clearer case for estoppel than if she had been absent. The present plaintiff had by her conduct induced defendant 4 to proceed on the basis of a particular position deliberately taken up in the previous proceedings and she cannot be allowed to approbate and reprobate. This conduct on the part of the plaintiff may be taken to lead to a species of estoppel which may be described to be an intermediate one between estoppel by record and estoppel in pais. This doctrine applies not only to successive stages of the same suit but also to suits other than the one in which the position had been taken up. A party must not be heard to allege things contradictory to each other. The doctrine of approbate and reprobate is not applicable in the case where there are clear provisions of a statute but applies only to the conduct of parties. On the facts of the present case, it is incontestable that the plaintiff is estopped from

taking up a position which is altogether contradictory to the one which she had adopted in the earlier proceedings. It must therefore be held that the plaintiff is estopped from raising the plea in the present suit that defendant 4 is not a subordinate tenant as claimed by her.

[7] Apart from the question of estoppel, the judgment of the Court of appeal below cannot be supported on the fact of the proof of the tenancy. The learned Additional District Judge has proceeded only on certain circumstances about the proof as made available of the genuineness of the dakhilas. Whether the dakhilas are genuine or not ought not to have been decided without a reference to the conduct of the present plaintiff in the sale set aside case: namely, Miscellaneous Case No. 101 of 1941. It must have been known to Sushila, the present plaintiff, when the proceedings for setting aside the sale were in progress that Rajlakshmi had no title to the land, holding a subordinate tenancy, if the claim as made by the plaintiff is true. The present plaintiff however did not raise any objection to the claim as put forward by Rajlakshmi and that conduct on the part of Sushila is a very strong piece of evidence which would have to be taken into consideration for determining whether the tenancy has been proved or not. If that fact is taken into consideration apart from the question of estoppel, as already discussed above, I have no doubt that the Court of appeal below would have come to the conclusion that the fact of the subordinate tenancy having been created by Bishnupada was proved and made out.

[8] The appeal must accordingly be allowed. The judgment and decree of the Court of appeal below are set aside and those of the Court of first instance restored. The claim for khas possession is dismissed. The appellant will be entitled to the costs of this Court and of the Court of appeal below.

[9] Leave to appeal under Cl. 15 of the Letters Patent has been asked for and is refused.

G.M.J. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 353 *[C. N. 130.]*

SEN J.

Balabux Darolia—Accused — Petitioner v. The King.

Criminal Revn. No. 930 of 1949, D/- 25th November 1949.

Criminal P. C. (1898), S. 162—Accused's right to copies.

The accused must be furnished with copies of statements of witnesses recorded by the police under S. 161 when the witnesses are examined in Court, whether the statements are recorded in full or whether the record consists only of the gist of the statements.

[Para 4]

Annotation: ('49-Com) Criminal P. C., S. 162, N. 14.

S. S. Mukherjee and Priti Bhusan Burman —for Petitioner.

Order.—This rule has been obtained by the accused who has been convicted of having committed an offence punishable under S. 14, Bengal Motor Spirit Sales Taxation Act of 1941, and sentenced to pay a fine of Rs. 300 in default to undergo simple imprisonment for 2 months. This sentence was upheld on appeal and the accused has obtained this rule.

[2] Several points were taken in the petition, applying for this rule. Only one point has been pressed, viz. that the accused has been prejudiced by reason of the refusal of the Magistrate to allow the accused to have copies of the statements made to the police by witnesses, under S. 161, Criminal P. C. I have seen the learned Magistrate's reply to this ground. He says that the matter was not pursued on the date fixed. It seems however from the record that there were two applications; the first application apparently was a verbal one and it was rejected. Thereafter, there was a written application referring to the prior application and asking the Magistrate to grant copies. The learned Magistrate passed an order upon this latter application. It is difficult to say that the accused did not pursue the application. Next, the learned Magistrate says that as the case depended on documentary evidence there was no question of prejudice to the accused. I cannot accept this view. Further the learned Magistrate says that the statements were "boiled statements" and therefore the accused was not entitled to them.

[3] I cannot agree with this view of the learned Magistrate. I do not know precisely what he means by "boiled statements". I presume he means statements not recorded verbatim but recorded briefly. Whether the statements were boiled or unboiled an accused is entitled to get copies thereof. These statements are very valuable to an accused person for the purpose of cross-examination and until the statements are seen it is not possible to say whether or not the accused has been prejudiced by the failure of the Court to give copies of the statements.

[4] I therefore set aside the order of conviction and sentence and direct that the accused be furnished with copies of statements made by the witnesses examined in Court before the police whether they were recorded in full or whether the records consisted only of the gist of the statements. The case started under

S. 14, Bergal Motor Spirit Sales Taxation Act of 1941 shall be retired from the stage at which the accused should cross examine the prosecution witnesses. The case shall be retried by some other Magistrate. The Rule is made absolute.

D.R.R. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 354 *[C. N. 131.]*

G. N. DAS AND DAS GUPTA JJ.

Rati Kanta Haldar and others — Defendants — Appellants v. *Burro and others — Respondents.*

Letters Patent Appeals Nos. 9 to 12 of 1948, D/- 3-2-1950, against judgments of R. P. Mookerjee J., in A. F. A. D. Nos. 1412 to 1415 of 1942, D/- 16-7-1948.

(a) Tenancy laws—Bengal Tenancy Act (VIII [8] of 1885), Ss. 193, 153, Exception — Applicability—Suit to recover rent for fishery — Second appeal, whether lies.

Section 193, Ben. Ten. Act, attracts not merely the procedural part but also the substantive part of the Act and as such the provisions of S. 153 are applicable to suits for recovery of rent in respect of rights over fisheries. Where there is a clear conflict between the parties as regards the right to recover such rent, the exception to the first part of S. 153 applies to the case as the words 'land or some interest in land' in the exception mean the subject-matter in respect of which a claim for rent is made and hence second appeal to High Court is not barred. [Paras 6 & 7]

(b) Interpretation of Statutes—Liberal and reasonable construction must be put on the words used—Construction should advance the clear intention of legislature in enacting a particular section. [Para 7]

Annotation : ('44-Com.) Civil P. C., Pre. N. 7, Pts. 35, 43.

(c) Fisheries—Right to recover rent—Limitation—9½ annas share-holder recovering 16 annas rent for fisheries for long period — No specific settlement for the period of suit proved—Amount can be recovered as damages—Claim must be limited to three years only—Tenancy laws—Bengal Tenancy Act (VIII [8] of 1885), S. 184. [Paras 10, 11]

Anilendra Nath Roy Choudhury and Biswanath Banerjee — for Appellants.

Paresh Nath Mukherjee and Manan Kumar Ghose and Satyendra Nath Mitra (for Dy. Registrar) — for Respondents.

G. N. Das J.—These Letters Patent Appeals arise out of suits for recovery of rent in respect of a jalkar in the river Ichhamati which again is a part of a bigger jalkar called Jalkar Jainti Gachi. The defendants are the appellants in this Court. The plaintiffs claim rent at the rate of Rs. 1-6-0 per boat and 0-11-0 as per man. The claim is for the period 1344 to 1347 B. S. The plaintiffs claim the right to recover rent as lessees from 9½ As. as proprietors of the jalkar. The proprietors are said to be entitled to an exclusive right of fishery in the said jalkar. The remaining 6½ as. proprietors are not parties to the present suits. The plaintiffs however claim 16 As. rent on the ground that they have acquired a right thereto on the basis of the lease granted by 9½ As. proprietors and by long possession. The basis of the claim is a settlement alleged to have been taken by the defendants from the plaintiffs. In the plaint the plaintiffs claim either rent on the basis of the settlement or in the alternative if the settlement is not proved, a fair compensation.

[2] The principal defences to these suits were (1) that the plaintiffs are not the 16 As. proprietors and in the absence of the 6½ As. co-sharer proprietors the suits are not maintainable. (2) The plaintiffs' right to the several fisheries on the basis of the lease was disputed. (3) It was also asserted that the tenancy set up by the plaintiffs was unknown to law. (4) It was further pleaded that the defendants as members of the public are entitled to fish in the disputed fishery without payment of any rent, the fishery being a part of the public domain.

[3] The trial Court was of the opinion that the plaintiffs were entitled to claim 16 As. rent on the basis of their lease from 9½ As. proprietors and long possession. On this ground it was held that the 6½ As. proprietors were not necessary parties. The tenancy pleaded was held to be not unknown to law. The Court found that the settlement by the plaintiffs to the defendants for the period in suit was not proved. The Court, however, passed a decree for the amounts claimed on the ground that even in the absence of proof of tenancy right the plaintiffs should be entitled to damages from the defendants. The suits were accordingly decreed.

[4] The defendants preferred appeals to the lower appellate Court. The first lower appellate Court affirmed the decrees of the trial Court. It came to the finding that the defendants were not entitled to fish in the disputed jalkar as a part of the public domain. The plaintiffs' title to claim 16 as. rent from the defendants was found by that Court. The settlement with the defendants for the period in suit was not established but the decrees of the trial Court were maintained on the ground that the plaintiffs were entitled to recover the amount claimed either as rent or as damages.

[5] Against the decrees passed by the first lower appellate Court second appeals were taken to this Court. The second appeals were heard by our learned brother Mookerjee J. At the time of the hearing of the second appeals a preliminary objection was taken on behalf of the respondents that the second appeals were incompetent being barred under the provisions of S. 153, Ben. Ten. Act read with S. 193 of the said Act. The preliminary objection was sustained by the learned Judge and the second appeals were dismissed on this ground. Leave to appeal under

the Letters Patent was given by the learned Judge. Pursuant to the leave so granted these appeals were filed by the defendants.

[6] The first question which calls for our determination is whether the second appeals were competent. I have already stated that the first lower appellate Court overruled the defendants' plea that they had a right to fish in the jalkar as a part of the public domain and upheld the claim of the plaintiffs to recover either rent or damages from the defendants on the ground that the plaintiffs have established their 16 As. right to claim rent or damages in respect of the fishery. The question whether the appeals to this Court were barred or not, depends on the interpretation of Ss. 193 and 153, Ben. Ten. Act. Section 193 states that the provisions of this Act applicable to suits for the recovery of arrears of rent shall, as far as may be, apply to suits for the recovery of anything payable or deliverable in respect of rights of pasturages, forest rights or rights over fisheries and like. Our learned brother Mookerjee J. was of the opinion that S. 193 attracted not merely the procedural part but also the substantive part of the Act and as such the provisions of S. 153 were attracted to suits for recovery of rents in respect of rights over fisheries. On this ground the appeals were held to be incompetent. Before our learned brother no question was raised about the applicability of the exception to S. 153, Ben. Ten. Act.

[7] Conceding that S. 153, Ben. Ten. Act applies to suits for recovery of rent in respect of rights over fishery a further question as regards the applicability of the exception to the first part of S. 153 has to be considered. The exception applies in cases where

"the decree or order has decided a question relating to title to land or to some interest in the land as between parties having conflicting claims thereto or . . . . . ."

In the present case, the plaintiffs claim a right to recover rent in respect of their right to the fishery. The defendants dispute that right and set up in themselves an independent right to fish free of the obligation to pay any rent or damages to the plaintiffs. There is thus a clear conflict between the parties as regards the right to fish in the Jalkar. The first lower appellate Court decided this conflict in favour of the plaintiffs and against the defendants. Prima facie, therefore, the exception would apply. Mr. Paresh Nath Mukherjee, appearing for the respondents, however, contends that the conflicting claims between the parties do not relate to "title to land or to some interest in land" and as such the exception to the first part of S. 153 does not apply. This contention receives support from the literal sense of the words used. We are however to consider the general intention of the Legislature as manifest in S. 193 which seeks to incorporate all the provisions of Act relating to suits for recovery of rent. In my opinion, the Legisiature never intended that the main part of S. 153 would be attracted and the exception thereto would be inapplicable. A liberal and reasonable construction has to be put upon the words used, a construction which would advance the clear intent of the Legislature in enacting S. 193. In my opinion, the words 'land or some interest in land" must be read as meaning the subject-matter in respect of which the claim to recover rent is made. If the words are so construed it follows that the exception to first part of S. 153 applies to the facts of this case. This aspect of the matter was not placed before our learned brother. In my opinion the second appeals preferred to this Court were competent and the decision has to be set aside on that ground.

[8] The merits of the controversy were not gone into in this Court. Learned advocates appearing before us stated that instead of the case being remitted to our learned brother the same may be considered by this Court. We have accordingly heard the learned advocates on this point and proceed to record our opinion on the points raised.

[9] Mr. Roy Chowdhury appearing for the defendants-appellants first contends that the plaintiffs had failed to prove their exclusive title to recover rent in respect of the jalkar as a part of the exclusive fishery of the plaintiffs lessors. It appears from the judgment of the first lower appellate Court that the title of the plaintiffs lessors to the jalkar as their exclusive fishery was not seriously disputed before that Court. The question of the plaintiffs' title under the lease of 9½ annas proprietors was also not disputed. The only point which was canvassed was whether the plaintiffs as lessees only from 9½ annas proprietors were entitled to realise 16 annas of the rent claimed. So far as this point is concerned there is a clear finding of the first lower appellate Court. The lower appellate Court points out that in the suit of 1889 the present plaintiffs asserted their exclusive title to the jalkar. The remaining 6½ annas proprietors were parties to that suit. The trial Court decreed the plaintiffs claim. On appeal to this Court the title of 6½ annas proprietors was, however, left open. The lower appellate Court has further found that since that suit the plaintiffs have been realising 16 annas rent from the fishermen including the defendants. Such possession following upon an assertion of 16 annas title of the plaintiffs is sufficient to support the finding of the first lower appellate Court so far as the plaintiff's right to

recover 16 annas rent or damages is concerned. The first contention raised by Mr. Roy Choudhury must, therefore, be overruled.

[10] Mr. Roy Choudhury next contends that even assuming that the plaintiffs have the right to recover 16 annas rent from the defendants, in view of the findings of the first lower appellate Court that the plaintiffs have failed to prove settlement for the period in suit, the plaintiffs cannot claim rent from the defendants on the basis of an implied agreement spelt out by the first lower appellate Court. This contention may be correct. The first lower appellate Court has, however, based its decision on the ground that the plaintiffs are entitled to claim the amounts stated in the plaint either as rent or as damages. We have therefore to consider whether the plaintiffs can claim the amounts in suit as damages. Mr. Roy Choudhury contends that there was no basis for supporting the claim for damages which was sustained by the first lower appellate Court. In my opinion, this contention cannot be accepted. The first lower appellate Court has found that for a long series of years the plaintiffs have been realising from the defendants as also from various other fishermen rent at the rates claimed. It is a fair inference to draw that the fishermen including the plaintiffs were content to pay such rents because a margin of profit was left to them. As such if the claim has to be decreed as damages the amount claimed by the plaintiffs would fall short of the compensation which would be properly leviable from the defendants. In this view the decrees passed by the trial Court and affirmed by the first lower appellate Court cannot be said to be unjust. The contention raised by Mr. Roy Chowdhury on this head must also be overruled.

[11] There is, however, another point which requires consideration. As the basis of the plaintiffs' claim as decreed proceeds on the ground of damages, the plaintiffs are entitled to claim damages only for three years prior to these suits. The claim in these suits were for a period of four years from 1344 to 1347 B. S. The plaintiffs' claim can, therefore, be decreed only for three years prior to these suits, that is for the years 1345 B. S., 1346 B. S. and 1347 B. S. The decrees passed in these cases must be modified accordingly.

[12] The appeals are accordingly allowed in part. The plaintiffs respondents will have proportionate costs of the trial Court and of the first lower appellate Court. Parties will, however, bear their own costs before this Court and before our learned brother Mookerjee J.

Das Gupta J. — I agree.

D.R.R. *Appeals allowed in part.*

A. I. R. (37) 1950 Calcutta 356 *[C. N. 132.]*

R. C. MITTER AND P. N. MITRA JJ.

Province of Bengal — Appellant v. *Amulya Dhon Addy and others — Receivers — Respondents.*

A. F. O. D. No. 9 of 1948, D/- 2-9-1949, against decree of President, Calcutta Improvement Trust Tribunal, D/- 30-1-1947.

(a) Limitation Act (1908), Ss. 12, 29 — Appeal against decision of Tribunal constituted under Calcutta Improvement Act (V [5] of 1911) — Applicability of S. 12 — Calcutta Improvement (Appeals) Act (1911), S. 3 — Special tribunal.

In computing the period of limitation for an appeal under S. 3, Calcutta Improvement (Appeals) Act, 1911, against the decision of the Tribunal constituted under the provisions of Chap. IV, Calcutta Improvement Act (V [5] of 1911), the appellant is entitled to deductions under S. 12, Limitation Act. That section is applicable either by reason of S. 29 (2) or otherwise. [Para 5]

Annotation : ('42 Com) Limitation Act, S. 12 N. 5; S. 29 N. 3.

(b) Limitation Act (1908), S. 12 — Interval between date of judgment and signing of decree — Period for copies of judgment and decree — If can be excluded.

Under S. 12, the period between the date of the judgment and the date when the schedule of costs (decree) is signed, and the period of time requisite for obtaining copies of the judgment and decree, can be excluded. [Para 5]

Annotation : ('42-Com.) Lim. Act, S. 12 N. 7, 25.

(c) Limitation Act (1908), Ss. 5, 12 and 29 — Appeal against decision of Tribunal constituted under Calcutta Improvement Act (V [5] of 1911) — Certificate of fitness under S. 3 (b) (i), Calcutta Improvement (Appeals) Act (1911) — Application for — Period of pendency — Exclusion under S. 12 or S. 5 — Calcutta Improvement (Appeals) Act (1911), S. 3.

The time during which the application for the certificate that the case was fit for appeal, asked for under S. 3 (b) (i), Calcutta Improvement (Appeals) Act, was pending before the President of the Tribunal constituted under the Calcutta Improvement Act (V [5] of 1911) cannot be excluded in computing limitation under the provisions of S. 12 and there is no provision in the Calcutta Improvement (Appeals) Act for excluding this period of time in making the computation of the limitation for appeal against the decision of the Tribunal. [Para 5]

This period of time, however, can be excluded by the Court under the provisions of S. 5, as that section applies to such appeals. The whole of the period during which the appellant's application for certificate was kept pending through no fault of his should be excluded. [Paras 5, 20, 21]

Annotation : ('42-Com) Lim. Act, S. 12 N. 5, 36.

(d) Limitation Act (1908), Ss. 3, 29 (2) — Special or local law — Applicability of S. 3 — Effect of Amendment of 1922.

Where the local or special law is silent on the matter of limitation in respect of suits, appeals or applications contemplated or authorised by it, and some Article of Sch. I, Limitation Act, would cover them, the whole of S. 3 would be applicable. The amendment of S. 29 by Act X [10] of 1922, does not affect the position. [Para 16]

Obiter.—Where some Article of that schedule would have covered such suits, appeals or applications, but the local or special law had prescribed a period of limitation different from that prescribed in the relevant

Article of Sch. I, either by altering the period of time mentioned in column 2 of the relevant Article of Sch. I or by prescribing a starting point different from that indicated in column 3 thereof, the *whole* of S. 3, Limitation Act is made applicable unless that section had been excluded by the special or local law, with the result that in that type of cases it would be legitimate for the plaintiff, appellant or applicant to invoke the aid of Ss. 4 to 25, Limitation Act, to save his suit, appeal or application from being dismissed for having been filed beyond the period of time prescribed. [Paras 15 & 17]

***Obiter.*—Where none of the Articles of Sch. I would have covered such appeals or applications and the local or special law itself prescribed limitation, Ss. 4, 9 to 18 and 22 are made applicable unless the special or local law excluded them or any of them, and the remaining sections, namely, 5 to 8, 19 to 21 and 23 to 25 are not to apply, unless they or any of them are made applicable by the special or local law. The very fact that a period of limitation had been prescribed by the local or special law would carry with it the power to dismiss the suit, appeal or application contemplated or authorised by the local or special law, if presented out of the time prescribed, provided that the suit, appeal or application had not been filed in circumstances which would have attracted any of the Ss. 4, 9 to 18 and 22, Limitation Act. [Paras 15 & 18]**

Annotation : ('42-Com.) Lim. Act, S. 29 N. 3, 4, 5 and 6.

(e) Calcutta Improvement Act (V [5] of 1911), S. 71 (b) and Sch. Art. 9—Compulsory acquisition —Market price—Valuation— Development method —Applicability—Land Acquisition Act (1894), S. 23.

In cases of compulsory acquisition of land for the Board of Trustees for the Improvement of Calcutta the "development method" is not permissible. The land has to be valued according to its disposition at the date of the declaration. It cannot be imagined to be in a different state than what it actually was at that point of time, nor can it be valued with reference to its possible future user by proposing a physical change. [Para 25]

Annotation : ('46-Man.) Land Acquisition Act, S. 23 N. 23.

***Lalit Mohan Baksi and Biswanath Naskar* — for Appellant.**

***Satyendra Nath Mitra* — for Respondents.**

R. C. Mitter J. — Premises No. 19, Surah Third Lane, was acquired for the purpose of Improvement Scheme No. IV (Maniktolla) made by the Board of Trustees for the Improvement of Calcutta and sanctioned by the Local Government under the provisions of the Calcutta Improvement Act, V [5] of 1911 B. C. The said premises was at all material times an open piece of land comprising an area of 10 bighas 12 cottas 36 square ft. There were two tanks within it. It abutted on the Sura third Lane which was to its East. It had a vista on a blind lane which stopped at a point of its Southern boundary. There was no roadway on the acquired premises in continuation of that blind lane. The said blind lane is a public one. The plot is shown in the Key plan, EX. 1. On 27th August 1948 the Collector made his award. He gave Rs. 61548-14-0 for the land, Rs. 725 for the trees and Rs. 9341-1-0 as statutory allowance—total Rs. 71614-15 odd.

[2] The claimants, who are the respondents before us, were dissatisfied with the Collector's award. At their instance the Collector made a reference under the provisions of S. 18, Land Acquisition Act, to the Tribunal constituted under the provisions of Chap. IV, Calcutta Improvement Act (V [5] of 1911 B. C.). The Tribunal enhanced the compensation by Rs. 18913-1-0. The judgment of the Tribunal was delivered and signed on 30th January 1947, and the schedule of costs, which is to be taken as equivalent to a decree, was signed by the President of the Tribunal on 7th May 1948. The Province of Bengal after obtaining a certificate from the President of the Tribunal to the effect that the case was a fit case for appeal filed the Memorandum of Appeal in this Court on 26th August 1947 and the appeal was duly registered after the Stamp Reporter had reported on the day of the presentation of the Memorandum of Appeal that it was properly stamped, was in form and had been presented in time. At the time of the presentation of the Memorandum of Appeal, the appellant had doubts as to whether the appeal was still in time. So on the same day an application was filed with an officer of this Court under S. 5, Limitation Act for extending the time for filing the appeal. As, however, the Stamp Reporter reported that the appeal had been filed in time the appellant's advocate took back the said application.

[3] When the appeal was opened before us the respondent's advocate took a preliminary objection to the competency of the appeal on the ground that at the date of the presentation of the Memorandum of Appeal it was already barred by time. In these circumstances we allowed the appellant to move with due notice to the respondent's advocate the application which had been filed under S. 5, Limitation Act on the date when the Memorandum of Appeal was presented in this Court but which had been taken back by the appellant's advocate in the circumstances stated above.

[4] The questions are : (1) whether the appeal was in time on 26th August 1947, and if not (2) whether S. 5, Limitation Act can in law be invoked and (3) that if that section could be invoked whether sufficient cause has been made out for extending the period of limitation. The article in the schedule to the Limitation Act which has been made applicable to appeals against the decision of the Tribunal is Art. 156 of Sch. I, Limitation Act. According to that article, the period of limitation is 90 days from the date of the decree or order appealed from. Having regard to the fact that the decree is to bear the same date as the judgment bears the starting point of limitation would be the date

when the judgment was delivered. This is admitted before us. The relevant dates for deciding the question as to whether, the appeal had been presented in time are as follows :

30-1-1947	...	Date of the judgment.
7-5-1947	...	Decree (schedule of costs) made and signed.
27-2-1947	...	Application by the appellant for certified copy of judgment.
29-3-1947	...	Court-fee payable for that copy assessed and notified.
3-4-1947	...	The said court-fee paid.
15-5-1947	...	Copy of the judgment ready for delivery.
13-5-1947	...	Application by the appellant for certified copy of the schedule for costs (decree).
16-5-1947	...	Court-fee payable for the same assessed and notified.
22-5-1947	...	Court-fee paid.
26-5-1947	...	Copy ready for delivery.
30-7-1947	...	Application by the appellant filed before the President of the Tribunal praying for a certificate under S. 3 (b) (i), Calcutta Improvement (Appeals) Act, XVIII [18] of 1911 I. C., that the case was a fit one for appeal.
23-8-1947	...	Certificate as prayed for given by the President.
26-8-1947	...	Memorandum of Appeal presented in this Court.

[5] The appellant is entitled to the following deductions under the provisions of S. 12, Limitation Act. That section would be applicable in any view of the matter either by reason of S. 29 (2), Limitation Act or otherwise : (a) the period between the date of the judgment and the date when the schedule of costs (decree) was signed *(Beni Madhub* v. *Matangini Dassi*, 13 Cal. 104 F. B.), (b) the period of time requisite for obtaining copies of the judgment and decree. In this case these periods overlapped each other to some extent. This was apparently overlooked by the Stamp Reporter when he made his report that the appeal had been presented in time. The periods of time which overlapped and which the Stamp Reporter apparently counted twice over are (a) the period between 27th February and 7th May 1947 ; (b) the period between 13th and 15th May. Bearing in mind these overlappings, the last date for filing the appeal would be 19th August 1947, after excluding the period of time allowable by S. 12, Limitation Act. The time during which the application for the certificate, asked for under S. 3 (b) (i), Calcutta Improvement (Appeals) Act was pending before the President cannot automatically be excluded in computing limitation under the provisions of S. 12 or any other section of the Limitation Act and there is no provision in the Calcutta Improvement (Appeals) Act for excluding this period of time in making the computation. This period of time, however, can only be excluded by the Court under the provisions of S. 5, Limitation Act, if that section is applicable to such appeals, namely, appeals allowed under the provisions of the Calcutta Improvement (Appeals) Act, XVIII [18] of 1911 I. C. This is the second and the more important question which we will not take up. The question is not free from difficulty.

[6] The Calcutta Improvement Act, V [5] of 1911 B. C., has to be classed as special and local law within the meaning of S. 29, Limitation Act. It was passed by the local Legislature and is to have operation in a portion of the Province, namely the municipal limits of Calcutta and its vicinity to which the Act may be extended by a notification of the Local Government. It is, also special law having for its purpose a special object to be accomplished through a special machinery provided for in the Act. There is, however, in this statute (Act V [5] of 1911 B. C.) no provision giving the right of appeal against the decision of the President or of the Tribunal, as the case may be. That right is given by Act XVIII [18] of 1911 passed by the Governor-General-in-Council — the Central Legislature. In a case concerning the Bombay Improvement Trust Act, IV [4] of 1898, on which the Calcutta Improvement Act, Act V [5] of 1911, B. C., is modelled, the Bombay High Court had decided in *Hari Pandurang* v. *Secretary of State*, 27 Bom. 424 : (5 Bom. L. R. 431) that a Provincial Legislature is incompetent to confer a right of appeal to the High Court against an order passed under the provisions of that special or local law, as a Provincial Legislature has no power to modify or add to the Letters Patent of the Chartered High Courts. It is only by reason of Art. 44 of the relevant Letters Patent that the Central Indian Legislature has that power delegated to it by Parliament. It is for this reason that the Central Indian Legislature had to pass the Calcutta Improvement (Appeals) Act XVIII [18] of 1911, which came into force on the same date as Act V [5] of 1911 B. C. So in substance this Central Act supplements the said Bengal Act and the Central Act must therefore be considered also to be local and special law.

[7] In 1911, when Act XVIII [18] of 1911 (I. C.) came into force the relevant part of S. 29 (1) (b), Limitation Act stood thus :

"Nothing in this Act . . . . shall affect or alter any period of limitation *specially prescribed* for any suit, appeal or application by any special or local law now or hereafter in force in British India."

The section stood in that form up to 1922, when it was amended by Act X [10] of 1922.

[8] Section 29 (1) (b), Limitation Act as it stood then would have made inapplicable the provisions of Ss. 4 to 25, Limitation Act, where

the special or local law had *specially prescribed* a period of limitation for a suit, appeal or application permitted or authorised by that special or local law. If that was not done by the special or local law but such a suit, appeal or application came within the purview of any of the Articles of Sch. 1, Limitation Act, S. 29 (1) (b), Limitation Act would have been out of the way, on the ground that the special or local law had not *specially prescribed* a period of limitation. In such a case the general provisions of the Limitation Act would have been applicable. In the light of these observations the provisions of Act (XVIII [18] of 1911 I. C.) have to be examined.

[9] Section 3 of that Act gave the right of appeal to the High Court against the decision of the President of Tribunal established under the Bengal Act (V [5] of 1911) when sitting singly without any qualification, and against the decision of the Tribunal (the President sitting with the Assessors) with certain qualifications and on grounds of appeal similar to the grounds of Second Appeals provided for by the Code of Civil Procedure. Section 4 then enacts that

"Subject to the provisions of S. 3, the provisions of the Civil Procedure Code, 1908, with respect to appeals from original decree shall, *so far as may be* apply to appeals under this Act."

[10] If this section stood without the qualifying words underlined (here italicised) above then there would not have been any doubt that Art. 156 of Sch. 1, Limitation Act would have applied *proprio vigore* to appeals given by S. 3 of the Act, for it has been held that the opening words of that Article—"Under the Code of Civil Procedure, 1908"—mean an appeal governed by the Code of Civil Procedure as *regards procedure*. Consequently, where the procedure prescribed for an appeal given or authorised by the special or local law is the procedure provided by the Code of Civil Procedure that Article would be applicable (*Aga Mohamed* v. *Cohen*, 13 Cal. 221 at p. 224; *Ramaswami* v. *Deputy Collector of Madura*, 43 Mad. 51: (A. I. R. (7) 1920 Mad. 407). In that case it could not have been said that the Special Act, namely Act XVIII [18] of 1911 had *specially prescribed* a period of limitation for appeals permitted by S. 3 of that Act. Section 6 then proceeds on to state that:

"In appeal under S. 3 shall be deemed to be an appeal under the Code of Civil Procedure 1908, within the meanidg of Art. 156 of Sch. 1, Limitation Act."

[11] This provision in our opinion did away for the purpose of limitation the effect which the phrase in S. 4 which we have underlined, (here italicised) might have had otherwise. Besides, this section namely 6, may be looked at from another point of view that in substance it added by way of amendment an explanation to Art. 156 of Sch. I, Limitation Act, and so did not *specially prescribe* a period of limitation within the meaning of S. 29 (1) (b), Limitation Act, as it stood at the time of the passing of Act XVIII [18] of 1911 and up to 1922 when it was amended by Act X [10] of 1922. The result is that up to the time of the aforesaid amendment of S. 29 (1) (b), appeals preferred to this Court by virtue of S. 3 of Act XVIII [18] of 1911 would have come within the purview of S. 3, Limitation Act, and could not have been dismissed as bing filed out of the time limit prescribed by Art. 156 by ignoring and in disregard of any one of the provisions of Ss. 4 to 25, Limitation Act. During that period between 1911 and 1922 S. 5, Limitation Act, could in law be in a fit case invoked to his aid by an appellant to save his appeal filed out of time from being dismissed.

[12] The next point is whether the amendment of S. 29 (1) (b), Limitation Act, by the Act X [10] of 1922 has affected or altered this position.

[13] The weight of decisions of this Court before the amendment of S. 29 (1) (b) in 1922 was that if the special or local law had *specially prescribed* a period of limitation none of the general provisions of the Limitation Act — namely Ss. 4 to 25—could be applied to a suit, appeal or application contemplated or authorised by the special or local law, unless the local or special law itself had made any or all of those general provisions of the Limitation Act applicable, though on a few occasions a different view had been expressed. In 1920 a Full Bench of this Court resolved the conflict by holding that in the face of the words of S. 29 (1) (b), Limitation Act, as it stood then S. 14, Limitation Act, and —necessarily all the other general provisions of the Limitation Act,—S. 5 could not be applied to a suit filed under the provisions of S. 77, Registration Act, *Kalimuddin* v. *Shahibuddin*, 47 Cal. 800: 24 C. W. N. 4: (A. I. R. (7) 1920 Cal. 14 F.B.). Shortly after this decision, the matter of amendment of S. 29 (1) (b) was taken up by the Legislature and the section was eventually amended in 1922. The Legislature thought fit to mitigate to some extent what it considered to be a hardship to the plaintiff, appellant or applicant caused by the rigorous interpretation of the original section. Generally speaking it did so by making S. 3 as also Ss. 4, 9 to 18 and 22, Limitation Act, pplicable unless hespecial or local law had excluded those or any one of those provisions, and the rest of the general provisions inapplicable, unless the special or local law had made themtapplicable, *Nealratan Ganguly* v. *Emperor*, 60 Cal. 571: (A.I.R. (20) 1933 Cal. 124 : 34 Cr. L. J. 633). In some of the

cases decided after the amendment the view has been expressed that the amended section is applicable only when the special or local law had prescribed a period of limitation *different* from that prescribed in Sch 1, Limitation Act. The case of *Venkatramayya* v. *Venkata Subbayya*, A.I.R. (33) 1946 Mad. 351: (1946-1 M.L.J. 271) has given expression to that view, as the following observations made therein would indicate:

"In S. 25A newly introduced into the Act (Madras Act IV [4] of 1938) though a right of appeal is given, no period of limitation *different* from the period prescribed by Sch. 1, Limitation Act, is indicated. *Therefore the provisions of S. 29 (2) have no application so as to exclude the provisions of S. 5, Limitation Act, from being applied to appeals* under the Special Act."

[14] Some of the decisions have also proceeded on the assumption that where none of the Arts. of Sch. 1, Limitation Act covers an appeal or application allowed by the special or local law and the local or special law prescribes the period of limitation, the case is to be considered to be a case where the special or local Act had prescribed a period of limitation *different* from that prescribed in Sch. 1, Limitation Act. On this basis, it has been laid down that the effect of S. 29 (2), Limitation Act (the amended section) attracts *proprio vigore* only the last part of S. 3, Limitation Act, which empowers the Court to dismiss *suo motu* a suit, appeal or application filed beyond time, and also Ss. 4, 9 to 18 and 22 but not the other sections of the Limitation Act mentioned in the first part of S. 3 unless the local or special law by its own provisions make any of those excluded sections applicable. The case of *Nesiratan Ganguly* v. *Emperor*, 60 Cal. 571: (A.I.R. (20) 1933 Cal. 124: 34 Cr. L. J. 633) expounds this view. Strictly speaking although it is not necessary for us in this case to consider the correctness of these views, we may state that as at present advised we are not prepared to fully endorse them for the following reasons.

[15] Cases calling for decision would necessarily fall into four types, namely, (1) Where the local or special law is silent on the matter of limitation in respect of suits, appeals or applications contemplated or authorised by it, and some Article of Sch 1, Limitation Act, would cover them; (2) Where some article of that schedule would have covered such suits, appeals or applications, but the local or special law had prescribed a period of limitation different from that prescribed in the relevant Article of Sch. 1, either by altering the period of time mentioned in Col. 2 of the relevant Article of Sch 1 or by prescribing a starting point different from that indicated in Col. 3 thereof; (3) Where none of the Articles of Sch. 1 would have covered such appeals or applications and the local or special law itself prescribed limitation. In this head and the next we are omitting a reference to suits for the reason that the residuary Article, namely 120 of Sch. 1 would in any event cover any class and every class of suits contemplated or authorised by the local or special Act, and we would fall either within type (1) or (2). We are however including applications, because of the view taken in some cases that Art 181 of Sch. 1, has a restricted application. (4) Where none of the Articles of Sch. 1, would have covered such appeals or applications and the special or local law prescribed none. It is not necessary to consider this case for the purpose of our discussion.

[16] In the first type what is contained in S. 3, Limitation Act—*the whole of it*—would be applicable as before. The amendment of 1922 does not touch that case. The case we are considering would in substance fall within this type.

[17] In our view, S. 29 (2), deals with the second and third types and that in a distinctive manner. The first part of that section contemplates the second and the last part the third type. The language employed in the opening paragraph would suggest that—the use of conjunctive particle "and" and the repetition of the phrase "prescribed for appeal or application by any special or local law" in the second part. The result is that for the second type the *whole of S. 3*, Limitation Act is made applicable, unless that section had been excluded by the special or local law, with the result that in that type of cases it would be legitimate for the plaintiff, appellant or applicant to invoke the aid of Ss. 4 to 25, Limitation Act to save his suit, appeal or application from being dismissed for having been filed beyond the period of time prescribed. It seems to us that what has been overlooked in previous cases is that S. 3 does not provide simpliciter for dismissal of suit etc . . . filed out of time, but itself subjects that power to certain qualifications.

[18] In cases falling within the third type Ss. 4, 9 to 18 and 22 are made applicable unless the special or local law excluded them or any of them, and the remaining sections, namely, 5 to 8, 19 to 21 and 23 to 25 are not to apply, unless they or any of them are made applicable by the special or local law. The very fact that a period of limitation had been prescribed by the local or special law would carry with it the power to dismiss the suit, appeal or application contemplated or authorised by the local or special law, if presented out of the time prescribed, provided that the suit, appeal or application had not been filed in circumstances which would have attracted any of the Ss 4, 9 to 18 and 22, Limitation Act. Our view is that the amendment of S. 29 by Act X [10] of 1922 has liberalised the

law as laid down before the amendment to the utmost extent in regard to the second type of cases and to a lesser extent with regard to the third type. We need not pursue the matter further, for, as we have already stated the case before us falls in substance within the first type.

[19] These being the results of amendment of S. 29 of 1922, the effect which S. 6 of Act XVIII [18] of 1911 (I. C.), had upon the question of limitation at the time when S. 29 (1) (b), Limitation Act stood in its original form, and which we have indicated in the earlier part of our judgment, has not therefore been in any way modified or affected by the amendment. In *Venkataramayya* v. *Venkata Subbayya*, A. I. R. (33) 1946 Mad. 351 : (1946-1 M. L. J. 271) referred to above, the position was the same as in the case before us, for the relevant provisions of the amending Act under consideration in that case was that an order made under Madras Act, IV [4] of 1938, refusing relief to a judgment-debtor was to be subject to appeal 'as if it was an order falling under S. 47, Civil P. C." That brought the appeal within the purview of Art 152 of Sch. I Limitation Act. So it could be said that the Special Act had not *prescribed a period of limitations at all*, but an substance had the effect of adding an explanation to Art. 152 of Sch. I, Limitation Act.

[20] We accordingly hold that S 5, Limitation Act is applicable to an appeal against the decision of the President or the Tribunal, as the case may be, established under the Calcutta Improvement Act, V [5] of 1911 B. C.

[21] The next question is whether the appellant has shown sufficient cause for extension of time. [After discussing the facts his Lordship proceeded:] On these facts, we hold sufficient cause has been shown by the appellant and we extend time to 26th August. Certainly the appellant should have the period of time during which his application for certificate was kept pending through no fault of his, namely from 30th July to 23rd August. That is enough for the appellant.

[22] We will now proceed to determine the merits of the appeal.

[23] For the purpose of determining fair market price of the land, the Province of Bengal examined a valuation expert, Atul Chandra Bose and the claimants another expert, Hirendra Kumar Sarkar. In view of the depth of the plot, both the experts agreed that the market price has to be determined by adopting the belting method. The land had one road frontage. It abutted on a public street, namely Sura 3rd Lane. Bose started his belting from this lane. He took as his first belt a depth of 100 feet from the existing lane. The second belt was taken by him to be the next strip of 150 feet. The rest of the back land be put in his 3rd belt. He took the market value of the two tanks at half the value of the firm land. On this basis he reduced the whole area to 105.6582 solid first belt units. He added 5% for the vista on the blind lane and deducted 15% on account of the shape and size of the land. The net result was that he valued the land on the basis of 94 3 net solid first belt units. He took the price of an unit of first solid belt to be Rs. 650.

[24] Sarkar on the other hand took an imaginary roadway right across the land in continuation of the blind lane on the south on which the land had a vista. By this division the land was divided in three blocks A, B & C. Block A abutted on Sura 3rd Lane as it actually did, and blocks B & C abutted on the two sides of the imaginary roadway. These three blocks have been marked in the key plan, Ex. I. Thus by this disposition of the land, which it did not actually have, he conceived the land to be divided in such a fashion as to have three blocks, each of such blocks having a road frontage, whereas in *fact* the land was a compact block which had only one road frontage. He then proposed to apply the belting method to each of these three blocks A, B & C. He appraised the value of the tank at 2/3rds of the value of the firm land. He estimated the value for the solid front belt unit of block A at Rs 750 and of the solid first unit of blocks B & C at Rs. 650. The Tribunal accepted this method on which Sarkar proceeded for valuing the property, namely, by imagining a roadway and so making three blocks with road frontages. This method means that the land could have been developed to its best advantage by driving that roadway. The Tribunal, however, held that the tank was to be valued at half the rate of the firm land, that only 5 per cent. deduction ought to be allowed for the shape and size of the land, and the market value of the solid front belt unit of block A ought to be Rs. 675 and of that of blocks B & C Rs. 575.

[25] If the valuation had to be made in accordance with the provisions of S. 23 (1), Land Acquisition Act as it stands in the Land Acquisition Act, there cannot be any question that the method of valuation on which Sarkar proceeded by imagining a road right across the acquired land could have been adopted. Market value is what an owner not obliged to sell would have got from a free buyer. Certainly a free buyer in estimating the price would have taken into consideration the fact that he would be able to develop the land,—to have the best user,—by dividing it into three blocks by con-

structing a road across the land at the place suggested by Sarkar, but the question is whether such a method is allowable in view of provisions of the Calcutta Improvement Act, V [5] of 1911 (hereafter called the Act). The Board of Trustees for the Improvement of Calcutta can acquire land for carrying out the purposes of the Act either through private treaty or by compulsory acquisition through machinary of the Land Acquisition Act, 1894 (Ss. 68 and 69). But in case of compulsory acquisition, some of the provisions of the Land Acquisition Act, 1894, are to be applied with the modifications indicated in the schedule to the Act (in S. 71 (b) of the Act). By reason of Art. 9 of that schedule "the market value of the land acquired for the 'Board of Trustees' shall be deemed to be the market value *according to the disposition of the land at the date of the publication of the declaration relating thereto under S. 6*"

of the Land Acquisition Act, 1894. Bearing this in mind, a Division Bench of this Court observed in cases of compulsory acquisition of land for the Board of Trustees for the Improvement of Calcutta that the "development method" is not permissible : *Hindusthan Co-operative Insurance Society Ltd.* v. *Secretary of State*, 56 Cal. 989 : (A.I.R. (17) 1930 Cal. 230). The land has to be valued *according to its disposition at the date of the declaration.* It cannot be imagined to be in a different state than what it actually was at that point of time, nor can it be valued with reference to its possible future user by proposing a plysical change.

[26] The question which we are considering was considered in detail in at least three cases : (i) *Harish Chunder Neogy* v. *Secretary of State*, 11 C. W. N. 875, (ii) *Manindra Chandra Nandi* v. *Secy. of State*, 41 Cal. 967 : (A.I.R. (1) 1914 Cal. 198) and (iii) *Shrosbree* v. *Secy. of State*, F.A. No. 192 of 1933—not reported—decided by Mitter & Patterson JJ. on 30th April 1936. These cases no doubt were not cases of compulsory acquisition under the Calcutta Improvement Act, but the point under consideration was dealt with in them. The first two were cases of compulsory acquisition under the provisions of the Calcutta Municipal Act of 1899 (Bengal Act III [3] of 1899) and the third was a case under the Calcutta Municipal Act of 1923 (III [3] of 1923 B. C.). Section 557 (c) of the first mentioned Municipal Act and S. 475 of the second mentioned Act on the construction of which the decisions were given are expressed in the same language which runs as follows : We are quoting S. 475 of the Act III [3] of 1923 B.C.

"Any land or buildings which the Corporation are authorised by this Act to acquire may be acquired under the provisions of the Land Acquisition Act, 1894, and for that purpose the said Act shall be subject to the amendment that the market value of any land or building to be acquired shall be deemed, for the purpose of clause *first* of sub-s. (1) of S. 23 of the said Land Acquisition Act, to be the market value *according to the disposition of such land or building at the date of the publication of the declaration relating thereto under S. 6 of the said Land Acquisition Act.*"

[27] This is exactly the manner in which the Calcutta Improvement Act by its schedule has modified S. 23 (1) *first* of the Land Acquisition Act, 1894.

[28] In *Harish Chandra Neogy's* case (11 C. W. N. 875) Mitra and Casperz JJ. observed as follows : "Section 557 of the Calcutta Municipal Act *precludes any valuation based on the most advantageous disposition of the land.*" This passage directly and squarely hits the method adopted by Sarkar. There was no road running right across the land at the time of the declaration under S. 6 and none at any material time. The whole of the acquired premises was one compact block, abutting on one land, namely, the Sura third Lane, and so had only one road frontage. The attempt on the part of Sarkar was an attempt to *create* a more advantageous disposition of the land.

[29] This passage in *Harish Chandra Neogy's* case (11 C.W.N. 875) together with the passage immediately following, which was an illustration, was expressly approved by a Division Bench in *Manindra Chandra Nandy's* case : (41 Cal. 967 : A. I. R. (1) 1914 Cal. 198). In the unreported judgment, Mitter and Patterson JJ. noticed *Manindra Chandra Nandy's* case : (41 Cal. 967: A. I. R. (1) 1914 Cal 198) and said that S. 475 of Act III [3] of 1923 which corresponded to S. 557 (c) of Act III [3] of 1899 and which had modified the Land Acquisition Act, 1894, in that manner meant that where land is compulsorily acquired under the provisions of S. 475, Calcutta Municipal Act, in assessing its market value any user to which it could be put in future should not be taken into consideration. The last part of the judgment where the learned Senior Government Pleader's extreme contention was overruled does not mean that in compulsory acquisitions under S. 475, Calcutta Municipal Act, a claimant can value the acquired land by the adoption of the "development method.' That part means that where the acquired land is an undeveloped area its value can still be determined by a reference to the value of developed land in a nearby area, e g., value of building sites—by deducting a reasonable estimated percentage.

[29] We accordingly hold that the tribunal has committed an error of law by ignoring, and by not giving proper effect to the provisions of Cl. 9 of the schedule of the Calcutta Improvement Act by which S. 23 (1) *first* of the Land Acquisition Act, 1894, was modified in the

manner indicated above. It is not necessary for us to consider whether there was any legal difficulty under the Calcutta Municipal Act in having such a road across the land as Sarkar had imagined. We generally agree with what has been said in the decision under appeal on this point.

[30] The belting method adopted by Bose has, therefore, to be adopted. The respondent's advocate admits that in that event depth of the first belt is to be 100 feet from the road frontage on Sura 3rd lane, of the second 150 feet and the rest of the land is to be in the third belt as has been done by Bose. The Tribunal has given a deduction of 5 per cent. for size and shape, have taken the value of tank at half of the first land and valued the first solid belt abutting on Sura 3rd lane at Rs. 675 per unit. These are all findings of fact and so cannot be reviewed by us. The respondent can at most press for a remand on one point only, namely, what should be percentage of increase by reason of the vista on the blind lane. We have however, the power to review the evidence on the record and come to a finding ourselves. On the evidence we find 5 per cent. increase on this head to be sufficient. The land acquired is of considerable size, and the blind lane touches a very insignificant portion of the land. The vista is not a wide one.

[31] We accordingly allow the appeal, set aside the award of the Tribunal and remand the case in order that the amount of the compensation may be assessed in accordance with our findings and conclusions after checking the figures. This would only involve the determination of the number of net solid first belt units, according to the belting method adopted by Bose, the price for each solid first belt unit being Rs. 675. .The respondents must pay to the appellant the costs of this appeal.

P. N. Mitra J. — I agree.

V.B.B. *Appeal allowed.*

[C. N. 133.]

A. I. R. (37) 1950 Calcutta 363

HARRIES C. J. AND BACHAWAT J.

Bejoy Chand Patra — ***Appellant*** v. ***The State.***

Criminal Appeal No. 252 of 1949, D/- 24-2-1950.

(a) Criminal P. C. (1898), Ss. 161 (3), 162 — Record of mere gist of statements of witnesses if compliance with S. 161 (3)—Effect on admissibility of evidence of such witnesses.

An investigating officer is not bound to record the statements of a witness. If he does reduce statements into writing he must make a separate record of the statement of each of the persons whose statements he records. He cannot record a condensed version of the examination of all of them or a precis of what the witnesses are supposed to have said. [Para 8]

Non-compliance with the provisions of S. 161 (3), however, does not make the evidence of the witnesses inadmissible though it is a matter which the Court is entitled to consider when dealing with credibility. [Para 11]

Annotation : ('49-Com.) Criminal P. C., S. 161, N. 6; S. 162, N. 8.

(b) Criminal P. C. (1898), Ss. 297, 161 (3) — Record of statements of witnesses contrary to S. 161 (3)—Failure to warn jury against this fact vitiates trial. [Paras 13 & 14]

Annotation : ('49-Com.) Criminal P. C., S. 297, N. 12.

(c) Criminal P. C. (1898), S. 162 — Use of previous statement to contradict witness — Evidence Act (1872), S. 145.

A previous statement in writing cannot be used to contradict a witness unless that witness has had an opportunity of dealing with the statement and explaining it away if possible. [Para 18]

Annotation : ('49-Com.) Criminal P. C., S. 162, N. 16; ('46-Man.) Evidence Act, S. 145, N. 6.

(d) Criminal P. C. (1898), S. 162 — Mere gist of statements of witnesses recorded — Right of accused to copies of such statements — Evidence Act (1872), S. 145.

The accused should be furnished with a copy of the gist of the statements recorded whether such can or cannot be used in cross-examination. The fact that the statements cannot be used is no ground for denying the right of the accused to these statements. [Para 20]

Annotation : ('49-Com.) Criminal P. C., S. 162, N. 14, Pt. 4 ; ('46-Man.) Evidence Act, S. 145, N. 8.

Sudhansu Sekhar Mukherji and Nripendra Nath Dutt Roy — for Appellant.

Ajoy Kumar Basu — for the State.

Manishi Kumar Das — for Complainant.

Harries C. J. — This is an appeal from a conviction under S. 307, Penal Code, and a sentence of six years' rigorous imprisonment.

[2] The charge against the appellant was that he on 13th July 1949 had attempted to murder his cousin, Kumud Chandra Patra, P. W. 1. The trial took place before a learned Assistant Sessions Judge sitting with a jury. The jury unanimously returned a verdict of guilty under S. 307, Penal Code, and agreeing with that verdict the learned Assistant Sessions Judge sentenced the appellant as I have indicated.

[3] The facts of the case were comparatively simple. The appellant and the injured man, Kumud, were cousins and apparently were co-sharers in a tank near the village. Alongside this tank ran a roadway or a pathway and it is said on behalf of the prosecution that the appellant claimed the sole right in this approach to the tank. His right was disputed by the injured man and this, it is alleged, led to a quarrel between them sometime before the occurrence. On the day of the occurrence, namely, 18th July 1949 the injured man Kumud was

standing at the edge of the water of the tank washing his hands when it is alleged that the appellant came from behind and struck Kumud with a big bhojali causing a severe bleeding injury. Kumud turned round, but the appellant showered further blows on him. Kumud being injured, amongst other places, on his hands as he was endeavouring to ward off the blows. The prosecution states that as many as 17 injuries were caused and Kumud was felled to the ground.

[4] The shouts of the injured man brought a number of persons to the scene and on seeing these persons the appellant, it is said, ran away. In due course information was given to the police and this case was instituted against the appellant.

[5] The defence was that the injured man had been injured by the appellant's wife who had to defend herself against an attempt by Kumud Patra to outrage her modesty or worse.

[6] There were a number of eye-witnesses or people who heard cries and rushed to the scene. These persons appear to have been examined by the police under S. 161, Criminal P. C., but the police had not complied with the mandatory provisions of that section.

[7] Section 161, Criminal P. C., is in these terms :

"(1) Any police officer making an investigation under this chapter or any police officer not below such rank as the Provincial Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so he shall make a separate record of the statement, of each such person whose statement he records."

[8] An investigating officer is not bound to record the statements of a witness. That seems clear from sub-s. (3) which says that the police officer may reduce into writing any statement made to him. However, the sub-section provides that if he does reduce statements into writing he must make a separate record of the statement of each of the persons whose statements he records. In other words, if a police officer examines a number of witnesses he cannot record a condensed version of the examination of all of them or a precis of what the witnesses are supposed to have said. He must record what each witness says. He cannot for example record that witnesses A, B and C said so and so. Neither can he lawfully do what police officers frequently do, that is, record the statement of A and then add that witnesses B and C corroborate what A says. If he purports to reduce the statements into writing he must record the statement of each of the witnesses whom he examines.

[9] In this case, as I have said, although a number of witnesses were examined their exact statements were not recorded. Whilst the investigating officer was being cross-examined an attempt was made to prove from him certain statements which the witnesses must have made in their examination under S. 161. The prosecution objected because the statements had not been separately recorded and were in a condensed or what has been referred to in this Court as a boiled form. The learned Assistant Sessions Judge upheld this objection in an order dated 16th November 1949 and observed as follows :

"I have gone through the police diary; no statements appear to have been recorded by the S. I. (P. W. 12) under S. 161, Criminal P. C. What he did was only to note the gist of the statements of the persons examined by him. So the learned pleader for the defence cannot be allowed to cross-examine the said witnesses with reference to the so-called statements of the prosecution witnesses named above in the police diary under S. 162, Criminal P. C. The prayer is refused."

[10] There appears to be no doubt that a number of witnesses were examined and the police purported in the diary to give the gist of the statements of the witnesses examined. Section 161 (3) of the Code makes it clear that if a police officer reduces into writing any statement made to him in the course of the examination he shall make a separate record of the statement of each person whose statement he records. He cannot give the gist of what a witness or witnesses have said. If he has recorded the gist then he has improperly recorded the statement which he should have recorded in full in the case of each witness under sub-s. (3) of S. 161. It appears to me in this case that the learned Judge has come to the conclusion that a precis or gist of statements were recorded and that is contrary to S. 161 (2).

[11] It has been held by their Lordships of the Privy Council that though the police are bound to record the statement as made, nevertheless if such is not done the evidence of the witness does not become inadmissible. The cases of their Lordships of the Privy Council are *Pulukuri Kottaya* v. *Emperor*, 51 C. W. N. 474 : (A. I. R. (34) 1947 P. C. 67 : 48 Cr. L. J. 533) and *Zahiruddin* v. *Emperor*, 51 C. W. N. 555 : (A.I.R. (34) 1947 P. C. 75 : 48 Cr. L. J. 679). Their Lordships however in both these cases pointed out that the failure to comply with the provisions of S. 161, Criminal P. C., might throw very grave doubt upon the evidence of the witnesses and it was a matter which the Court was

entitled to consider when dealing with the credibility of the witnesses.

[12] This point as to the admissibility of evidence of witnesses whose statements have been improperly recorded by the police was considered by a Bench of this Court in the case of *Lakshman Chandra* v. *Emperor*, 52 C. W. N. 401 : (A.I.R (35) 1948 Cal. 278: 49 Cr. L. J. 469) The Bench held that failure to supply copies of statements of witnesses recorded under S. 161, Criminal P. C., either because the statements were lost, destroyed or were recorded in a boiled form in contravention of sub-s. (3) of that section does not make the evidence of those witnesses inadmissible. The Bench however held that in such circumstances if the trial is by a jury, the Judge should give proper directions to the jury as regards the weight to be given to such evidence which the accused had no opportunity to test by cross examination in some particulars. If such statements were deliberately destroyed or were recorded in a boiled form in contravention of law, that would be tantamount to withholding of evidence by the prosecution and a presumption might be raised under S. 114, Evidence Act, 1872, that the evidence if produced would have gone against the prosecution.

[13] The statements of witnesses were undoubtedly recorded in this case in a condensed or, if I may use the words of the Bench which decided *Lakshman Chandra Ghose's case* (52 C. W. N. 401 : A. I. R (35) 1948 Cal. 278 : 49 Cr. L. J. 469), in a boiled form contrary to the express provisions of sub-s (3) of S. 161. This Bench held that where such was the case the jury should be directed that the police had not observed the law and that the jury might, if they thought proper, presume under S. 114, Evidence Act, that if these statements had been recorded the witnesses might well have been flatly contradicted.

[14] We are bound by the case of *Lakshman Chandra Ghose* v. *Emperor* (52 C. W. N. 401 : A. I. R. (35) 1948 Cal. 278 : 49 Cr. L. J. 469) and therefore we are bound to hold that in this case where no reference whatsoever is made to the manner in which these statements were recorded in the charge to the jury, the charge is defective. The jury should have been warned as to the danger of accepting these witnesses in the circumstances as witnesses of truth and should have been told that it was open to them, if they thought proper, to disbelieve these witnesses on the assumption that their statements, if properly recorded, would have contradicted their evidence in Court. It appears to me that in the present case the failure to warn the jury of the effect of the non-compliance with sub s. (3) of S. 161 vitiates the verdict. The verdict may well have been otherwise if the jury had been warned and properly directed concerning their duty in approaching the evidence for the prosecution. That being so, the verdict cannot stand and must be set aside.

[15] It appears to me that this is a case in which there should be a retrial. There is a good deal of evidence, but that is hotly denied and the defence have put forward a very different version. It is a case pre-eminently fitted for decision by a jury and that being so I think a new trial should be ordered.

[16] I should like to mention that when the new trial is held the learned Judge presiding must carefully consider whether or not cross examination to contradict the witnesses is possible from the condensed or boiled statements recorded by the police. If it is possible from those condensed statements to make out what a witness said to the police then such can be put to the witness to contradict him or her under S. 162, Criminal P. C. On the other hand, if the actual statements of the witnesses cannot be deduced from the gist which was recorded then the learned Judge must treat the case as one in which statements of witnesses were recorded but in contravention of S. 161 (3) of the Code, and consequently must direct the jury as provided for in the case of *Lakshman Chandra Ghose* v. *Emperor*, 52 C. W. N. 401 : (A I.R. (35) 1948 Cal. 278 : 49 Cr. L. J. 469) and in accordance with the observations which I have made in this judgment.

[17] If, however, the witnesses can be cross examined and confronted with what must have been their statements to the police in order to contradict the witnesses then of course the jury can draw no adverse inference from a failure properly to record the statements. The learned Judge should consider the statements as recorded and come to the conclusion whether or not they can be intelligently put to the witnesses If they can be put then it cannot properly be held that the statements were improperly recorded in violation of S. 161 (3). For the purposes of this judgment, I must assume that they were improperly recorded by reason of the order which the learned Judge passed forbidding any questions on these statements.

[18] Before concluding I should like to point out that if it is possible to deduce from the gist recorded what witnesses said then what each witness said must be put to the witness if it is intended to contradict the witness by use of such statement. It is not sufficient to obtain proof of the statements from the investigating officer and then ask the jury to hold that the witnesses have contradicted themselves. A previous statement in writing cannot be used to contradict a witness unless that witness has had an opportunity of

dealing with the statement and explaining it away if possible. This is clear from S. 145, Evidence Act, which provides:

"A witness may be cross examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

[19] I merely point out the proper procedure to be followed because in the hearing the first attempt to use these statements if they could be used at all appears to have been made in the cross-examination of the investigating officer.

[20] In the result therefore this appeal is allowed and the verdict of the jury and the conviction and sentence are set aside and the appellant will be retried by a Judge of the rank of Sessions Judge, other than the Judge who presided over the original trial, sitting with a jury. In this trial the statements of witnesses if they can be deduced from the gist must be allowed to be put to the witnesses to contradict them. But if the statements of witnesses cannot be deduced from the gist then in his charge to the jury the learned Judge will deal with the failure properly to record these statements as directed in *Lakshman Chandra Ghose's case* (52 C. W. N. 401 : A. I. R. (35) 1948 Cal. 278 : 49 Cr. L. J. 469) and in this judgment. The accused should be furnished with a copy of this gist of the statements whether such can or cannot be used in cross-examination. The fact that the statements cannot be used is no ground for denying the right of the accused to these statements.

[21] The appellant will continue on the same bail until the commencement of the retrial. Whether he will continue on bail during that trial will be a matter for the learned Judge presiding.

Bachawat J. — I agree.

G.M.J. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 366 *[C. N. 134.]*

LAHIRI AND GUHA JJ.

Bhujagendra Bhusan Banerjee — Plaintiff — Appellant v. *Dist. Board of 24-Parganas, Alipore—Defendant—Respondent.*

A. F. A. D. No. 1090 of 1946, D/- 16-3-1950, against decree of Addl. Dist. Judge, Second Court, Alipore, D/- 8-12-1945.

(a) Bengal Service Rules, Part I, R. 46 — Time scale — Increments above efficiency bar when can be claimed—Fundamental Rules, R. 25.

Where an efficiency bar is prescribed in a time scale, the increment next above the bar shall not be given without specific sanction of the authority empowered to withhold increments. Hence, where a servant of a District Board drew for some time a salary above the limit of the efficiency bar without any express order of the Chairman of the District Board sanctioning the removal of the bar nor did the Board acquiesce in the position that the servant had been permitted to cross the efficiency bar, the principle of the above rule will apply and the servant will not be entitled to claim the arrears of pay with respect to increments above the efficiency bar. [Para 4]

(b) Bengal Local Self-Government Act (III [3] of 1885), S. 35A — Rules under — Provident Fund Rules, R. 5A — Scope of — Payment of additional provident fund whether discretionary.

The payment of additional amount of provident fund under R. 5A is absolutely at the discretion of the District Board and the amount mentioned in the rule is not imperative if the District Board chooses to exercise the discretion. The rule only fixes a maximum that could be paid: A. I. R. (30) 1943 Cal. 447, *Rel. on.* [Para 5]

By its resolution a District Board granted to the plaintiff, a retired servant of the Board, additional provident fund 'due to him' but the Board did not decide what would be the rate of additional contribution nor did it decide for what period it was to be paid. On the strength of this resolution the plaintiff sued for recovery of additional provident fund:

Held, that the claim was premature as the Board by its resolution merely conceded in principle that the plaintiff would get additional provident fund but did not in fact exercise the discretion under R. 5A by fixing the rate and certain other matters which were essential to the exercise of the discretion. [Para 6]

C. S. Sen and Kamjit Mookerjee—for Appellant.

Purnendu Sekhar Bose—for Respondent.

Guha J.—This appeal by the plaintiff arises out of a suit for recovery of arrears of increased pay amounting to Rs. 1327-8-0 and for additional provident fund dues of Rs. 1250. The facts which gave rise to the present litigation are briefly as follows.

[2] The plaintiff was an employee under the District Board of the 24-parganas who are the defendants in this suit. He joined the service of the District Board on 1st June 1915. On 1st January 1920 a time scale for clerks was introduced, the time scale being Rs. 45/3/75 (efficiency bar) 2½-100. On 1st January 1922, the plaintiff was allowed to draw the pay of Rs. 66 and in June 1924 his pay became Rs. 72. He continued to draw the same say till June 1928, when he was transferred to Basirhat. From 1st August 1928 he drew pay at Rs 82-8-0. From 1st June 1930 he drew pay at Rs. 87-8-0 but the amount was reduced by Rs 2-8-0 with effect from 1st July 1930. From 1st July 1930 to 23rd April 1940 when he retired from service he continued to draw pay at the rate of Rs. 85 without having any increment during this period of about ten years. The plaintiff's grievance was twofold. He claimed that some arrears in pay were due to him under the rules and secondly, he claimed that though by a resolution of the District Board on 22nd May 1940 confirmed on 19th June 1940 he was entitled to additional provident fund money, no such sum was paid to him

till the institution of the suit which was filed on 7th May 1943. The defence of the District Board was briefly to the effect that the plaintiff was not entitled to any arrears of pay as he had not crossed the efficiency bar. As regards the claim in respect of the provident fund, the defence *inter alia* was that the claim was premature. On both the points the lower Courts have found in favour of the defendant and dismissed the plaintiff's suit accordingly.

[3] It is urged on behalf of the appellant that the decision of the Courts below on both the above points is erroneous.

[4] We propose to take up the first point about the plaintiff's right to recover the arrears of increment of pay as claimed by him. It will be noticed from the time scale mentioned above that efficiency bar is reached at the stage of Rs. 75. It has been held by the Courts below upholding the contention of the defendant District Board that in the circumstances of the present case the efficiency bar was not crossed by the plaintiff. Where an efficiency bar is prescribed in a time scale, the increment next above the bar shall not be given without specific sanction of the authority empowered to withhold increments. That is the provision contained in Fundamental R. 25 which corresponds to R. 46 of the Bengal Service Rules Part I. The principle contained there will govern the present case. In the present case there was no specific order by the Chairman of the District Board sanctioning the removal of the bar. It is argued however, on behalf of the appellant that though there was no such order in so many words there are circumstances which unmistakably go to show that the District Board authorities treated the case as if the bar had been removed. It is pointed out that on 1st August 1928 the plaintiff was allowed to draw pay at a rate above Rs. 75 and this, it is argued, is consistent with the position that the District Board authorities did in effect waive the bar. In this connection our attention has, however, been drawn to the series of correspondence that passed between the Chairman of the District Board, 24 Parganas, and the Chairman of the Local Board, Basirhat, various office notes regarding fixation of the pay of the appellant, and the series of orders passed by the Chairman of the District Board upon them. On a consideration of all these letters and orders it appears abundantly clear that the appellant drew pay at rates higher than Rs. 75 in spite of the directions of the Chairman of the District Board. There is a letter by the Chairman of the District Board to the Chairman of the Local Board pointing out clearly that the removal of the efficiency bar required the sanction of the Chairman of the District Board and that the appellant's pay should be drawn below the efficiency bar pending the order of the Chairman of the District Board. This position was pointed out again and again but somehow or other the directions of the Chairman of the District Board were not carried out and the appellant continued to draw pay at rates higher than what he was strictly entitled to. There is another circumstance which goes to show that the District Board did not acquiesce in the position that the appellant had been permitted to cross the efficiency bar. It is pertinent in this connection to refer to certain resolutions passed by the District Board. Reference may in this connection be made to the resolution No. 507 passed by the Board on 22nd May 1940 and to resolution No. 530 of the Board passed on 19th June 1940. Resolution No. 507 runs thus :

"Considered the prayer of Babu Bhujagendra Bhusan Banerjee, Clerk, on the following points :

* * * * *

(5) Granted pay at the increased rate with all arrear increments due."

The proceedings of the meeting held on 22nd May 1940 came up for confirmation on 19th June 1940, and the relevant resolution, viz., resolution No. 530 passed on that date shows that the word "granted" was a mistake for "refused". Reading the two resolutions together it is clear enough that the District Board did not consider that the appellant had crossed the efficiency bar and the District Board decided that the plaintiff was not entitled to arrear of increment at the increased rate. Whatever the reason, the District Board did not choose to claim any refund from the plaintiff. That, however, was in the nature of some indulgence or sympathy shown to the plaintiff, but that circumstance cannot be turned into an argument in support of the plaintiff's claim. In our opinion there is no sufficient reason for us to interfere with the decision of the lower Courts dismissing the claim of the plaintiff for arrear increment.

[5] The next point that falls for determination is whether the lower Courts were justified in rejecting the plaintiff's claim for additional provident fund money. The Courts below have held that this claim was premature. It is necessary in this connection to refer again to resolution No. 507 passed by the District Board on 22nd May 1940. Item (7) of the resolution runs as follows: "Granted additional provident fund due to him (i. e., Bhujagendra Bhusan Banerji)". This part of the proceeding, it may be mentioned in passing, was confirmed in the meeting held on 19th June 1940. On the strength of the resolution it has been urged on behalf of the appellant that there is absolutely no reason why after the District Board had finally passed and confirmed a resolution granting additional provident

fund due to the plaintiff, he should be debarred from getting the amount. At the first sight the argument looks attractive but on further scrutiny we are of opinion that the prayer of the plaintiff for additional provident fund money cannot be allowed. Reference may, in this connection, be made to the case of *District Board of Khulna* v. *Jogesh Chandra Basu*, 47 C.W.N. 323: (A.I.R. (30) 1943 Cal. 447). The matter under consideration depends upon proper construction of R. 5A regarding additional contribution. This rule was construed in the case referred to above and it was held by a Division Bench of this Court that the payment of additional amount of provident fund was absolutely at the discretion of the District Board and that the amount mentioned in the rule was not imperative if the District Board chose to exercise the discretion. The rule only fixed a maximum that could be paid.

[6] Mr. Sen appearing for the appellant argued that by virtue of the resolution No. 507, item (7) referred to before the case cited above does not stand in his way. His argument boils down to this: By that resolution the District Board decided practically everything in regard to the additional provident fund money claimed by the plaintiff and all that remained to be done was to make a simple arithmetical calculation. We are unable, however, to construe the resolution in the way that Mr. Sen has invited us to do. By the resolution the plaintiff was granted additional provident fund due to him. The phrase "due to him" is significant. It appears to us that by the resolution what was meant was this: The District Board decided that the plaintiff was entitled to additional provident fund but what exactly was due to him was dependent upon certain other circumstances which were not merely of ministerial calculation. The Board conceded in principle that the plaintiff would get additional provident fund money but the Board did not decide what would be the rate of additional contribution nor dit it decide for what period it would be paid. These were matters which were left undecided and these again were matters which could not be decided on mere calculation because in respect of these matters the Board would have to exercise certain discretion which, we hold, has not yet been exercised by it. This being so, we are inclined to hold that the claim of the plaintiff in regard to additional provident fund money is premature as held by the Courts below, though the grounds on which we have come to this decision are not exactly the same as those of the lower Courts.

[7] The result, therefore, is that both the points urged before us on behalf of the appellant must be decided against him.

[8] The appeal is accordingly dismissed with costs.

Lahiri J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 368 *[C. N. 135.]*

HARRIES C. J. AND SARKAR J.

Badri Prasad Jhunjhunwalla—Defendant 1—Appellant v. *Babulal Jhunjhunwalla and others—Respondents.*

A. F. O. O. No. 88 of 1948, D/- 2-2-1950, against order of Sub Judge, Zillah Burdwan at Asansol, D/- 23-3-1948 and 8 5-1948.

(a) Civil P. C. (1908), O. 38, Rr. 5 and 6 —Order under—Non-compliance with rules.

An order for attachment before judgment passed without complying with Rr. 5 and 6 is both irregular and objectionable. But such an order is not necessarily *ultra vires* or void *ab initio*. The order should be set aside, but a conditional attachment should be maintained and the Court which levied the attachment should go into the question after issuing a proper notice in accordance with the rules. [Para 3]

Annotation: ('44-Com.) Civil P. C., O. 38 R. 5, N. 25.

(b) Civil P. C. (1908), S. 100—Son incurring debt —Father alive — Son, if had power to bind entire joint family—Question is one of fact—Hindu law—Debts. [Para 4]

Annotation: ('44 Com.) C. P. C., Ss. 100-101 N. 51.

Jagadish Chandra Ghose — for Appellant.

Dr. N. C. Sen Gupta with Sudhansu Bhusan Sen—for Respondents.

Sarkar J.—This is an appeal from an order made by the learned Subordinate Judge at Asansol, directing an attachment before judgment. The suit is on a loan which was said to have been advanced by the plaintiffs to one Kaliprosad Jhunjhunwalla who was in charge of a business. Kaliprosad being dead the suit has been brought against the members of the family which carried on that business.

[2] The plaintiffs applied for attachment before judgment in respect of their claim in this suit of a certain decree which had been passed in favour of defendant 1 who is the senior most member of the family, on 28th January 1948. Notice was issued by the learned Subordinate Judge which was served by affixation at the door of the residence of the defendants. The defendants' case is that they did not get this notice and in those circumstances they did not appear to show cause. The learned Subordinate Judge thereupon passed an order for attachment before judgment *ex parte*. Subsequently, the defendants made an application that they should be allowed to show cause and on that application the order appealed from was made.

[3] Learned Advocate appearing for the appellant has taken two points. The first point taken was that the provisions of O. 38, R. 5, Civil P. C., had not been complied with. His

contention is that an order for attachment before judgment can be made only under O. 38, R. 6 and in order that that rule may apply the conditions laid down in R. 5 must be satisfied. The point that is made is that the notice that was issued by the learned Subordinate Judge before he ordered attachment before judgment was a general notice. It did not specify that the defendants would have either to furnish security in case the application succeeded and that on their failing to furnish security attachment before judgment would issue. Learned advocate for the appellant has drawn our attention to the case of *Prag Nath* v. *Mt. Indra Devi*, A. I. R. (21) 1934 ALL. 456 : (148 I. C. 509). In this case Sulaiman C. J., and King J. said that non-compliance with Rr. 5 and 6 of O. 38 amounted to an irregularity, and the order passed without complying with these rules was as both irregular and objectionable. They, however, went on to hold that the order was not in those circumstances necessarily *ultra vires* or void *ab initio*. Their decision in that case was that the order for attachment before judgment should be set aside, but a conditional attachment should be maintained and the case should be sent back to the Court which levied the attachment to go into the question after issuing a proper notice in accordance with the rules. I think that that is the most that the appellant can get in this case. This point about the notice being defective was not raised in the Court below and it strikes me that if this irregularity was really felt as a hardship, it would have there been taken. Dr. Sen Gupta appearing for the respondents made an offer that he was prepared to accept security here if security was offered. Learned advocate for the appellant was, however, in the absence of his client not in a position to make any offer as to security.

[4] The next point that was raised was that the suit was defective inasmuch as the plaint showed that the money had been borrowed by Kaliprosad who it appears is now dead and that Kaliprosad was the son of defendant 1. It is contended that so long as the father is alive it is not possible under the Hindu law for the son to incur a debt which would be binding on the joint family. It appears to us that as to whether Kaliprosad had the power to bind the entire family by a debt incurred by him is a question of fact. He could have been held out as a person who had the power to incur a debt for the purposes of the entire family. We do not propose at this stage to go into that question of fact. The learned Judge in the Court below had held on the *prima facie* evidence before him that Kaliprosad had power to bind the whole family and it has not been shown to us that that decision is in any way wrong. In those circumstances the second point taken on behalf of the appellant must fail.

[5] In the view that we have taken of the judgment of Sulaiman C. J. and King J., we think that we should make in this case an order as was there made. We would therefore set aside the order for attachment and send the case back to the Subordinate Judge, Asansol, to proceed with the matter in compliance with O. 38, Rr. 5 and 6. In the meantime, however, there will be a conditional attachment of the property which has already been attached and this will last till the final order is made by the learned Subordinate Judge. As to costs we do not think that any order for costs should be made in this appeal for this point was not taken in the Court below. The only point that the respondents will be entitled to raise in the Court below will be as to the amount of security to be furnished. They will not be entitled to contend that the order for attachment before judgment should not be made.

Harries C. J. — I agree.

V.R.B. *Order set aside.*

A. I. R. (37) 1950 Calcutta 369 *[C. N. 136.]*

DAS GUPTA AND LAHIRI JJ.

Karunamoy Mukherjee — *Petitioner* v. *Kalika Prosad Bhadury* — *Opposite Party.*

Criminal Revn. No. 110 of 1950, D/- 26-4-1950.

Criminal P. C. (1898), Ss. 517, 520 and 145— 'Concluded' — Meaning of—Dropping of proceedings under S. 145 (5) —Order for disposal of property —Validity.

The word "concluded" in S. 517 has been used to mean conclusion after full enquiry. The cancellation of proceedings under sub s. (5) of Section 145 cannot be considered to amount to conclusion of enquiry. Hence, where the Magistrate has dropped the proceedings he cannot pass an order of disposal of the property under S. 517 in favour of either party. Any such order passed by the Magistrate would be without jurisdiction and will be set aside in revision by the High Court : A. I. R, (12) 1925 Mad. 1252, *Rel. on.* (The High Court directed the sale proceeds of the crops raised on the land to be deposited till one of the parties established his right thereto in a civil Court.)

[Paras 5, 6]

Annotation : ('49-Com.) Criminal P. C., S. 517, N. 3; S. 145 N. 48 Pts. 16, 17.

Jagannath Gangopadhyay — for Petitioner.

Asoke Chandra Sen — for Opposite Party.

Das Gupta J.—The proceedings under S. 145, Criminal P. C., which were drawn up on the application of the present petitioner were "dropped" on 22nd December 1949, on an application by the petitioner that there was no longer any likelihood of any apprehension of the breach of the peace over the possession of the property. The question then arose as to the disposal of the sale proceeds of the crops which had been sold

by the receiver. The learned Magistrate passed an order for payment of this money which amounted to almost Rs. 2,000 to the second party as he was of opinion that the documents produced before him showed that the second party had title to the crops.

[2] An application against this order before the learned Sessions Judge was unsuccessful.

[3] We are now asked to interfere with the order passed by learned Magistrate on the ground that he had no jurisdiction to pass such an order. Obviously, unless he could be considered to have exercised jurisdiction under S. 517, Criminal P. C., the learned Magistrate had no jurisdiction to pass an order as regards the disposal of the sale proceeds after the proceedings had been dropped and he had not come to any conclusion as regards the party entitled to possession.

[4] Whether such an order could be passed under S. 517, Criminal P. C., depends really on the answer to the question whether when the proceedings are terminated by an order of cancellation passed under sub-s. (5) of S. 145, Criminal P. C., it can be said that the enquiry in S. 145 proceedings is concluded. In a case which came up before this Court very many years ago, an order directing the first party to reap the crops after the proceedings had been dropped was claimed to have been passed under S. 517, Criminal P. C. This Court said, "If that be so, we have jurisdiction to interfere under S. 520 of the same Code" and the Court for reasons recorded cancelled the order passed. It will be noticed that the Court did not discuss or determine the question whether in fact such an order could be passed under S. 517 of the Code, but proceedings on the assumption that this was so, held that the Court could interfere under S. 520, Criminal P. C., and the order was passed.

[5] In my opinion, the cancellation of proceedings cannot be considered to amount to a conclusion of the enquiry. I think that the word 'concluded" in S. 517, Criminal P. C., is used to mean 'conclusion after full hearing'. We are fortified in this view by a decision of the Madras High Court in the case of *Narasayya* v. *Venkiah*, 49 Mad. 232 : (A. I. R. (12) 1925 Mad. 1252 : 27 Cr. L. J. 95), where it was held that when a Magistrate has dropped a proceeding, he cannot pass any order in favour of either party as regards the disposal of the sale proceeds of the crops raised on the land in dispute but should keep the same in deposit pending orders of Civil Court.

[6] I am, therefore, of opinion that the order passed by the learned Magistrate was without jurisdiction. I would, therefore, set aside that order and direct that the money be kept in deposit till one of the parties has established his right by suitable proceedings in the Civil Court. The Rule is accordingly made absolute.

Lahiri J. — I agree.

K.S. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 370 *[C. N. 137.]*

LAHIRI AND GUHA JJ.

Harit Krishna Deb—*Decree-holder*—*Appellant* v. *Anil Krishna Deb*—*Judgment debtor*—*Respondent.*

A. F. O. O. No. 49 of 1946, D/- 17-3-1950, against order of Sub-Judge, 1st Court, 24 Parganas, D/- 8-12-1945.

Limitation Act (1908), Art. 182 (5)—Final order.

A decree dated 15th September 1936 was put into execution on 15th September 1939. The judgment-debtor's objection under S. 47, Civil P. C. as to the maintainability of execution was dismissed on 17th June 1940 as a miscellaneous case. Subsequently, on 31st August 1940, the Court dismissed the execution case for non-prosecution. On 21st November 1940 an appeal against the order dated 17th June 1940 was filed and the order was confirmed on 20th August 1942 with a direction that "the costs of this appeal will abide the ultimate result." On receipt of the record on 9th September 1943 from the High Court the executing Court directed the decree-holder to proceed with execution and ultimately dismissed the execution on 2nd December 1943 for non-prosecution. The question was whether subsequent execution filed on 18th August 1945 was within limitation :

Held, that (i) the order of the High Court dated 20th August 1942 was an order in the execution case itself and the subsequent execution filed on 18th August 1945 was within limitation. [Para 5]

(ii) that the effect of the High Court's order dated 20th August 1942 was to supersede the order of dismissal dated 31st August 1940 and the executing Court was perfectly justified in calling upon the decree-holder to proceed with the execution on 9th September 1943 and the subsequent proceedings in execution were not without jurisdiction. The order dated 2nd December 1943 dismissing the previous execution for default was therefore the final order and in that view the subsequent execution was admittedly within limitation. [Para 7]

Annotation : ('42-Com.) Lim. Act, Art. 182 N. 129.

A. C. Gupta; *A. C. Mukherjee and Ganga Narayan Chandra* — for Appellant.

Dr. Pal, Paresh Nath Mukherjee, Jahnabi Ch. Das Gupta and Pashupati Ghose — for Respondent.

Judgment.—This appeal by the decree-holder arises out of an order under S. 47, Civil P. C. by which his application for execution has been dismissed as barred by limitation. The facts material for the purposes of the present appeal are as follows :

[2] On 15th September 1936, the appellant obtained a decree in an administration suit and he put that decree into execution on 15th September 1939 in Title Execution Case No. 71 of 1939. The judgment-debtor filed an objection under S. 47 raising the question of the maintainability of the execution and this objection

gave rise to Miscellaneous Case No. 54 of 1940. This case was dismissed by the executing Court by an order dated 17th June 1940. Thereafter the judgment-debtor intimated to the Court that he proposed to file an appeal to this Court against the order of dismissal and prayed for stay of execution. This prayer was granted for a limited period but eventually the executing Court wanted to proceed with the execution as no order for stay of execution had been received from the High Court. The decree-holder was called upon to take steps which he did not do with the result that execution case No. 71 of 1939 was dismissed for non-prosecution on 31st August 1940.

[3] On 21st November 1940, the judgment-debtor filed an appeal to the High Court against the order of the executing Court dated 17th June 1940, and this appeal was registered and numbered as F. M. A. 307 of 1940. By a judgment dated 20th August 1942, this Court upheld the order of the executing Court dated 17th June 1940 but gave certain directions to the executing Court and made an order with regard to costs. On 9th September 1943, when the record of the case was received back by the executing Court from this Court, the executing Court directed the decree-holder to take steps in the execution case but as the decree-holder failed to do so, the execution case was eventually dismissed on 2nd December 1943.

(4] On 18th August 1945, the decree-holder started the present execution case which was registered as Title Execution Case No. 22 of 1945. The judgment-debtor filed an objection under S. 47, Civil P. C. on the ground that this execution case having been filed more than three years from the dismissal of the first execution case on 31st August 1940, it was barred by limitation. The decree-holder maintained that the starting point of limitation was not 31st August 1940, but 2nd December 1943, when the first execution case was finally dismissed after the decision of the High Court in F. M. A. 307 of 1940. The learned Subordinate Judge has upheld the contention of the judgment-debtor and dismissed the execution case as barred by limitation. In dismissing the application for execution the learned Subordinate Judge has found that the starting point of limitation is 31st August 1940, and not 2nd December 1943, and that all the proceedings taken by the executing Court after the return of the record on the decision of F. M. A. 307 of 1940 were without jurisdiction.

[5] Against this decision, the decree-holder has filed the present appeal and in support of this appeal Mr. Gupta has argued in the first place that the final order in the previous execution case under Art. 182, cl. (5), Limitation Act, was the order made by the High Court in F. M. A. 307 of 1940 on 20th August 1942, and the present application being within three years of the date, it cannot be said to be barred by limitation. The learned Subordinate Judge repelled this contention on the ground that the order of the High Court was not an order in the execution case itself but an order in a proceeding under S. 47, Civil P. C. Dr. Pal appearing for the respondent has tried to support that reason and has argued that an order relating to an execution case is not an order in the execution itself. The previous objection filed by the judgment-debtor related to the maintainability of the execution case itself and if that objection succeeded, the execution case would be dismissed on that ground and it could not be said that the order did not relate to the execution case. We therefore did not see any reason to hold that the order would not relate to the execution case if the objections of the judgment-debtor were overruled. By its judgment dated 20th August 1942, this Court held that the objection of the judgment-debtor had no substance and that there was no bar to the maintainability of the execution case. We are inclined to think that the order made by this Court in F. M. A. 307 of 1940 was an order in the execution case itself and the decree-holder was entitled to apply within three years from the date of that order. The first point raised by the appellant must therefore succeed.

[6] Mr. Gupta has argued in the second place that the order of the High Court in F. M. A. 307 of 1940 superseded the order of dismissal dated 31st August 1940, and the executing Court was perfectly right in starting the execution case afresh on 9th September 1943, after the arrival of the record in that Court and the real order of dismissal of the previous execution case was the order dated 2nd December 1943. In the concluding portion of the judgment of this Court in F. M. A. 307 of 1940 there is the following direction

"the costs of this appeal will abide the ultimate result, the hearing fee in the High Court being assessed at 3 gold mohurs."

This direction, according to Mr. Gupta, relates to the first execution case which was ordered to proceed.

[7] Dr. Pal has argued that this direction should be held to apply to a future execution case that might be started by the decree-holder and he has further argued that as the order of dismissal dated 31st August 1940, was made before the filing of the appeal to this Court, the order of this Court cannot be held to apply to the order of dismissal dated 31st August 1940. The concluding portion of the order of this Court which we have already quoted shows that

this Court contemplated the passing of further orders by the executing Court at least with regard to costs. We do not think that the order as to costs related to the result of a future execution case that might be started by the decree-holder. The second part of Dr. Pal's argument that the order of dismissal dated 31st August 1940, was not affected by the order of this Court as it was passed before the filing of the appeal is also unacceptable, because this Court clearly directed that the costs of this Court should abide the result of the execution case which meant that the executing Court should make a further order as to costs on receipt of the record from this Court. For these reasons, the executing Court was perfectly justified in calling upon the decree-holder to take further steps by its order dated 9th September 1943, and in dismissing the execution case on 2nd December 1943, on the decree-holder's failure to do so. We cannot agree with the Subordinate Judge that the orders of the executing Court beginning from 9th September 1943, and ending with 2nd December 1943, were without jurisdiction. The decree-holder was therefore entitled to file a second application in execution within three years from 2nd December 1943 which was the final order made in the previous execution case.

[8] In the result this appeal is allowed with costs throughout the order of the Court below is set aside and the execution case ordered to proceed according to law.

K.S. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 372 *[C. N. 138.]*

HARRIES C. J. AND BACHAWAT J.

Ramasray Singh and others—Appellants v. *Bibhisan Sinha and others—Respondents.*

A. F. A. D. No. 113 of 1945, D/- 14-2-1950, against decree of D. J., Darjeeling, D/- 9-9-1942.

(a) Debt Laws — Bengal Money-lenders Act (X [10] of 1940), S. 38 (3) — Right to file cross-objection — Civil P. C. (1908), O. 41, R. 22.

As under S. 38 right of appeal is given to an established Court, namely, the Court of the District Judge, and nothing is stated in S. 38 (3) expressly as to the procedure of the appeal, under the ordinary procedure in O. 41, R. 22 the respondent will have a right to file a cross-objection. [Paras 7, 9]

Annotation : ('44-Com.) Civil P. C., O. 41, R. 22, N. 11.

(b) Civil P. C. (1908), O. 41, R. 22—Right to file cross-objection—Limitations to.

The right to file a cross-objection is not subject to the respondent's acceptance of some part of the decree as good. He can do so even when he challenges the whole of the decree. [Paras 12, 13]

Annotation : ('44-Com.) Civil P. C., O. 41, R. 22, N. 3.

Jajneswar Majumdar with Uma Prosad Mookerjee — for Appellants.

Jyotis Chandra Pal — for Respondents.

Bachawat J. — This is an appeal from a decree of the District Judge of Darjeeling, dated 9th September 1942.

[2] The matter arises out of an application made under S. 38, Bengal Money-lenders Act by the respondent who was the borrower against the appellant. The appellant contested the application and two points arose before the learned Subordinate Judge. The first issue was : "Is the loan a commercial loan ousting the scope of the Bengal Money-lenders Act, 1940?" The second point was if it was not a commercial loan what should be the amount of the liability of the applicant calculated in accordance with the Bengal Money-lenders Act. The learned Subordinate Judge came to the conclusion that the loan was not a commercial loan and therefore the provisions of the Bengal Money-lenders Act applied. He further held that the applicant-respondent was liable for the sum of Rs. 2029. Eventually by an order dated 25th April 1942 he declared that the debtor was liable to the creditor for the sum of Rs. 2029 and that was the maximum amount that was recoverable by the creditor. An appeal by the applicant-respondent was filed against that declaration before the Court of the District Judge. His contention was that he was liable to pay a much lesser sum of money. The appellant Ramasray did not file an appeal before the District Judge, but he filed a cross-objection in time. In so far as the appeal of the respondent Bibhisan Singh before him was concerned, the District Judge found that he was in fact liable to pay the sum of Rs. 1956 and not the sum of Rs. 2029 as found by the learned Subordinate Judge. In so far as the cross-objection filed by the appellant Ramasray Singh was concerned, the District Judge held that the cross-objection was misconceived and that the appellant Ramasray Singh ought to have filed an appeal before him and in the circumstances he refused to entertain the cross-objection and he dismissed it with costs. It is from that order of the District Judge that this appeal has been filed.

[3] The only point which has been argued before us is as to whether the learned District Judge was wrong in refusing to entertain the cross-objection and deciding the objection of the appellant on its merits.

[4] Section 38 (3), Bengal Money-lenders Act reads as follows :

"A proceeding under this section shall be deemed to be a suit for the purposes of S. 11, Civil P. C., 1908, and a declaration under this section shall be subject to appeal, if any, as if it were a decree of the Court, and every decision in appeal shall be subject to appeal to the High Court in the same manner as a decree passed in appeal."

[5] It is contended by learned advocate appearing on behalf of the respondent that a

statutory right of appeal is given under this sub-section and no right of cross-objection is conferred by S. 38 and his contention is that if any litigant is aggrieved by a decision of any Court under S. 38 his remedy is to file an appeal and not to agitate the matter by way of cross-objection.

[6] In this connection, I would like to draw attention to the observations of Viscount Haldane L. C., in *National Telephone Co. Ltd.* v. *Post-Master General (No. 2)*, (1913) A. C. 546 at p. 552: (82 L. J. K. B. 1197) where he observes as follows:

"When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches."

[7] It is to be observed that by S. 38, Bengal Money-lenders Act, a right of appeal is given in express terms. By sub-s. (3) of S. 38, a declaration under that section is to be subject to an appeal, if any, as if it were a decree of the Court. The right of appeal, under that section is given to an established Court, namely, the Court of the District Judge. Nothing is stated expressly in the sub-section as to the procedure regulating such appeal. In our view, where nothing is stated expressly as to the procedure of an appeal before a District Judge, the law will import that the ordinary procedure of that Court on appeal will apply. The ordinary procedure of an appeal is that the respondent has the right to file cross-objection and therefore it is quite clear that the respondent has the right to file a cross-objection.

[8] If the appeal before the District Judge was an appeal under the Code of Civil Procedure the whole of O. 41, Civil P. C., would apply to such appeals. It is and must be conceded that the appeal before the District Judge was under the Code of Civil Procedure. If it were not so, Art. 152, Limitation Act, would not apply and there would be no period of limitation applicable to an appeal before the District Judge under S. 38, Bengal Money lenders Act, and in that event the District Judge could treat the cross-objection as an appeal inasmuch as there was no bar of limitation.

[9] Learned advocate on behalf of the appellant has also drawn our attention to the case of *Pramatha Nath* v. *Sanat Kumar*, 53 C. W. N. (F.R.) 12:(A. I R. (36) 1949 F.C. 60). The Federal Court there held that although no further right of appeal from the decision of a High Court is expressly given under S. 38 (a), Bengal Money-lenders Act, the question whether an appeal lies in a given case from a declaration made under S. 38 (a) is left to be determined by the general law, that is, the provisions of the Civil Procedure Code, and that once a proceeding under S. 38 reaches the High Court, further rights of appeal are governed by the provisions of the Civil Procedure Code. The reasoning of the Federal Court in that matter supports our conclusion. Once a proceeding in appeal has reached the Court of the District Judge the incidents and procedure applicable to that appeal are governed by the provisions of the Code of Civil Procedure. In that view of the matter, once an appeal is filed before the District Judge the respondent will have the right to file a cross-objection.

[10] It is further contended by learned advocate on behalf of the respondent that even if O. 41, R 22 applies to the matter before the learned District Judge, even then the appellant had no right to file a cross-objection in this matter.

[11] Order 41, R. 22 reads as follows:

"Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal provided he has filed such objection in the appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate Court may seem fit to allow."

[12] The contention of the learned advocate appearing on behalf of the respondent was that before a party can file cross-objection he must accept some part of the decree as good. If he challenges the whole of the decree in that case according to him the respondent to the appeal has no right to file a cross-objection. In our view that contention is unsound.

[13] Order 41, R. 22 consists of two parts—the first part confers a right upon the respondent to support a decree on any ground decided against him although he may not have appealed from any part of the decree. If the respondent has not appealed or filed any cross-objection he cannot ask the appellate Court to set aside the decree of the lower Court so far as it was against him but he may support the decree even on a ground which has been decided against him. The second part of R. 22 gives the respondent a right to file a cross-objection which he could have taken by way of appeal. This right to file a cross-objection is not limited in the way suggested by the respondent. If an appeal is filed the respondent to the appeal without filing any appeal can take cross objection to the decree on any ground on which he could have filed an appeal.

[14] It follows, therefore, that the learned District Judge was wrong in refusing to entertain the cross-objection and dismissing it.

[15] The appeal must, therefore, be allowed. The order of the lower appellate Court is set aside and the case is sent back to the lower appellate Court to be heard and decided on the merits in accordance with law. The appellant will have costs of this appeal the hearing fee being assessed at three gold mohurs.

Harries C. J.—I agree.

D.H. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 374 *[C. N. 139.]*

ROXBURGH J.

Annada Prosad — Petitioner v. *Harihar Manna and others —Opposite Party.*

Civil Rule No. 1435 of 1949, D/- 24-2-1950, from order of D. J., Hooghly, D/- 29-6-1949.

Civil P.C. (1908), O. 21, R. 89 — Person holding interest—Co-sharer.

On the plain meaning of the words used in R. 89, a cosharer is certainly a person whose interest is affected and hence he is entitled to apply under O. 21, R. 89. Thus, a cosharer who is not in any way a party to the suit or execution proceedings in which a share of a joint tank has been sold can make an application under O. 21, R. 89 : 5 All. 42; A. I. R. (15) 1928 Mad. 399; A.I.R. (14) 1927 Cal. 82, *Disting.*; A.I.R. (13) 1926 Nag. 68 and A.I.R. (10) 1923 Pat. 451, *Ref.* [Paras 5, 14]

Annotation : ('44-Com.) Civil P. C., O. 21, R. 89 N. 15 Pt. 3.

Nani Bhusan Mukherji — for Petitioner.
Apurbadhan Mukherji and Sunil Kumar Ghose — for Opposite Party.

Order.—This rule raises the question ; can a cosharer who is not in any way a party to the suit or execution proceedings in which a share of a tank has been sold in execution make an application under O. 21, R. 89, Civil P. C. The trial Court has decided that he can ; the lower appellate Court relying on an incorrect version of R. 89 as in force in West Bengal, has decided that he cannot.

[2] The tank in question was part of the joint property of three brothers, one of whom is the depositor under R. 89 and another the deceased father of the judgment debtors. The other joint properties of the brothers were partitioned, the tank remaining joint. The sale was held in execution of a money-decree.

[3] Authority on the question is curiously meagre, no case of this Court directly in point had been cited before me. It was considered in *Bisheshar Kuar* v. *Hari Singh*, 5 ALL 42: (1882 A. W. N. 146) in 1882 under the provisions of the Old Code, but in relation to S. 311 or O. 21, R. 90 as it then stood. The cosharer there had actually made a bid at the sale and relied in his application under O. 21, R. 90 (S. 311) on O. 21, R. 88 (S. 310). His application was rejected on the ground that he was not "either the decree-holder or a person whose immovable property had been sold." The decision is not of assistance in interpreting the present R. 89 (as introduced in 1933) "any person, whose interest is affected by such sale," or the similar words of R. 90 "any person. . . . whose interests are affected by the sale."

[4] In *Ramchandra* v. *Srinivasa*, 51 Mad. 246: (A.I.R. (15) 1928 Mad. 399) in 1927 it was held that the cosharer was a "person holding an interest in the property sold," as every member of an undivided family has an interest in joint family property, that is to say, not the share of each, but the whole corpus of the property. The case was one under R. 89, Jackson J. remarking that if one brother chose to pay another brother's debts rather than see the ancestral property pass to stranger (a transaction which may easily involve the family in discredit and inconvenience) there is no objection to his doing so. The decision was not under the wider terms of R. 89 as in force here.

[5] A cosharer is given a right under O. 21, R. 88 to have priority if he makes an equal bid with a stranger. (It is true the right seems not to be one of much substance). This surely recognises that he has some interest in the sale, if not 'in the property sold' in the strictest meaning of the term. But R. 89 does not specifically require the depositor's interest that is affected is to be strictly in the property sold. The rule has been amended to give a wider application. It seems anomalous to suggest then that if a cosharer fails to take advantage of R. 88 (or misses an opportunity to do so through no fault of his own) he should not be able to take advantage of R. 89 to protect the same interest as is apparently intended to be protected (however inadequately) by R. 89. On the plain meaning of the words now used, it seems to me clear that a cosharer is certainly a person whose interest is affected by the case and he is entitled to apply under R. 89. If the sale happens to be a share of an occupancy holding his interest is now recognised to the extent that he is given a right of pre-emption under S. 26F, Bengal Tenancy Act.

[6] In *Kunjolal* v. *Idurali*, A.I.R. (14) 1927 Cal. 82: (97 I. C. 757) relied on by the opposite party in this rule, there are some remarks which appear opposed to the above view, but examination of the case shows that the present point was not really in issue. The facts are not very clearly stated in the judgments delivered, but I have referred to the original records, which show that the defendants were cosharers as heirs of the original holder Hanif. They also claimed to have purchased the share of Keshab one of the sons of Hanif from Keshab's daughters. The suit was for partition the plaintiffs claiming to have purchased the share of Keshab by a kobala,

and the share of Sabdan, another son of Hanif, in execution of a decree against him. The plaintiffs failed so far as the alleged purchase of Keshab's share by kobala was concerned, but succeeded in respect of the share of Sabdan. The argument put forward for the plaintiff appellants as regards the share of Sabdan was that:

"the only person who could raise the question (as to the irregularity of the sale) would be either the decree-holder or a person whose interest was affected by the sale, that these persons could only raise the question under the provision of O. 21, R. 90, Civil P. C."

Cuming J. remarked on this :

"This contention, I think, is correct. So far as regards the third party it is not open to them to challenge the validity of the sale. It is not contended for the respondents that the sale was void. The irregularities of which they complain were admittedly irregularities which might or might not render the sale voidable. But it would be voidable only at the instance of the judgment-debtor whose interests were affected by the sale (sic) and the judgment-debtor alone could get the sale set aside if he succeeded in proving that he had sustained substantial loss by reason of the irregularities. To succeed in their defence, the respondents must be able to set aside the sale. If they cannot set aside the sale the title of the plaintiffs is perfectly good title."

He, therefore, held that the defendants could not raise the defence that the sale was not valid. Page J. agreed, but added a comment suggesting that he was of opinion that the defendants had acquired their interest as co-sharers by purchase after the execution sale. In fact this was not so. It was their purchase of Keshab's share (which the plaintiff also claimed to have acquired by Kobala) which took place of the execution sale of Sabdan's share, they were already co-sharers as heirs of Hanif.

[7] The argument put forth was clearly sound but it was entirely unnecessary to hold that the defendants could not have made an application under O. 21, R. 90. The only question for decision was whether an execution sale could be set aside by the suit (or more strictly by way of defence in a partition suit). The basis of the decision is that no one can do this; it is immaterial whether the person seeking to do it is one who might have succeeded in an application under O. 21, R. 90. The position is clear. A third party whose interest is not affected by the sale cannot challenge the sale either under O. 21, R. 90, or by suit. Certain persons can challenge the sale under O. 21, R. 90 but not by suit. When the question is whether the sale can be challenged by way of suit, it is immaterial therefore whether the challenger could have challenged it under O. 21, R. 90 or not. It is possible perhaps to read into the remarks of Cuming J. an expression of opinion that the defendants as co-sharers could not have challenged the sale under O. 21, R. 90, but the opinion is not clearly expressed, and was quite unnecessary to the main decision, namely, that they could not challenge it by way (?) of defence in the partition suit.

[8] Page J. twice stated that the defendants were not persons competent to apply to have the sale set aside under O. 21, R. 90 but gave as his reason that they were persons

"who acquired an interest in the property after the sale had become absolute and the sale certificate had been issued",

a reason which I think is not supported by the actual facts, but makes the decision no authority on the question of the rights of a co-sharer who had acquired or inherited his interest before the execution sale.

[9] This case, therefore, is no authority conflicting with the view I have expressed above.

[10] In *Kanhairam* v. *Kalicharan*, A. I. R. (13) 1926 Nag 63 : (91 I. C. 218), the position of co sharers in a partition suit with reference to an execution sale against a co sharer came also into consideration. There the argument put forward was in the opposite form, namely, that because the co-sharer could have applied under O. 21, R. 90 he was not entitled to raise the question of the validity of the sale in the partition suit. The case is not of any real assistance in the present matter as in effect the co-sharer did not seek to have the execution sale set aside. The execution sale was in respect of a decree against the plaintiff's brother Karu, and purported only to sell Karu's interest, but described his interest as being the whole house in which the plaintiff's brother claimed a share. The plaintiff was allowed to to establish that he had such share.

[11] The circumstances in *Mehdni Prasad Singh* v. *Nand Keshwar Prasad Singh*, 2 Pat. 386 : (A. I. R. (10) 1923 Pat 451) were somewhat similar. The shares of plaintiff's 1 and 2, co-sharer in a Mitakshara family had been sold in execution. They had failed in an application under O. 21, R. 90. Then they along with plaintiff 3, their brother and plaintiff 4, son of plaintiff 1, brought a suit apparently in form for setting aside the sale. The Subordinate Judge held that as plaintiff 3 could have applied under O. 21, R. 90 and had not done so he could not bring a suit. The High Court held that if the property was joint (and not separate as the defendants claimed), there would not be a decree setting aside the sale, but a decree should be made in a particular form defining the position of the defendants as purchasers in execution of a share of a Mitakshara joint family, and giving plaintiff 3 a right of possession.

[12] Except that the cases have some discussion of the position of co sharers in relation to execution sales in particular circumstances they are not of much assistance in the present matter.

[13] For the petitioner I have also been referred to two cases in which it is contended that a broad interpretation of the phrase 'whose interests are affected' have been taken. *Mundrika Sing* v. *Nand Lal Singh*, A. I. R. (28) 1941 Pat. 204 : (191 I. C. 639) and *Kamiruddin Khan* v. *Sachidananda Jana*, A. I. R. (35) 1948 Pat. 66 : (13 Cut L. T. 25). These lend some support to the view I have expressed.

[14] I hold therefore that the learned munsif was correct in his view that the applicant before him was entitled to make a deposit under O. 21, R. 89. I therefore make the rule absolute setting aside the order of the learned District Judge, and restoring that of the trial Court. I make no order as to costs.

D.R.R. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 376 *[C. N. 140.]*

SEN AND CHUNDER JJ.

Anil Chandra Banerjee and anothers — *Appellants* v. *Gopinath Mukherjee and others* —*Respondents.*

A. F. O. O. No. 21 of 1948, D/- 18-4-1950, against order of Sub Judge, Burdwan, D/- 6 9-1947.

(a) Civil P. C. (1908), S. 146, O. 43, R. 1 — Order under S. 146—No appeal lies. [Para 3]

Annotation : ('44-Com.) Civil P. C., S 146 N 5 ; O 43, R 1, N 1.

(b) Civil P. C. (1908), S. 146 — Rights of transferee.

Section 146 means that an application or proceeding of a like nature can be taken by the transferee as could have been taken by the transferor, not that he should make the identical application. If the transferor could have applied for substitution of his name in the case the transferee can apply for the substitution of his own name as the interest of transferor has devolved upon him. [Para 5]

Annotation : ('44-Com.) Civil P. C., S 146, N 2.

(c) Civil P. C. (1908), S. 146, O. 22, Rr. 3, 10 — Transferee from legal representative of a deceased party cannot come either under O. 22, R. 10 or O. 22, R. 3. [Para 5]

Annotation : ('44 Com.) Civil P. C., S 146, N 2; O 22, R 10, N 2.

A. N. Bose; Harideb Chatterjee and Hemanta Kumar Bose —for Appellants.

Apurba Charan Mukherjee and Ganga Narayan Chandra — for Respondents.

Chunder J. — This is an appeal against an order of the Subordinate Judge of Burdwan in a suit for partition.

[2] It appears that there were four brothers Bidhusekhar, Adyanath, Akul Nath and Kali Nath. It was alleged in the partition suit that Akul Nath and Kali Nath separated and Bidhusekhar and Adyanath were joint in property. Adyanath's widow Bhuban Mohini sued the heirs of Bidhusekhar, who was then dead, for a partition of the joint properties. It was numbered as Partition Suit No. 252 of 1931 and was filed on 21st February 1931. The suit was dismissed on 5th April 1933 and on an appeal being taken to this Court, being Appeal No. 148 of 1933, a preliminary decree was passed for partition by this Court on 8th June 1936. It appears that no further steps were taken towards the final decree in the Subordinate Judge's Court and the Subordinate Judge consigned the record to the record room by his order dated 10th December 1936. It appears that Bhuban Mohini died on 6th November 1943. At the time of her death, it is said that Kali Nath was dead and Akul Nath was the sole surviving reversioner. It appears that Akul Nath did not get himself substituted in the partition suit nor did he take any steps. On 26th January 1944, he transferred the properties he has inherited as reversioner to Gopinath Mukherjee who is the petitioner in this case and is the respondent in this appeal. Gopinath applied to be substituted in the suit and the defendants, that is, the heirs of Bidhusekhar filed an objection. The objection was fought out by defendant 4 who is the appellant before us. The Subordinate Judge refused the prayer for substitution by his order dated 31st August 1945 and on revision proceedings being taken in this Court in Revision Case No. 94 of 1946 the case was sent back to the Subordinate Judge for decisions on the merits. The Subordinate Judge has now allowed substitution. He has held that O. 22, R. 3 and O. 22, R. 10, Civil P. C., do not apply. He has further held that S. 146 of the Code applies and he has allowed substitution under S. 146 of the Code. The present appeal relates to that order.

[3] The first point that arises is whether an appeal at all lies. An appeal is a creature of statute and in the Code of Civil Procedure an appeal is given against a decree and against some orders which are considered as in the nature of a decree, for example, decisions under S. 47, Civil P. C. As against other orders to have a right of appeal the case must come within O. 43, R. 1. Order 43, R. 1 of the Code gives a right of appeal as against certain orders under O. 22, but gives no right of appeal as against an order under S. 146, Civil P. C. Therefore in the present case no appeal lies and the appeal is dismissed.

[4] There has been filed a petition to treat this as a petition in revision in case an appeal does not lie. We are, therefore, taking it up as a matter in revision under S. 115, Civil P. C.

[5] The very short point which really arises in this case is whether Gopinath can come under S. 146, Civil P. C. Reliance has been placed upon a decision of the Patna High Court in the case of *Gobardhan* v. *Saligram*, 15 Pat. 82 : (A. I. R. (23) 1936 Pat. 123). In that case it

was decided that the transferee from the legal representative of a deceased party had no right to come either under R. 10 of O. 22 or R. 3 of that Order. In the present case such has also been held rightly by the Subrdinate Judge. Then in that case it was further said that

"Section 146 authorises a person claiming under another person to make an application which the other person could have made. The appellant can make an application which Priyasakhi (that is the person through whom the claim was filed) could have made namely for substitution of her name. I fail to understand how he can apply for substitution of his own name."

In other words, according to the Patna decision as applied in this case the position would be that Gopinath may be entitled to ask for substitution of the name of Akul Nath but not for substitution of his own name. With great respect to the learned Judge of the Patna High Court, we are unable to agree with this view. To take a very simple contingency: If Akul Nath had died in the present case a day after the death of Bhuban Mohini, that is after having succeeded to the estate, would it be necessary for Akul's heirs to ask the Court to substitute a dead person instead of themselves in place of Bhuban Mohini? In the present case, on the same analogy as Akul had no further interest in the property to be partitioned we do not see why it should be necessary for Gopinath to ask for the substitution of the name of Akul. What S. 146 of the Code means is that an application or proceeding of a like nature can be taken by the transferee as could have been taken by the transferor, not that he should make the identical application. As Akul could have asked for substitution and made an application to that effect, the transferee from Akul also as claiming through him under S. 146 of the Code can apply for substitution and the application in his case will be for the substitution of his name as the interest has now devolved upon him.

[6] The Subordinate Judge, therefore, rightly decided that under S. 146, Civil P. C., Gopinath could ask for substitution of his name in place of Akul though Akul had not applied for such substitution himself. The Subordinate Judge rightly allowed the prayer of Gopinath.

[7] The revision petition is, therefore, rejected with costs.

Sen J. — I agree.

D.H. *Revision dismissed.*

A. I. R. (37) 1950 Calcutta 377 *[C. N. 141.]*

J. P. MITTER J.

Maniklal Shah — Plaintiff v. *Hiralal Shaw — Defendant.*

Testamentary Suit No. 12 of 1948, D/- 9-3-1949.

(a) Evidence Act (1872), Ss. 35 and 77 — Death register maintained under Calcutta Municipal Act —Admissibility — Entry in register — Probative value—Municipalities — Calcutta Municipal Act (III [3] of 1923), Chap. 31.

The register of deaths maintained by the Sub-Registrar under Chap. 31, Calcutta Municipal Act, 1923, is admissible in evidence under S. 35, Evidence Act, and any entry in such a register can be proved under S. 77 by the production of a certified copy thereof.

The entry in such a register is evidence of the fact of death. Other particulars such as 'the cause of death', 'the deceased's age' etc., as to which the officer concerned can have no personal knowledge or any means of checking, cannot be treated as evidence. [Para 4]

Annotation ; ('46-Man.) Evidence Act, S. 35 N. 5, 19; S. 77 N. 1.

(b) Succession Act (1925), S. 300 (2) — Notification under.

A notification issued by the Local Government under S. 2, Probate and Administration Act V [5] of 1881, (re-enacted in S. 300 (2) of the present Act) such as was required under that section, is sufficient compliance with the provisions of S. 300 (2) of the present Act. [Para 9]

Annotation: ('46-Man.) Succession Act, S. 300 N. 1.

(c) Succession Act (1925 as amended in 1929), S. 2 (bb) — Definition of District Judge includes Judge of High Court on Original Side. [Para 10]

Annotation : ('46-Man.) Succession Act, S. 2 N. 2.

(d) Succession Act (1925), S. 300—High Court—Original Side—Property not within limits of ordinary Original civil jurisdiction — Jurisdiction to grant probate—Letters Patent (Cal), Cl. 34.

A High Court Judge on the Original Side has concurrent jurisdiction with the District Judge in all testamentary matters. Section 300 (1) does not require that any portion of the property should be within the limits of the ordinary Original Civil jurisdiction of the High Court. The High Court, therefore, has jurisdiction on the Original Side, to entertain a suit for grant of probate in respect of property situated beyond those limits. [Paras 10, 11, 12]

Annotation : ('46-Man.) Succession Act S. 300 N. 1. Letters Patent S. 34 N 1.

Judgment. — This is a suit in the testamentary jurisdiction of the Court for the grant of probate of the Will of one Narsing Prosad Shaw, deceased. The plaintiff Maniklal is the executor under the Will and is the elder of the two surviving sons of the testator. The defendant Hiralal is the other son.

[2] The original application for grant of probate was presented on 18th December 1947. Hiralal's name not having been mentioned in the said application as one of the sons of the the testator, no citation was issued to him, and in due course, probate of the Will, which is dated 12th October 1946 was issued on 22nd December 1947. On 7th May 1948, Hiralal made an application for the revocation of the probate on the ground of absence of citation on him. This application was heard by Majumdar J. who held that the want of citation was a 'just cause' within the meaning of S. 263, Succession Act, and by his order dated 20th July 1948, he revoked the said grant. The directions given by

Majumdar J. as to the filing of the caveat and the supporting affidavit as also those in respect of discovery and inspection were complied with and the proceedings were marked as a contentious cause.

[3] The testator Narsing Prosad Shaw, who was a Hindu governed by the Mitakshara School of Hindu law, lived at Dum-Dum. He had three sons, Maniklal—the plaintiff, Hiralal—the defendant and one Pannalal who predeceased the testator. Pannalal's widow Binapani and his son Mrityunjoy are living. The testator who was a well-known wrestler in the locality died on 5th November 1946, admittedly at a very old age. As I have said before, the disputed Will is alleged to have been executed on 12th october 1946, that is, less than a month before the testator's death. By the said Will, which is in the Bengali language and character, he bequeathed all his properties and credits to the plaintiff and his grandson, the said Mrityunjoy Shaw, in equal shares, and appointed the plaintiff the sole executor. Hiralal was completely left out. The reason for Hiralal's exclusion from the Will is stated in the within the following terms :

"My second son Sreeman Hiralal Shaw left me long ago and having built houses etc. at a different place is in the enjoyment and possession of the same. His financial position is also good. But it never strikes him that he ought to be tending and nursing his aged father."

[4] Defendant Hiralal's case, *inter alia*, is that the testator was about 100 years of age when the Will is said to have been executed and that by reason of his old age and illness to which he later succumbed, his father had no testamentary capacity, that the alleged signatures of the testator in the Will did not appear to be in the handwriting of the testator and that, if the signatures be held to be genuine, the plaintiff in collusion with two lawyer friends of his—Surath Nath Ganguli and Sachindra Nath Mitra—caused the alleged Will to be executed by his father "by undue influence, fraud and coercion." No particulars of the allegations of undue influence and coercion and of fraud were given and, curiously enough, no particulars were asked for on behalf of the plaintiff. After the opening by learned counsel on behalf of the plaintiff, the following issues were raised :

"(1) Had the deceased any testamentary capacity at the time of the execution of the Will ?

(2) Was the Will validly executed ?

(3) Was the Will executed under the undue influence of Maniklal ?

(4) Has this Court jurisdiction to entertain and try this suit ?"

To support his case the plaintiff, besides examining himself, called the two attesting witnesses to the Will—Surath Nath Ganguly and Sachindra Nath Mitra, as well as a neighbour by name Charu Chandra Samanta. (After dismissing the evidence His Lordships proceeded:) This brings me to the certified copy of the entry in the Register maintained by the Calcutta Corporation at the Cossipore Cremation Ghat. Chapter 31, Calcutta Municipal Act (1923) deals with the registration of births and deaths and disposal of the dead. Under this Chapter it is the duty of the Sub-Registrar for each registered burial or burning ground to maintain a register of deaths in which the particulars prescribed in Sch. 22 to the Act have to be entered in respect of every death. Exhibit 2 is in the form prescribed by the said Schedule which is a form for registration of deaths with some fourteen columns with such heads as 'date of death', 'age', 'cause of death', 'signature', 'description and residence of informant.' This register is thus kept by a public servant in the discharge of his official duty and is admissible under S. 35, Evidence Act. Any entry in such a register can be proved under S. 77, Evidence Act by the production of a certified copy thereof. The question is how much of the entry in this register is evidence. Clearly the entry is evidence of the fact of death. Other particulars such as 'the cause of death', 'the deceased's age' etc., as to which the officer concerned can have no personal knowledge or any means of checking, cannot be treated as evidence. [After discussing the evidence further His Lordship proceeded:]

[5] On a consideration of the entire evidence, I hold that the plaintiff has proved that the testator had the requisite testamentary capacity, that the will was validly executed and that the defendant has failed to prove that the execution of the will was caused by undue influence or coercion. It must be borne in mind that by his will, the testator bequeathed his property in equal shares to the plaintiff and the deceased Pannalal's son. Had the plaintiff had the testator completely under his control, I see no reason why he could not have persuaded the testator to leave all his property to the plaintiff absolutely.

[6] Mr. J. K. Ghosh on behalf of the defendant has taken the point that this Court has no jurisdiction to entertain and try this suit. His reasons are, firstly that the property which is the subject matter of the Will is situated outside the local limits of the Ordinary Original Civil Jurisdiction of this Court and secondly, that the testator lived and died in Dum Dum which is also outside the local limits of the said jurisdiction.

[7] Mr. Ghosh says that the concurrent jurisdiction which the High Court has with the District Judge under sub-s. (1) of S. 300, Succession Act, 1925, is restricted by sub-s. (2) of that section.

It is pointed out that the present case is one to which S. 57 of the Act does not apply, and accordingly the High Court has no jurisdiction to entertain it in the absence of a notification in the official gazette as required under sub-s. (2). He says further that this limitation imposed on the High Court's concurrent jurisdiction with the District Judge is not in any way affected by cl. 34 of the Letters Patent of 1865, as the proviso to cl. 34, says:

"nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India by which power is given to any other Court to grant such probates and letters of administration."

Mr. Ghosh contends that by reason of this proviso the wide testamentary jurisdiction of the High Court under the first part of cl. 34, is controlled by sub-s. (2) of S. 300, Succession Act.

[8] The present Indian Succession Act (Act XXXIX [39] of 1925) is a consolidating Act, into which has been consolidated, amongst others, the Probate and Administration Act V [5] of 1881. Sub-section (2) of S. 300 of the present Act is *toti dem verbis* S. 2, Probate and Administration Act V [5] of 1881. I find that a notification such as was required under S. 2, Probate and Administration Act V [5] of 1881 was issued by the local Government in its official gazette on 20th April 1881. The said notification is at page 445, Part I of the Calcutta Gazette of that date and is in terms as follows:

"The 1st April 1881.—In exercise of the power conferred by S. 2, Act V [5] of 1881, His Honor the Lieutenant Governor of Bengal, with the previous sanction of the Governor-General in Council, is pleased hereby to authorise the High Court of Judicature at Fort William in Bengal, throughout the territories subject to the Lieutenant-Governor of Bengal, and all District Judges as defined in the said Act within the said territories, and such judicial officers as the said High Court may from time to time appoint as district delegates, to receive applications for probate and letters of administration."

[9] The provisions of S. 2, Probate and Administration Act having been re-enacted as indicated above, the said notification, to my mind, is sufficient compliance with the provisions of sub-s. (2) of S. 300, of the present Act.

[10] There is a further answer to Mr. Ghosh's contention. The definition of "District Judge" given in S. 2 (bb) of the amending Act XVIII [18] of 1929 includes a Judge of the High Court on the Original Side (see *Manubhai* v. *General Accident, Fire and Life Assurance Corporation Ltd.*, 38 Bom. L. R. 632 at p. 655 : (A. I. R. (23) 1936 Bom. 363). The result is that a High Court Judge on the original side has concurrent jurisdiction with the District Judge in all testamentary matters. In the case of *In the Goods of Mohendra Narain Roy*, 5 C. W. N. 377. Sale, J., held that the "High Court" in S. 87, Probate and Administration Act (V [5] of 1881) was not merely confined to the Appellate Jurisdiction of that Court, but included its Original Jurisdiction and that under section the High Court, exercising its Original Jurisdiction, had concurrent jurisdiction with the District Judge.

[11] In *Nagendra Bala* v. *Kasipati*, 37 Cal. 224 : (5 I. C. 1003), Fletcher, J. held that the High Court had jurisdiction to grant probate and letters of administration, on its original side, in any case which could have been brought before any District Judge in either of the two Provinces of Bengal. This decision involved the consideration of Ss. 2, 51 and 87, Probate and Administration Act V [5] of 1881, and Fletcher, J., summarised his conclusions thus: "I think, from Ss. 2, 51 and 87, it is clear that the High Court has jurisdiction in all districts." These three sections of the Probate and Administration Act correspond to Ss. 300 (2), 264 (1) and 300 (1) of the present Act respectively. Like S. 87, Probate and Administration Act, the corresponding S. 300 (1), does not require that any portion of the property should be within the limits of the Ordinary Original Civil Jurisdiction of the High Court.

[12] Under cl. 34, Letters Patent (1865), the High Court's jurisdiction in testamentary matters is co-extensive with the limits of the Province. This jurisdiction cannot be said to interfere with those provisions of the Indian Succession Act which confer jurisdiction on District Judges to grant probates. The exercise by the High Court of its testamentary jurisdiction beyond the local limits of its ordinary original civil jurisdiction is not exclusive of, but concurrent with, the jurisdiction of the District Judge. I hold therefore that this Court has jurisdiction to entertain and try this suit.

[13] In the result I decree that probate of the Will of Narasingh Prosad Shaw, deceased, dated 12th October 1946 be granted to the plaintiff Manik Lal Shaw. (The rest of the judgment is not material for purposes of reporting—*(Ed.)*.)

V.B.B. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 379 *[C. N. 142.]*

HARRIES C. J. AND SARKAR J.

Abdul Rahim Naskar — Plaintiff — Petitioner v. *Abdul Jabbar Naskar and others — Defendants — Opposite Party.*

Civil Rule No. 1381 of 1949, D/- 3rd February 1950, from order of Addl. Sub-J., 2nd Court, Alipore, D/- 30th June 1949.

(a) Civil P. C. (1908), O. 6, R. 17 — Grounds for refusal.

If the amendment is necessary to decide the real issue between the parties the amendment should be granted, even though the Court may think that the

plaintiff or the defendant who seeks the amendment will not be able to establish the facts necessary to support the amendment plea or defence. [Para 3]

Annotation: ('44-Com.) Civil P. C., O. 6, R. 17 N. 2.

(b) Civil P. C. (1908), S. 115; O. 6, R. 17—Discretionary order — Interference.

Where the lower Court has wrongly rejected an application for amendment, the High Court can interfere under S. 115. [Para 5]

Annotation: ('44-Com.) Civil P. C., S. 115, N. 20, O. 6, R. 17 N. 21.

Shyama Charan Mitra — for Petitioner.

Sarat Chandra Janah and Binod Behari Haldar — for Opposite party.

Harries C. J. — This is a petition for revision of an order of a learned Subordinate Judge refusing to amend a plaint. The plaintiff brought a suit for a declaration of his title in certain land of which he claimed to be in possession. The land was described in Sch. Ka of the plaint and the plaintiff claimed a six anna interest therein. On one reading of the plaint it would appear that the plaintiff claimed an undivided six annas in the plots mentioned in the schedule. But we cannot overlook the fact that in the body of the plaint he claimed that he had been in exclusive possession of the six annas which had apparently been allotted to him on a partition. Being in exclusive possession of his share suggests that the six annas in the property mentioned in schedule Ka must have been demarcated and therefore his claim was to specific portions of each of the plots mentioned in the schedule.

[2] As the case proceeded, the plaintiff realised that it would be necessary to amend the plaint in order to claim specific portions of the plots in question. The learned Subordinrte Judge refused to grant the amendment asked for. He says that there is nothing in the plaint to show that the plaintiff possessed any demarcated portion of any of the plots of the suit land. That is true to some extent, but, as I have said, there is also a plea that the plaintiff was in exclusive possession of his share by cultivation and it is impossible to cultivate exclusively six annas of any property unless that share has been demarcated or separated from the remaining ten annas.

[3] The learned Judge also points out that in evidence the plaintiff was very vague as to the properties he actually claimed. The learned Judge says that the demarcation now alleged must be regarded as illusory. In other words the learned Judge appears to think that if the plaint was amended and specific portions of each of the plots claimed, the plaintiff could never hope to establish his claim. That however is no ground whatsoever for refusing an amendment. If the amendment is necessary to decide the real issue between the parties the amendment should be granted, even though the Court may think that the plaintiff or the defendant who seeks the amendment will not be able to establish the facts necessary to support the amendment plea or defence. It seems to me that as the case proceeded justice required that the plaintiff should be given leave to amend the schedule to his plaint so that the Court could decide the real issue in the case; that is whether or not the plaintiff was entitled to portions of these plots which he alleged he had possessed exclusively by cultivation. That being so, if we have power to interfere, I would be inclined in this case to set aside the order of the learned Subordinate Judge and direct him to allow the amendment.

[4] It was, however, urged before us that we could not interfere under S. 115, Civil P. C. Whether an amendment should or should not be granted is a matter within the discretion of the Court and it is urged that this Court cannot interfere under S. 115, Civil P. C. with the exercise of such discretion.

[5] The very point was considered by a Bench of this Court in *Loke Nath* v. *Abani Nath*, 37 C. W. N. 1093 : (A. I. R. (21) 1934 Cal. 102). This was a case decided before the Government of India Act, 1935. A Bench which decided the case held that there is no hard and fast rule that in no circumstances can a discretionary order by a Judicial officer be reviewed either under S. 115, Civil P. C. or under S. 107, Government of India Act or under the combined operation of both. The Bench further held that the Court could interfere where the lower Court had wrongly rejected an application to amend.

[6] It might be suggested that the recent pronouncements of their Lordships of the Privy Council are not consistent with this case. But it must be observed that this case deals not only with S. 115, Civil P. C., but with S. 107, Government of India Act, 1919. Courts have held that under S. 107, Government of India Act, 1919, orders in the nature of orders in revision could in proper cases be made. Any right to make such orders however was expressly taken away by the Government of India Act, 1935, which limited the rights of superintendence to what I may describe as purely non-judicial matters. In the new Constitution however that limitation has been removed and the right of superintendence which this Court now has is practically the right it had under the Act of 1919. The position today, therefore, is precisely the same as it was when *Loke Nath's case*, (37 C. W. N. 1093 : A.I.R. (21) 1934 Cal. 102) was decided, and therefore, it appears to me that we must follow that decision as it is binding on us. We, therefore, must hold that we now can interfere, either under S. 115,

Civil P. C. or under powers which we now possess under the new Constitution to superintend the lower Courts.

[7] That being so, I would allow this application, set aside the order of the learned Subordinate Judge and remand the case to him, with the direction that he should allow the amendment of the plaint as prayed. An opportunity of course must be given to the defendants to file amended written statements and then the case will proceed.

[8] The Rule is, therefore, made absolute in these terms, but in the circumstances I would direct that costs of this application be costs in the suit.

Sarkar J. — I agree.

D.H. *Rule made absolate.*

A. I. R. (37) 1950 Calcutta 381 *[C. N. 143.]*

ROXBURGH J.

Sm. Sarojini Debi—Judgment-debtor—Petitioner v. *Rabindra Mohan Sen and others — Decree-holders—Opposite Party*

Civil Rule No. 1923 (S) and Civil Revn. No. 1870 of 1949, D/- 28-3-1950.

(a) Tenancy Laws—Calcutta Thika Tenancy Act (II [2] of 1949), S. 28—Applicablility—Essentials.

In order to determine whether a decree passed before the Act can be varied under S. 28, the Court has (1) to see if it amounts to the sort of order that would have been passed by the Controller in a case under the Act, in other words, whether the conditions of S. 3 are fulfilled which lays down the grounds on which a thika tenant can be ejected and (2) whether in form the order is of the type that would be passed under S. 6 of the Act. [Para 13]

(b) Tenany Laws—Calcutta Thika Tenancy Act (II [2] of 1949), S. 28—Decree for ejectment and for arrears of rent—Variation of.

Under S. 5 of the Act, the Controller is only given power to pass an order for ejectment. He cannot pass any order which can be executed for recovery of arrears of rent. Where, therefore, a decree passed before the Act is both for ejectment and for payment of arrears of rent, it is clearly necessary to separate the two. It is only the decree for ejectment which is to be converted into an order such as the Controller could pass and could execute, under the powers given to him under S. 27 (6) of the Act. [Paras 15, 17]

(c) Tenancy Laws—Calcutta Thika Tenancy Act (II [2] of 1949), Ss. 6, 28—Decree for ejectment with damages from date of suit till delivery of possession —Variation of.

Where a decree for ejectment of a *Thika* tenant passed before the Act includes also a decree for damages from the date of the suit till delivery of possession, it is not an order which the Controller could pass. Under S. 6, the limit of the Controller's powers is to specify the actual arrears, the costs and the damages if any, and the total is to be an amount which the tenant may pay within 30 days of the date of the order and so save himself from ejectment. In such a case, the decree has to be divided into two separate decrees and the decree for ejectment must be limited to one containing the actual order of ejectment plus the specification of arrears, costs and damages, limited to damages upto the date of the order. [Para 20]

(d) Tenancy Laws—Calcutta Thika Tenancy Act (II [2] of 1949), Ss. 6, 28—Decree for ejectment and for arrears of rent—Date of varied decree—Tenant, whether entitled to time for payment under S. 6.

The varied decree is to be executed as if it was an order made under and in accordance with the provisions of the Act. It, therefore, follows that the varied decree, to be treated as such order, must be dated after the commencement of the Act. S. 28 seems to mean that the variation is not to be one of mere form, but that the whole proceedings have to be gone over to see if the landlord can bring his case under S. 3. Hence, in cases where under the Act the decree is amended to an order for ejectment under S. 3 (1) of the Act, and the provisions of S. 6 are to be carried out, the date of the order will be the date of the varied order, and thus the tenant will have the opportunity of paying the arrears. [Para 23]

(e) Tenancy Laws—Calcutta Thika Tenancy Act (II [2] of 1949), S. 28—"Court making the decree or order"—Expression refers to trial Court — Investigation as to conformity is to be made by trial Court and not by any other Court. [Para 24]

(f) Tenancy Laws—Calcutta Thika Tenancy Act (II [2] of 1949), S. 28—Variation of decree under—Nature of — Both sides must be given opportunity to establish conformity or otherwise.

Section 28 seems to mean that the variation is not to be one of mere form, but that the whole proceedings have to be gone over to see if the landlord can bring his case under S. 3. The whole law of ejectment has been changed by the Act; it is surely unfair to tie either the landlord or the tenant to pleadings and evidence led when the matter in issue was entirely different. If the conformity is to be with the whole new Act, in particular S. 3, and not merely some change in the decree itself both sides must be given opportunity to establish a case of conformity or non-conformity. [Para 23]

Sitaram Banerji and Arun Kumar Datta —for Petitioner.

Dr. Sen Gupta and Bhabatosh Ghakravarty —for Opposite Party.

Order.—This is a Rule for action to be taken under S. 28, Calcutta Thika Tenancy Act, 1949, hereafter referred to as the Act, and an application in revision against an order of a Munsif refusing to take such action. The decree to be dealt with under that section was passed in Title Suit 123 of 1939, a suit for ejectment and recovery of arrears of rent which was filed in the 3rd Court of the Munsif at Alipore. The suit was decreed on 28th June 1940 for rent only. On appeal by the landlord, the Subordinate Judge of Alipore added a decree for ejectment. There was a second appeal to this Court and on 22nd December 1943, Lodge J. dismissed the appeal. There have been subsequent proceedings under S. 47, Civil P. C. but I do not think they have any bearing on the present matter.

[2] The tenant applied to the original Court which passed the decree under S. 28 of the Act. The Munsif held that the case was covered by the provisions of S. 3 (1) of the Act as the land-

lord had sued for arrears of rent as well as ejectment but refused to take action on the application. The landlord had mentioned in his plaint that he required the land for his own use. This was quite unnecessary in the state of the law at the time the suit was filed, but might if established bring the case under ground 3 (iv) of the Act. The matter was admittedly not in issue in the suit as tried, but the learned Munsif seems to have held that this ground was established, though his judgment is not quite clear on the point. The learned Munsif also considered the question whether the case came under ground 3 (vi) of the Act, namely, that the tenant held under a registered lease which expired. The learned Munsif found some references to a lease in the judgments in the case, but was unable to conclude whether it was registered or not, and held that to bring their case under this ground the plaintiffs must substantiate their case by furnishing the lease.

[3] It is not clear what the learned Munsif would have done if he had not found that the application was in any case liable to dismissal as the plaintiffs could show that there existed arrears of rent at the time of the suit, so as to bring the case under ground 3 (1) of the Act.

[4] The tenant made an application in revision and obtained a rule solely on the ground that the Munsif acted without jurisdiction. Later he made an application direct to this Court for action under S. 28, evidently on the basis of the decision in *Gostha Behari* v. *Panchu Gopal*, (Civil Rev. No. 861 of 1941) in which it was decided that applications under S. 18, West Bengal Premises Rent Control Act must be made to the appellate Court, as being "the Court which made the decree" within the meaning of the words used in that section. It was apparently assumed that the decision necessarily also covers the same phrase used in S. 28 of the Act. Whether it does so or not seems to depend on the whole interpretation of S. 28 of the Act, which question I proceed to discuss.

[5] The decree as it stands is (1) for ejectment, (2) for arrears of rent, (3) for interest and costs and (4) for damages at the rate of Rs. 7 per year until delivery of possession.

[6] Section 28, Calcutta Thika Tenancy Act, runs as follows :

28. Power of Court to rescind or vary decrees and orders in certain cases :

"Where any decree or order for the recovery of possession of any holding from a thika tenant has been made before the date of commencement of this Act but the possession of such holding has not been recovered from the thika tenant] the execution of such decree or order, the Court by which the decree or order was made may, if it is of opinion that the decree or order is not in conformity with any provision of this Act other than sub-s. (1) of S. 5 or S. 27, rescind or vary the decree or order in such manner as the Court may think fit for the purpose of giving effect to such provision and the decree or order so varied by any Court shall be transferred by such Court to the Controller for execution under this Act as if it were an order made under and in accordance with the provisions of this Act."

We have to try and give an intelligible, workable interpretation of these provisions without straining the canons of interpretation of statutes. The material words are :

"If it is of opinion that the decree or order is not in conformity with any provision of this Act other than sub-s. (1) of S. 5 or S. 27."

What precisely does this mean?

[7] If the Court thinks the decree or order is not in conformity with the provisions of the Act it is to rescind or vary it for the purpose of giving effect to such provision, and the decree or order is to be transferred to the Controller for execution "as if it were an order made under and in accordance with the provisions" of the Act. The Act itself makes no provision for any decree, but only for an order *for ejectment* by the Controller. The intention seems to be that the decree or order varied is to be in all respect the same as if it were an order passed by the Controller.

[8] At first sight, one might think that the words had some reference to some provision of the Act which required a decree to be in some particular form. The only section which apparently would have any bearing in that view would be S. 6, which requires that when the Controller makes an order for ejectment his order "shall specify the amount of the arrear and of the interest, if any, due thereon" and then adds

"and no such order shall be executed if that amount the costs of the proceedings arising out of such application and such damages as the Controller may allow are deposited with the Controller within thirty days from the date of the order."

[9] But at once one asks what is the significance, if any of the reference to sub-s. (1) of S. 5 and to S. 27 of the Act? If we examine the Act these will be seen to be, so to speak, the alpha and omega of proceedings for ejectment as provided for in the Act. Section 5 shows that the only way for a landlord to obtain ejectment of a thika tenant is to move the Controller, while S. 27 provides for appeal, review and execution. The reference to these sections is somewhat obscure but it does appear sufficiently clear I think that the intention is that in examining whether the decree is in conformity with the Act, we have not only to look at the mere actual form of the decree itself but also to the whole proceedings except the naturally impossible requirement that they should have been held before the Controller.

[10] This view is supported by reference to the following S. 29 which deals with ejectment suits pending at the time when the Act came into force. There, a different phraseology has been employed. The section runs as follows :

29. Application of Act to pending suits and proceedings :

"The provisions of this Act shall apply to all suits and proceedings, including proceedings in execution, for ejectment of a thika tenant which are pending at the date of commencement of this Act, and if any such suit or proceeding relates to any matter in respect of which the Controller is competent after the date of such commencement to pass order under this Act, such suit or proceeding shall be transferred to the Controller who shall on such transfer deal with it in accordance with the provisions of this Act as if this Act had been in operation on the date of institution of the suit or proceeding :

Provided that in applying the provision of this Act to any suit or proceeding instituted for the ejectment of a thika tenant so transferred, the provisions regarding notice in S. 4 of this Act shall not apply."

In pending cases for ejectment, the Controller is to take over the proceedings and deal with them as if the Act had been in operation *at the date of the institution of the suit or proceeding*. In other words, he will deal with the whole proceedings in conformity with the Act and necessarily at the end pass an order in conformity with the Act. Now, it would be strange if the Act made any substantial distinction between a case where a decree for ejectment had been passed by the Court, shall we say, on 27th February 1949, the day before the Act came into force and another case which happened to last one day longer and, therefore, was pending on 28th February 1949, when the Act came into operation.

[11] I think this view is further re-enforced if we look at the Thika Tenancy Ordinance 1948, which came into force a few months previously on 26th October 1948. The substantial provision there was that although a decree for ejectment might be passed it could not be executed, provided, in a case where the tenant was in arrears with his rent, he deposited into Court the amount of the decree and costs within 30 days from the date of the decree or order. One may surely gather from this the intention that from the date of the Ordinance decrees for ejectment against thika tenants were, subject to their paying arrears if any (in time) to be kept in suspense till further provision was made. The intention is in fact indicated in the preamble to the ordinance. The further provision is made in the Act in S. 28 and we may at any rate assume that the intention was by S. 28 to give similar treatment to such tenants against whom such decrees had been passed, as to tenants against whom suits are proceedings for ejectment were pending when the Act came into force. The interpretation I suggest carries out that intention.

[12] It is to be noted also that in cases where there are no arrears, S. 6 would have no application. Execution of the decree would have been stayed under S. 3 of the Ordinance, and if all that was required to bring the decree into conformity with the Act (under S. 28) were to amend the decree in conformity with S. 6 then nothing would be required to be done in such cases. The suspension of execution by the Ordinance would have given no benefit to the tenant. It seems to be sufficiently clear that a tenant who was not in arrears and who thus under the Act would not be liable to ejectment, unless the landlord could show the case came under one or other of sub-cls. (ii) to (vi) of S. 3, and who was protected temporarily by the provisions of S. 3 of the Ordinance, was also intended to get the benefit of the Act by operation of the provisions of S. 28. If this were not so, tenants in cases where there were arrears, and where variation was necessary in the decree to make it conform with S. 6, would be in a better position than tenants who were never in arrears. I think then it is clear that a decree is to be varied or rescinded under S. 28 if the tenant can show it is equivalent to an order that the Controller would not be competent to pass under the Act because of the non-existence of one of the 'grounds' for ejectment given in S. 3 of the Act. (In parenthesis I may point out that under S. 28 the only decrees to be 'transferred' by the Court are those which are decrees or orders 'varied' by the Court. If no variation is made, as unnecessary, there is no provision for transfer, though S. 29 assumes that pending proceedings for execution are to be dealt with by the Controller. The flaw is perhaps not serious, but S. 28 should have also provided for transfer of "unvaried" decree also).

[13] From the above then it would appear in dealing with the decree in question, we are, in substance, (1) to see if it amounts to the sort of order that would have been passed by the Controller in a case under the Act, in other words, whether the conditions of S. 3 are fulfilled which lays down the grounds on which a thika tenant can be ejected and (2) whether in form the order is of the type that would be passed under S. 6 of the Act.

[14] As I have pointed out in *Panchanan Shaw* v. *Satya Bandhu Mukherjee*, Civil Revn. No. 1927 of 1949 : (A. I. R. (37) 1950) Cal. 319) trouble may arise in some cases because S. 28 has not excepted S. 4 (requiring 30 days' notice) as one of the sections with which conformity is necessary, though S. 4 is excepted in S. 29. No such difficulty arises in the facts of the present

case. It would be argued that this shows a deliberate intention to distinguish between completed cases dealt with by S. 28 and pending cases dealt with by S. 29, but I think it is a case of oversight. There is the equally anomalous omission of an exception of sub-s. 1 of S. 5 (requiring intitial approach to the Controller) from S. 29 though it is specifically excepted in S. 28.

[15] Here it seems to me to be important to note carefully that the Controller is only given power to pass an order for ejectment. He cannot pass any order which can be executed for recovery of arrears of rent. It is true that under S. 6 under the words previously cited above he has to state the amount of the arrears, and costs (I think also the damages; vide below) and if the tenant pays them he will not be ejected, and in that sense the Controller will collect the rent for the landlord, but I can find nothing in the Act which will allow the Controller to pass an order for actual payment of arrears in the event that the tenant does not pay up within the time specified in S. 6; on the contrary, there are several indications that the Controller has no such power. Section 5 itself clearly only bars a landlord going to Court for an ejectment order. It does not bar him suing for arrears of rent, and the order to be made under S. 5 is only one:

"directing the thika tenant to vacate the holding and subject to the provisions of S. 10, to put the landlord in possession thereof."

Again, if we turn to S. 29 of the Act, we will see that the provisions of the Act are to apply to

"suits or proceedings, including proceedings in execution, for *ejectment* of a thika tenant, which are pending at the date of the commencement of the Act."

[16] Reference may also be made to S. 23 of the Act which refers to "the institution of the suit", clearly contemplating a separate suit for recovery of arrears of rent.

[17] The importance of this is that in cases such as the present where there is a decree both for ejectment and for payment of arrears of rent, it is clearly necessary to separate the two. It is only the decree for ejectment which is to be converted into an order such as the Controller could pass and such as the Controller can execute, under the powers given to him under S. 27 (6) of the Act.

[18] In the present case, so far as S. 3 (1) of the Act is concerned, there is no difficulty as the landlord not only sued for ejectment under the law then in force in 1939, but also sued and obtained a decree for arreas of rent. So the case is one under cl. 3 (1). The only question that gives rise to difficulty in this connection is the matter of the applicability of S. 6 and in short the question whether the amendment of the decree is to give the tenant some opportunity to pay up the arrears. On 22nd December 1943, there was a decree for arrears of rent and it is admitted on behalf of the tenant that the arrears in fact were not cleared up until a payment was made on 1st March 1949.

[19] If he is to be given such opportunity the question then arises whether the landlord in turn should be allowed to show that the case comes under S. 3 (iv) or 3 (vi) and if so how.

[20] I have stated that the decree as it stands, includes a decree for damages from the date of the suit till delivery of possession. That is not an order in my opinion which the Controller could pass. Under S. 6, the limits of the Controller's powers are to specify the actual arrears, the costs and the damages, if any, and the total is to be an amount which the tenant may pay within 30 days of the date of the order and so save himself from ejectment. Clearly, under those powers, the Controller cannot direct the tenant to go on paying further sums in the event of his not depositing the amount within those 30 days. Therefore, the decree in this case must be altered. The decree as I have said has to be divided into two separate decrees, in so far as there is a decree for arrears of rent and damages; this is not a decree or order which the Controller himself could pass at all. Again, the decree for ejectment, in view of what I have just said must be limited to one containing the actual order of ejectment plus the specification of arrears, costs and damages, limited to damages upto the date of the order.

[21] On this matter, I may refer to an argument put forward by Dr. Sen Gupta based on the wording of S. 6. Literally, it would appear that the Controller's order is merely to show arrears, interest and costs and the tenant is then to come within 30 days to pay them and, as he is about to pay, he is to be told that in addition certain amount of damages also would be paid. I do think, clumsy as the wording of the section is, that it is necessary to say that it must be interpreted as literally as this, and it may be fairly interpreted as meaning that the Controller's order itself will state all the items to be paid within 30 days including damages so that the tenant will know exactly what he has to pay and if he does pay the amount he will get the benefit of the section and avoid ejectment.

[22] The next problem is to settle then whether the amendment is to be of any substantial use to a tenant in arrears in giving him an opportunity to pay the arrears. As Dr. Sen Gupta urges the decree here as it stands is in conformity with the Act. I have pointed out why I think, in any view, of the matter, it must

be amended to some extent. The really material point is in fact what is to be the date of the amended decree. If it is dated as from the date of the order, varying the decree, the tenant will have his opportunity to pay up the arrears. In the present case, it is stated that the tenant had already paid the arrears on 1st March 1949, after the conclusion of the appeal in this Court arising out of proceedings under S. 47, Civil P. C. If the date of the decree, however, is to remain as the date of the order of Lodge J., viz., 22nd December 1943, then the one month's grace given by S. 6 has long passed.

[23] It seems to me this question is closely related to the whole question of how to interpret the intention as to how the provisions of S. 28 are to be carried out. I have pointed out the apparent connection between the provisions of S. 28 and S. 29. The varied decree is to be executed as if it was an order made under and in accordance with the provisions of the Act. Does it not follow that the varied decree to be treated as such order must be dated after the commencement of the Act. Again I have said that S. 28 seems to mean that the variation is not to be one of mere form, but that the whole proceeedings have to be gone over to see if the landlord can bring his case under S. 3. The anomaly in the learned Munsif's treatment of this case is obvious. The whole law of ejectment has been changed by the Act; it is surely unfair to tie either the landlord or the tenant to pleadings and evidence led when the matter in issue was entirely different. Before the Act the 'ground' for ejectment was termination of the tenancy on expiry of the lease, or on notice, and other grounds given in the Transfer of Property Act. If the conformity is to be with the whole new Act, in particular S. 3, and not merely some change in the decree itself both sides must be given opportunity to establish a case of conformity or non-conformity. Surely we must interpret S. 28 as meaning this. Does it not follow then that the only possible Court that can properly do this is the Court which passed the original decree, the trial Court. And does is not also follow that the order passed as to be executed as one under the Act must be dated as passed, so that an intelligible and meaningful order can be passed under S. 6 in cases of arrears. If the latter be not the case then the Court will amend a decree in a case of arrears specifying the amount of arrears and so forth on the lines I have indicated, but the whole will be maeningless, as the object of the specification, namely the opportunity to pay up the amount specified will be non-existent, as the 'date of the order' will be some date much in excess of thirty days prior to the actual date on which it is made, the date on which the original order was varied. I think, therefore, in cases where under the Act the decree is amended to an order for ejectment under S. 3 (1) of the Act, and the provisions of S. 6 are to be carried out, the date of the order will be the date of the varied order, and thus the tenant will have the opportunity of paying the arrears. Section 6 of the Act requires that they along with the other items mentioned herein be deposited with the Controller.

[24] From the above it follows that the decision in *Gosta Behari Sadhu Khan's case*, Civ. Revn. No. 861 of 1941, however applicable to the provisions of S. 18, West Bengal Premises Rent Control Act, cannot apply to S. 28 of the Act. The phrase 'Court which made the decree' has to be interpreted in the particular context in which it appears, and if the view I have taken of the interpretation of S. 28 is correct, the legislature cannot possibly have intended that the investigation as to conformity was to be made by other than the trial Court. I may point out that there is a considerable distinction between the provisions of S. 18, West Bengal Premises Rent Control Act, and S. 28 of the Act, in particular if my interpretation is correct that we are to look to the provisions of S. 29 to assist in the interpretation S. 18 of the former Act speaks of the decree being varied if the Court 'is of opinion that the decree or order would not have been made if this Act had been in operation *at the date of the making of the decree or order*. Section 29 of the latter Act requires the Controller in pending cases to deal with them 'as if this Act had been in operation *on the date of institution* of the suit or proceeding. Again in the case of the Rent Act the varied decree is still a decree of Court to be executed by the Court, whereas under the Act as far as it relates to ejectment it is to be executed as "an order made under and in accordance with the provisions of this Act," i. e., as an order of the Controller.

[25] The result is that in my opinion the learned Munsiff had jurisdiction to deal with the application under S. 28, but there has been material irregularity in his exercise of his jurisdiction. Rule No. 1870 is accordingly made absolute without costs and the application of the tenant is directed to be re heard and disposed of in the light of what I have said above. The learned Munsif should give the plaintiff an opportunity of showing that the case is governed by S. 3 (iv) or (vi), and the defendant an opportunity of meeting the plaintiff's contention, evidence may be taken if necessary. If the tenant is held to be liable to ejectment on the ground of arrears only the decree will be amended to consist of (1) an order in the form indicated

in S. 6 showing arrears, interest, costs, and damages to the date of the new order; this will be transferred to the Controller for executions and (2) a decree for arrears, interest, costs, damages at Rs. 7 per year till the date of recovery of possession to be executed by the Court.

[26] C. R. 1923-S of 1949 is discharged without costs.

D.R.R. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 386 *[C.N. 144.]*

HARRIES C. J. AND BACHAWAT J.

Surendra Narayan Deb and another — Plaintiffs — Petitioners v. *Bhairabendra Narayan Deb and others—Defendants—Opposite Party.*

Civil Rules Nos. 7 and 26 of 1949, D/- 27-2-1950, from order of Sub-J., Alipur, D/- 29-9-1948.

(a) Specific Relief Act (1877), S. 42, Proviso — Suit for mere declaration — Defendant acquiring possession pending suit.

Where a suit for a mere declaration was properly constituted when filed it does not become unmaintainable by reason of the fact that subsequently the defendant acquires actual possession of the property. Thus where during the pendency of a suit for declaration the estate is released by the Court of Wards in favour of the defendant, the suit is not affected by the release. [Paras 12 and 14]

Annotation : ('46-Man.) Specific Relief Act, S. 42, N. 9, Pt. 6.

(b) Bengal Court of Wards Act (IX [9] of 1879), Ss. 13 and 13A — Distinction.

Section 13 presupposes that there is no person in existence whose *prima facie* claim can be recognised by the Court of Wards and that being so the section entitles the Court of Wards to continue to manage the property and to hold it until one of the claimants to the property establishes his claim. On the other hand, S. 13A presupposes the existence of a rightful successor or of a proprietor not disqualified but merely gives the Court of Wards power to retain management of the estate of such successor or proprietor until certain debts of his predecessor have been discharged. [Paras 18 and 19]

(c) Bengal Court of Wards Act (IX [9] of 1879), S. 13A — Court of Wards if stake-holder under section.

Under S. 13A the Court of Wards is not in the position of a stake-holder. It is in much the same position as it is in when it has taken over the management of a disqualified proprietor's estate. It is managing the property of another though for certain limited purposes. The property belongs to the ward and the Court of Wards is merely a manager for certain limited purpose. [Para 25]

(d) Specific Relief Act (1877), S. 42, Proviso — Suit for declaration — Property managed by Court of Wards under S. 13A, Bengal Court of Wards Act — Injunction restraining Court of Wards from giving possession to defendant—Suit, if maintainable — Bengal Court of Wards Act (IX [9] 1879), S. 13A.

The plaintiff brought a suit for a declaration against the defendant represented by the Manager, Court of Wards, that the property in suit belonged to him. The property was under the management of the Court of Wards under S. 13A, Bengal Court of Wards Act. In an earlier litigation an injunction had been issued restraining the Court of Wards from giving possession of the property to the defendant. This injunction was in existence when the suit for declaration was filed although it was discharged later on. The question was whether the suit was maintainable without the relief for possession :

Held, that the plaintiff could have claimed possession against the defendant through the Court of Wards, and that being so, no declaration could be made by reason of S. 42 and the suit was consequently not maintainable; [Para 28]

Held further, that the injunction was no bar to a suit for possession brought against the defendant as represented by the Court of Wards, because once it was established that the defendant had no title and that the same was in the successful plaintiff the Court of Ward's right to manage would cease. [Para 33]

Annotation : ('46-Man.) Specific Relief Act, S. 42, N. 9.

(e) Bengal Court of Wards Act (IX [9] o 1879), S. 13A — Claim for possession against ward of Court—Specific Relief Act (1877), S. 42, Proviso.

The provisions of S. 13A of the Act can never be applied if there is no holder of the property who can be regarded as a ward. Where such a person exists the property is his though subject to the management of the Court of Wards and if possession of the property is claimed from such person then a claim for possession must be made in which the so-called ward, through the Court of Wards, is made the defendant. [Para 28]

Annotation : ('46-Man.) Specific Relief Act, S. 42, N. 9.

(f) Bengal Court of Wards Act (IX [9] of 1879), S. 13A — Ward losing property to person with better title — Right of Court of Wards to manage property.

Where the Court of Wards manages for a ward, the right of the Court to manage must depend upon the right of the ward to the property. If the ward has no right to the property neither has the Court of Wards a right to continue in management. If the ward loses the property to a person with a better title such person does not become *ipso facto* or by operation of law a ward of the Court. The Court would be bound to assume management of the estate of the successful claimant by some fresh notification or declaration. [Paras 29 and 30]

(g) Civil P. C. (1908), S. 115 — Wrong decision as to maintainability of suit—Revision, if lies — *(Obiter.)*

(Obiter): A wrong decision as to the maintainability of a suit amounts to a denial of jurisdiction to decide the suit on its merits and hence an application can be brought under S. 115. [Para 37]

Annotation : ('44-Com.) Civil P. C., S. 115, N. 11, Pt. 3.

Paresh Nath Mookerjee (Jr.) and Asoke Chandra Sen (in No. 7) —for Petitioners.

Amarendra Mohan Mitra and Nagendra Mohan Saha (in No. 26), Atul Chandra Gupta, Ashutosh Ganguly and Jatindra Nath Banerjee —for Opposite Party.

Harries C. J.—These are two petitions for revision of orders made by the learned Subordinate Judge of the First Court of 24-Parganas on 29th September 1948. By these orders the learned Subordinate Judge held that two suits filed by the petitioners were not maintainable by reason of S. 42, Specific Relief Act.

[2] The petitioners were related—one being the uncle of the other. Each of the petitioners had brought a suit claiming that the Bijni Raj which owned extensive *zamindary* property in Assam and other properties in Calcutta and Benaras, belonged to them. One based his claim on lineal primogeniture and the other on the rule of ordinary primogeniture. In both the suits two defendants were impleaded, namely, Kumar Bhairabendra Narayan Deb, the present holder of the Raj as defendant 1 and the same Bhairabendra represented by the Manager of the Bijni Raj Wards Estate, as defendant 2.

[3] To appreciate the points at issue it will be necessary shortly to set out the history of litigation relating to this estate. The litigation actually started soon after March 1883 when the then holder of the Raj, Raja Kumud Narayan Bhup died. The Raja left surviving him two widows—Rani Abhoyeswari and Rani Siddheswari—and these two Ranis litigated. After the death of Rani Abhoyeswari Raja Jogendra Narayan Bhup, a brother's son of Raja Kumud Narayan, became the holder of the Raj. Raja Jogendra Narayan Deb, however, became insane and the Court of Wards took over the management of the estate in December 1918. It is to be observed that litigation went on relating to this estate and eventually the dispute was decided by the Judicial Committee of the Privy Council who pronounced judgment on 16th February 1942.

[4] In order to put an end to this dispute relating to this Raj the Assam Government in the year 1931 enacted the Bijni Succession Act (Assam Act II [2] of 1931) which came to be considered in the Privy Council case which brought one stage of this litigation to a close. This Act declared that the then holder Raja Jogendra Narayan, was the owner of the estate and provided that the next holder of the estate would be Bhairabendra Narayan Deb, defendant 1 in the present suits. Raja Jogendra Narayan whose estate was still being managed by the Court of Wards died on 18th June 1937 whereupon the Assam Government by a notification in the gazette declared that Kumar Bhairabendra Narayan Deb, defendant 1 in these suits had become the proprietor of the Bijni Raj. The Court of Wards continued in the management of the estate ostensibly for the purposes of paying off certain debts and expenses incurred during their management of the estate for Raja Jogendra Narayan.

[5] The two suits previously referred to which were brought by the plaintiffs were filed in the year 1940 and in each of the suits there is a prayer for a declaration that the plaintiff of that suit is entitled to the Bijni Raj. Both the plaintiffs in their respective plaints have made it clear that the decision of the Judicial Committee in the earlier suit was not binding upon them. Both the suits are purely declaratory suits and a court-fee of Rs. 20 was paid in respect of each of them. The suits are valued for purposes of jurisdiction at Rs. 92,000,00 and Rs. 89,60,991.

[6] During the pendency of these suits the Court of Wards on 1st October 1914, released the estate in favour of defendant 1 Raja Bhairabendra Narayan. Shortly after the estate had been released, Bhairabendra, defendant 1 in the suits, raised a preliminary issue regarding the maintainability of each of these suits. It was contended on his behalf that S. 42, Specific Relief Act, was a bar to each of the suits and eventually this Court directed the trial Court to decide this preliminary issue before proceeding further with the case.

[7] The preliminary issue was raised in two issues which had been framed by the lower Court :

Issue 7 : Can this suit proceed as framed ? Is it maintainable in view of S. 42, Specific Relief Act ? Has the plaintiff paid proper court fees ?

Issue 27 : Is the possession of the Court of Wards that of a stake-holder ? Has it retained charge of the properties in suit for and on behalf of the defendant Raja Bhairabendra Narayan Bhup ?

[8] On behalf of the petitioners it was argued in the Court below that the suits were maintainable as in the circumstances existing when the suits were filed no relief other than that of a declaration was open to either of the plaintiffs. It was contended that the defendant Raja Bhairabendra was not in possession and that the Court of Wards was in possession as a stake-holder. That being so, a declaration in favour of either of the plaintiffs would have the effect of compelling the stake-holder to hold the property for the successful plaintiff. As the Court of Wards was actually in possession as a stake-holder, a claim for possession by either of the plaintiffs was inappropriate and could not be made. Therefore, S. 42, Specific Relief Act would be no bar to the suits.

[9] On behalf of the defendant Bhairabendra it was argued in the first place that even if the suits when filed were properly framed a claim for possession had become essential in the events that had happened. As I have said, the Court of Wards gave up the management of the estate and released the same to Bhairabendra during the pendency of the suit. Bhairabendra was thereafter clearly in possession and no declaratory suit could possibly, it was argued, be maintained after such release. It was contended, therefore, that even if S. 42, Specific Relief Act did not bar these suits when they were originally instituted, the section certainly barred each of

the suits after the estate had been released in favour of Bhairabendra, defendant 1.

[10] Section 42 Specific Relief Act, in so far as it is material is as follows :

"Any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief :

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

[11] It will be observed that the section does not actually state that where a plaintiff is able to seek further relief but seeks merely a declaration the suit should be dismissed, but it does provide that in such a case no Court shall make the declaration prayed for. What is suggested in this case is that each of the plaintiffs was able to seek further relief, namely, possession of the estate and that being so, a Court could not make a declaration *simpliciter*. After the estate was released during the pendency of the suits the plaintiffs could have asked for possession. But it is contended on behalf of the petitioners that if the suits as originally framed were properly constituted the release of the property by the Court of Wards at a later stage could not affect the maintainability of the suit.

[12] Before us, it was not contended with any persistency that the subsequent release by the Court of Wards in favour of Raja Bhairabendra made these suits unmaintainable if they were maintainable when they were actually filed. The effect of subsequent events on the maintainability of a suit of this nature was discussed in a Bench case of the Madras High Court in *Govinda* v. *Perumdevi*, 12 Mad. 136, in which it was held that where a suit was brought for a declaration that certain alienations of land made by a Hindu widow to the defendants were not binding on the plaintiff, her reversionary heir, and pending appeal by the plaintiff, the widow died, the plaintiff was entitled to proceed with his appeal and further that he could not be permitted to amend his plaint and claim possession. It is unnecessary in the present cases to consider whether an amendment could be allowed. But there can be no doubt that this case is clear authority for the fact that where a suit for a mere declaration was properly constituted when filed it does not become unmaintainable by reason of the fact that subsequently the defendant acquires actual possession of the property.

[13] The same view was taken by a Bench of this Court in the case of *Sm. Annapurna Dasi* v. *Sarat Chandra*, 46 C. W. N. 355 : (A.I.R. (29) 1942 Cal. 394). In that case the learned Judges who constituted the Bench were of opinion that where there is properly framed declaratory suit at the time of the institution thereof, but by reason of subsequent events a prayer for consequential relief becomes necessary, the suit will not be hit by S. 42; the Bench was of opinion that a Court of Justice could take note of subsequent events and could mould the decree according to the circumstances.

[14] The learned Subordinate Judge was of opinion that the suits were not affected by the release which took place after the suits had been instituted and with that view I agree. Subsequent events could not attract the operation of S. 42 and, therefore, this Court must consider whether or not the suits were maintainable when they were actually filed.

[15] There can be no doubt that when these suits were instituted the estate was under the management of the Court of Wards. On 21st June 1937 the Assam Government by a notification in the gazette had declared that under the Bijni Succession Act, Raja Bhairabendra was the person who succeeded to the estate. On 28th July 1937 the Assam Government by another notification declared Raja Bhairabendra as a Ward of the Court of Wards under S. 3 and S. 60B, Bengal Court of Wards Act, and declared that the Court of Wards were retaining possession of the estate under Ss. 13 and 13A of the Act. On 1st November 1937, the notification of 28th July 1937 was corrected and it was stated that the Court or Wards were managing the estate on behalf of Bhairabendra under the provisions of S. 13A of the Act and not under Ss. 13 and 13A.

[16] As I have already stated the notification of 21st June 1937 that Raja Bhairabendra succeeded to the estate was merely a notification of succession, as provided by the Bijni Succession Act. The Court of Wards had been in possession of the estate of Bhairabendra's immediate predecessor, Raja Jogendra Narayan, and by reason of the notification of 28th July 1937 and 1st November 1937 they continued in management of the estate. Section 13, Bengal Court of Wards Act, 1879, provides the procedure when succession to the property of a ward is disputed. The section reads as follows :

"Whenever, on the death of any ward, the succession to his property or any part thereof is in dispute, the Court may either direct that such property or part thereof be made over to any person claiming such property, or may retain charge of the same until the right to possession of the claimant has been determined under Bengal Act VII [7] of 1876, or until the dispute has been determined by a competent Civil Court."

[17] Section 13A of the Act gives the Court of Wards power to retain charge of the property of a deceased disqualified proprietor or of a

proprietor who has ceased to be disqualified until certain debts have been discharged. The section reads as follows :

"If, when any disqualified proprietor dies, or ceases to be disqualified within the meaning of this Act, there remains undischarged any debts or liabilities which were incurred by, or are due from, such proprietor or which are a charge upon his property or any part thereof or any liabilities which were incurred by the Court for the benefit of the property of such proprietor.

Then notwithstanding anything contained in the foregoing sections, the Court may either withdraw from the charge of such property or retain such charge until such debts and liabilities, as the Court considers necessary to be discharged, together with all interest due thereon, have been discharged :

Provided that, after the death of a proprietor, the Court shall not retain charge on account of any debt or liability which has been declared by a competent Civil Court not to be binding on his representative."

[18] As I have said earlier, the Assam Government by their notification of 28th July 1937 declared that the Court of Wards retained possession of the estate under both S. 13 and S. 13A, Bengal Court of Wards Act. Quite clearly the Court of Wards could not retain possession under both these sections. If possession of an estate is retained under S. 13, there can be no doubt I think that the Court of Wards would retain possession as a stake-holder. They would be holding and managing the property on behalf of the person whose right of possession had later been determined under Bengal Act VII [7] of 1876 or by a competent Court. Section 13 presupposes that there is no person in existence whose *prima facie* claim can be recognised by the Court of Wards and that being so the section entitles the Court of Wards to continue to manage the property and to hold it until one of the claimants to the property establishes his claim.

[19] Section 13A, however, deals with entirely different circumstances. This section does not presuppose any dispute relating to the right to succeed to the property of a disqualified proprietor, but what it presupposes is the existence of certain debts which it is necessary to discharge before the Court of Wards releases the property to the successor of such disqualified proprietor or to the person who has ceased to be disqualified. The section in fact presupposes the existence of a rightful successor or of a proprietor not disqualified but merely gives the Court of Wards power to retain management of the estate of such successor or proprietor until certain debts of his predecessor have been discharged.

[20] The Assam Government realised eventually that the Court of Wards could not retain management under both these sections and by the notification of 1st November 1937 the original notification was corrected and it was declared that the Court of Wards would continue in management of the estate under S. 13A.

[21] It was contended on behalf of the petitioner that the Court of Wards were in fact stake-holders whether they managed under S. 13A of the Act. As I have already stated, the Court of Wards would appear to be stake-holders if they continued to manage the property under S. 13. But in my view they would not be stake-holders if they continued to manage the property of a disqualified proprietor under S. 13A. Under S. 13A the Court of Wards would in fact be managing the property of the heir or successor of the disqualified proprietor or of the proprietor who has ceased to be disqualified but only for certain purposes, namely, the discharge of debts due from the disqualified proprietor's estate.

[22] It seems to me clear that where the Court of Wards manages property under S. 13A, the Court of Wards manages the property of a ward.

[23] A "ward" is defined in S. 3 of the Act and means "any person who is under the charge of the Court of Wards, or whose property is under such charge."

[24] Section 60B of the Act provides :

"For the purposes of S. 10C, Part VII and Ss. 60 and 60A, a person whose property is under the charge of the Court of Wards under S. 11 by reason of the fact that such person has become entitled to the property jointly with a disqualified proprietor, or charge of whose property has been retained under S. 13A, shall be deemed to be a ward, but only so far as regards such property."

[25] It is, therefore, clear that where the Court of Wards retains the management of property under S. 13A the owner of such property, namely, the lawful successor of the disqualified proprietor or the proprietor who has ceased to be disqualified is deemed to be a ward for certain purposes and the Court manages the property on behalf of such ward. It is true that the owner is not a ward in the true sense because he is not a disqualified proprietor. But he is deemed to be a ward in so far as it is necessary to enable the Court of Wards to manage the property and to make provisions for the payments of the debts of the estate. It seems to me clear that under S. 13A of the Act the Court of Wards is not in the position of a stake-holder. It is in much the same position as it is in when it has taken over the management of a disqualified proprietor's estate. It is managing the property of another though for certain limited purposes. The property belongs to the ward and the Court of Wards is merely a manager for certain limited purpose.

[26] Where the Court of Wards manages the property of a disqualified proprietor there can, I think, be no doubt that the disqualified pro-

prietor is the owner of the property and is in possession of it. He cannot sue and be sued except through the Court of Wards and if a person makes claim to property held by a ward he must claim possession of that property and sue the disqualified proprietor as represented by the Court of Wards. In short, he must observe the provisions contained in PART VII of the Act relating to suits brought against the Court of Wards. An outsider claiming possession of the property of a disqualified proprietor would have to sue the proprietor through the Court of Wards. A suit merely against the Court of Wards alleging the latter to be in possession could not possibly succeed as the possession of the Court of Wards if it can be said to be any possession, is merely possession as manager of the estate of the ward.

[27] It appears to me that the position of a ward under Ss. 13A and 60B of the Act is precisely similar to the position of a disqualified proprietor when a third party claims property said wrongly to form part of such ward's estate. The claimant is not claiming property in the possession of the Court of Wards but is claiming property, in the possession of the ward though under the management of the Court of Wards. Section 60B provides that such a person whose property, the Court of Wards is managing, is deemed to be a ward for the purpose of PART VII of the Act and therefore must be sued as a ward through the Court of Wards as provided by S. 51 of the Act.

[28] It appears to me that the provisions of S. 13A of the Act can never be applied if there is no holder of the property who can be regarded as a ward. Where such a person exists, the property is his though subject to the management of the Court of Wards and if possession of the property is claimed from such person then a claim for possession must be made in which the so-called ward, through the Court of Wards, is made the defendant. That was precisely the position when these two suits were instituted by the petitioners. Each of the petitioners was in a position to claim further relief against Bhairabendra through the Court of Wards. They could have claimed possession and that being so, no declaration could be made by reason of S. 42, Specific Relief Act, and neither of the suits was consequently maintainable.

[29] On behalf of the petitioners it was contended that no claim for possession could be made in either suit because even if it was established that either of the plaintiffs had a better title to the property than Bhairabendra, nevertheless the Court of Wards would be entitled to retain possession of the estate of the deceased disqualified proprietor until the debts were paid. If that were so the Court of Wards would be in the position of a stake-holder. But in my view by reason of Ss. 3 and 60A of the Act the Court of Wards under S. 13A is clealy managing the property of a ward, and if the ward for whom the Court of Wards is managing has no title to such property, neither has the Court of Wards any right to manage such property. Under the section it has a right to manage the property of a particular person and if that person has no right to such property neither has the Court of Wards a right to continue in management.

[30] It may be that if either of the plaintiffs succeeded in recovering possession of this property the Assam Government might notify that the Court of Wards should take over such property for the payment of the debts of the late Raja Jogendra Narayan. But in my view there could be no management of any estate successfully claimed by either of the plaintiffs without a fresh notification. The management of the estate of Bhairabandra could not become, by operation of law, management of the estate of either of the plaintiffs if he was successful in a claim for possession. Where the Court of Wards manages for a ward, the right of the Court to manage must depend upon the right of the ward to the property. If the ward loses the property to a person with a better title such person does not become *ipso facto* or by operation of law a ward of the Court. The Court would be bound to assume management of the estate of the successful claimant by some fresh notification or declaration. The case is entirely different from the case envisaged in S. 13 of the Act where the Court of Wards is merely managing for the person who ultimately succeeds in establishing title to property. In my judgment as Bhairabendra was clearly a ward a claim to property held by him could be made and a suit could be brought for possession by suing Bhairabendra represented by the Court of Wards. This relief was open to each of the petitioners and therefore the suits which they filed which were purely declaratory suits were not maintainable.

[31] It was also contended that declaratory suits were the only form of suits which could be brought in this case by reason of the fact that in earlier litigation an injunction had been issued restraining the Court of Wards from giving possession of the property to Bhairabendra. This injunction was not discharged until the end of the litigation in the Privy Council in 1942 and the injunction was therefore clearly in existence when these suits were filed in 1940. The contention is that as the Court of Wards could not give possession to Bhairabendra a suit for possession against Bhairabendra could not possibly succeed as the latter was not in a position to give possession. Reliance was placed

upon an observation of Lord Thankerton in the case of *Sunder Singh Mallah Singh Sanatan Dharam High School Trust* v. *Managing Committee, Sunder Singh Mallah Singh Rajpur High School*, 65 I. A. 106 at p. 112 : (A. I. R. (25) 1938 P. C. 73). The learned Lord observed :

"The Subordinate Judge held that a suit for declaration did not lie, on the ground that the plaintiff was neither in possession nor in control of the management of the school, and that the proper form of the suit would have been one for possession and management of the school and not merely a declaration of such right, and that the plaintiff had omitted to seek this further relief. The High Court took the contrary view, on the ground that the defendants were not in possession or in a position to deliver possession of the properties and that therefore there was no further relief available to the plaintiffs against the defendants. Their Lordships agree with the High Court in this view."

[32] It is contended that as an injunction existed restraining the Court of Wards from giving Bhairabendra possession the latter was not in a position to deliver possession and therefore no claim for possession could be made and suits for declarations simpliciter would be maintainable.

[33] It appears to me, however, that this injunction was no bar to a suit for possession brought against Bhairabendra as represented by the Court of Wards, because once it was established that Bhairabendra had no title and that the same was in the successful plaintiff the Court of Wards' right to manage would cease. All that the injunction meant was that whilst the Court of Wards was in management of the property which it was entitled to manage, it should not hand over or release the property to Bhairabendra. The injunction would have no effect if it was established that the property belonged not to Bhairabendra but to a third person. He could recover possession as against Bhairabendra through the Court of Wards, as strictly, the possession throughout is the possession of the ward and not of the Court of Wards. All that the injunction really meant was that the Court of Wards should not release the property or give up management in favour of Bairabendra. If, however, a successful claimant made good his title to the property the Court of Wards would not be acting in breach of the injunction in giving up the management. Bhairabendra through the Court of Wards could be ejected in execution of a decree and that being so, the fact that an injunction existed did not, to my mind, make it impossible for the plaintiffs in these suits to claim possession of the property.

[34] Lastly it was argued that if S. 13A contemplated a ward, the ward was in fact the deceased disqualified proprietor. Clearly such a contention is contrary to S. 60A of the Act. But reliance was placed upon the proviso to S. 13A which is as follows :

"Provided that, after the death of a proprietor, the Court shall not retain charge on account of any debt or liability which has been declared by a competent civil Court not to be binding on his representative."

[35] It was contended that this proviso suggested that the disqualified proprietor's representative was not a ward as contemplated in the Act. But I can see nothing in the proviso which can affect the matter in any way. The Court of Wards under S. 13A manages the property for its ward who is the legal representative of the deceased disqualified proprietor. If the debts or liability for the discharge of which the Court retains possession, are not binding on the ward then the Court has no right to retain the management of the property.

[36] For these reasons I am satisfied that the learned Subordinate Judge was right in holding that neither of the suits filed by the petitioners was maintainable.

[37] It might be suggested that even if the learned Subordinate Judge was wrong we could not interfere in this case under S. 115, Civil P. C. In my view, however, a wrong decision of the learned Subordinate Judge in this question of the maintainability of these suits would amount to a denial of jurisdiction to decide the suits on their merits and that being so the applications could in my view be brought under S. 115, Civil P. C., and we could have interfered had we been of opinion that the Subordinate Judge was wrong. The point, however, does not arise, as in our view the decision of the learned Subordinate Judge cannot be assailed and therefore the petitions fail and each rule is discharged with costs. We assess the hearing fee in each case at ten gold mohurs.

Bachawat J.—I agree.

V.R.B. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 391 *[C. N. 145.]*

CHATTERJEE J.

Babulal Dhandhania — Petitioner v. *Messrs. Gauttam & Co. — Respondent.*

Arbitration Suit No. 141 of 1949, D/- 12th August 1949.

Partnership Act (1932), S. 69 (3) — 'Proceeding,' meaning of — Arbitration clause in contract with unregistered firm — Reference to arbitration if barred — Arbitration Act (1940), S. 2 (a).

The word 'proceeding' in S. 69 (3) means something in the nature of a suit, that is, a proceeding which is instituted or initiated in a Court and does not cover a reference to arbitration *aliunde* the Court. Hence S. 69 cannot preclude a party from making a reference to arbitration without the intervention of the Court, in pursuance of an arbitration clause in a contract with an unregistered firm. [Paras 17, 23]

Annotation: ('46-Man.) Partnership Act, S. 69, N. 9.

K. K. Basu — for Petitioner.
R. S. Bachawat — for Respondent.

Order. — This is an application by the petitioner Babulal Dhandhania for setting aside an award made by the Bengal Chamber of Commerce, dated 8th April 1949.

[2] On 9th March 1948, the respondent Gauttam & Co. bought from the petitioner 2,000 maunds of linseed oil at Rs. 36 per maund. The terms of the contract will appear from Bought Note No. 2957, a copy of which is annexed to the petition.

[3] There was a clause that any dispute regarding the contract was to be settled by arbitration of the Bengal Chamber of Commerce in Calcutta. The petitioner failed to deliver the goods in time and it is alleged by the respondent that at the request of the petitioner the time for delivery was extended from time to time till 21st July 1948.

[4] The petitioner delivered certain quantities but failed to deliver about 1056 maunds. The time for delivery was further extended till 25th August 1948. Yet the petitioner failed and neglected to give delivery. According to the petitioner there was a frustration of the contract. But the respondent alleged that the real reason for non-delivery was that the market had gone against the petitioner and he wanted to avoid delivery.

[5] On 19th October 1948, the respondent referred the disputes to the arbitration of the Bengal Chamber of Commerce. An award was made on 8th April 1949 by that Chamber which was filed in Court on 9th July 1949. Under the award the petitioner who carried on business under the name and style of Jhowla Prosad Babulal was directed to pay to the respondent Gauttam & Co., a sum of Rs. 18,480 8-9 together with interest and costs as mentioned therein.

[6] The ground on which the petitioner seeks to set aside the award is that the respondent is not a registered firm and in any event was not registered under the Indian Partnership Act at the material time. The letter dated 6th May 1949 from the Registrar of firms addressed to the petitioner's attorney shows that Gauttam & Co. was not registered in the office of the Registrar under the Partnership Act.

[7] Learned counsel for the petitioner, Mr. K. K. Basu, has contended that the effect of non-registration is fatal to the validity of the reference and the award. His argument is based on S. 69, Partnership Act. The relevant portion of that section is set out below :

"*69.* (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of firms as partners in the firm.

(3) The provisions of sub-ss. (1) and (2) shall apply also to a claim of a set-off or other proceedings to enforce a right arising from a contract, but shall not affect—

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner."

[8] Mr. Basu contends that the reference to arbitration to the Bengal Chamber of Commerce constitutes a "proceeding to enforce a right arising from a contract" under S. 69 (3), Partnership Act. According to him the effect of sub-ss. (1), (2) and (3) of S. 69 properly read is that no suit or proceeding to enforce a right arising from a contract shall be instituted in any Court or before any arbitrator by a firm unless that firm is registered under the Partnership Act.

[9] No authority has been cited by Mr. Basu in support of his contention. In the affidavit in opposition filed by the respondent it is pointed out that Gauttam & Co. is a registered firm and it was registered under the Partnership Act on 1st June 1949 and this appears from a copy of the certificate of the Registrar annexed to the affidavit of a partner of the said firm. But Mr. Basu contends that on the date the reference was made, which was admittedly 19th October 1948, the firm was not registered and, therefore, the reference to arbitration was bad and the arbitrators had no authority to decide the alleged disputes referred to them. He argues that the reference to the Bengal Chamber of Commerce means the enforcement of an arbitration agreement between the parties and therefore it was really enforcing a right arising from a contract between the parties.

[10] The question, I have to determine, is whether the reference to arbitration in this case meant a proceeding to enforce a right arising from a contract within the meaning of S. 69 (3), Partnership Act.

[11] Section 69 contains one of the most vital provisions introduced by the Partnership Act of 1932. It was suggested in some quarters that it was desirable to make the registration of a firm compulsory but that suggestion was not acceeded to. Yet the practical effect of S. 69 is to make the registration of a firm compulsory. That section forbids the institution of certain suits in

respect of a partnership which has not been registered under the Act.

[12] Under sub-s. (1) a partner cannot institute a suit to enforce a right arising from a contract or conferred by the Act against the firm or his co-partners unless the firm is registered.

[13] Sub-section (2) lays down that a firm which has not been registered shall not be competent to institute a suit against any third party to enforce a right arising out of a contract until the registration of the firm is effected.

[14] Sub-section (3) extends the provision of sub-ss. (1) and (2) to a claim of set-off or other proceedings to enforce a right arising from a contract. But it introduces exceptions in case of suits for the dissolution of the firm or for accounts of a dissolved firm and preserves the power of an Official Assignee under the Insolvency Acts.

[15] Sub-section (2) bars suits by an unregistered firm for the recovery of damages for non-delivery of goods. Obviously if a firm is sued as a defendant and then if it wants to claim a set-off for such damage, then the firm must be registered otherwise the claim would be incompetent.

[16] The question is can the bar be extended to the case of an unregistered firm which claims reference to arbitration under an arbitration clause in a contract between the parties? I am assured that there is no authority directly on the point. In *Jamal Usmal* v. *Firm Umar Haji Karim*, I.L.R. (1943) Nag. 540:(A.I.R. (30) 1943 Nag. 175), the learned Judges held that S. 69 (3), Partnership Act has no application to the execution of a decree. They held that the words "other proceedings to enforce a right arising from a contract" are to be taken as *sui generis* of a claim of set off. Sub-sections (1) and (2) relate to the right of bringing a suit and the opening words of sub-s. (3) relate to the right of setting up a defence and have no relation to the entirely different question of a claim to enforce the execution of a decree. A claim of set-off can be a partial defence to a suit and such a claim arising out of a contract may be set up in defence to negative the right of suit altogether, and it is these claims in defence which are placed under the same disabilities as the right to bring a suit at all in so far as unregistered firms are concerned. Sub-section (3) of S. 69 has, therefore, no application in the execution of decrees, whether consent decrees or decrees after contest. I have to point out that such elaborate discussions were not needed because in S. 69 (4) it is clearly provided that S. 69 shall not apply to any proceeding in execution. Another case cited is *Satish Chandra* v. *P. N. Das & Co.*, 16 Pat. 742 : (A. I. R. (25) 1938 Pat. 231): Objection was taken to the enforceability of an award in favour of an unregistered firm under S. 69 (1), Partnership Act. It was held that there was no illegality on the face of the award within cl. (c) of para. 14 of Sch. 2 to the Code. No argument was advanced on the basis of S. 69 (3), Partnership Act.

[17] In my view the word 'proceeding' in S. 69 (3) means something in the nature of a suit that is a proceeding which is instituted or initiated in a Court. Mr. Bachawat, learned counsel for the respondent, has drawn my attention to *Hood Barrs* v. *Cathcart*, (1894) 3 Ch. D. 376. In that case the words "action or proceeding instituted" in S. 2, Married Women's Property Act, 1893 were held to mean some action, or proceeding in the nature of an action, initiated by a married woman as a plaintiff, and do not include a motion or step taken by a married woman in an action in which she is defendant. Davey L. J. observed as follows :

"It must be borne in mind that an appeal is in reality in the nature of a defence by the person against whom an order has been made. Now, I take it that the words 'action or proceeding' must mean some action, or some proceeding in the nature of an action ; that is to say, a proceeding in which a lis is initiated ; and it appears to me that 'instituted' would be an inapt word for any such proceeding as has been suggested by Mr. Hopekinson. I have never myself heard of an appeal being instituted and I do not suppose any one ever heard of such an expression being applied to an appeal ; whereas 'instituted' is an apt word for the commencement of a suit, and I think the use of the words 'from time to time' points out what is meant."

[18] In *Sharpington* v. *Fulham Guardians*, 1904-2 Ch. 449 : (73 L. J. Ch. 777), it was held that a demand for a reference to arbitration under an arbitration clause in a building contract in respect of an alleged breach of that contract by the guardians of a union was not a commencement of proceedings within the meaning of S. 4, Poor Law (Payment of Debts) Act, 1859, and a claim for damages for breach of such a contract did not constitute "a debt, claim or demand lawfully incurred or become due" within the meaning of S. 1 of that Act until the amount of the damage had been ascertained either by the award of an arbitrator or in some other manner provided by law.

[19] Stroud in his Judicial Dictionary, Supplementary volume, 1931 Edition, at page 728, cites this case as authority for the proposition that a claim or demand for arbitration under a contract is not a "proceeding" within S. 4, Poor Law Act of 1859.

[20] On the authority of *Chhabba Lal* v. *Kallu Lal*, 73 I. A. 52 : (A. I. R. (33) 1946 P. C. 72), Mr. Bachawat contends that the petitioner cannot set up the alleged illegality or invali-

dity of the reference on an application to set aside an award. With considerable cogency Mr. Basu points out that in that case the application was made under paragraph or S. 15 of Sch. II, Civil P. C., which applies to an award made as the result of an order of reference in a suit. The Judicial Committee had to construe the words 'being otherwise invalid' in S. 15. But their Lordships pointed out that by way of contrast the language of S. 21 of Sch. II may be noted. Sir John Beaumont observed :

"That S. 21 empowers the Court to pronounce judgment according to an award made on a reference out of Court, and the opening words require the Court to be satisfied that the matter has been referred to arbitration. There are no such words in S. 16."

Section 21 dealt with the filing and enforcement of an award on a reference without the intervention of Court and in such a case the Court must be satisfied that there was a valid reference to arbitration. It is urged by Mr. Basu that the Privy Council judgment is an authority only for the proposition that when a reference has been made by an order of Court in a suit the validity of the award cannot be questioned on an application for setting aside the award. Really such reference by Court presupposes a valid agreement for arbitration judicially recognised as binding on the parties.

[21] My attention has been drawn to *E. D. Sassoon and Co.* v. *Ramdutt Ramkissendas*, 49 I. A. 366 : (A. I. R. (9) 1922 P. C. 374). The Judicial Committee held that where an award is objected to on the ground of want of jurisdiction in the arbitrator, suit can be instiuted and also an application can be filed under S. 14, Arbitration Act, 1899 for setting aside the award. How far the present Arbitration Act 1940 reproduces the old law is a debatable point.

[22] I would allow Mr. Basu to urge his point and to treat it as an application under S. 33, Arbitration Act and, if necessary, I would have allowed an amendment of the petition.

[23] On the merits the question raised is one of the proper construction of S. 69, Partnership Act. Under sub-s. (3) the provisions of sub-ss. (1) and (2) shall apply also to proceedings to enforce a right arising from a contract. Let us assume that a reference to arbitration is a proceeding to enforce a right within sub-s. (3). Yet the question is : What is the penalty or disqualification created or imposed by sub ss. (1) and (2) ? These sub-sections merely bar the institution of certain suits in any Court. Therefore applying the provisions in those sub-sections to a case covered by sub s. (3), the penalty or disqualification that the non registration of a firm entails is that it is debarred from instituting proceedings in any Court. In my view, S. 69, Partition Act, does not preclude a reference to an arbitrator without the intervention of a Court and the word 'proceeding' in S. 69 (3) does not cover a reference to arbitration *aliunde* the Court.

[24] A word like 'proceeding' may have several or different meanings and its exact meaning can be determined by its association with other words. The language used is not very clear and in case of any doubt or obscurity the right of a person under a valid and binding contract to resort to a private forum for the determination of his disputes should not be taken away and a new obligation or penalty ought not to be imposed on him so as to bar the exercise of his right in the absence of explicit language in the Statute compelling the Court to decide against such reference to arbitration.

[25] The application fails and is dismissed with costs.

K S. *Application dismissed.*

A. I. R. (37) 1950 Calcutta 394 *[C. N. 146.]*

DAS GUPTA J.

Gangadhar Ram Chandra, a firm — Plaintiff — Petitioner v. *Dominion of India — Opposite Party.*

Civil Rule No. 599 of 1949, D/- 9-9-1949, from order of Munsif, 2nd Court, Burdwan, D/- 31-1-1949.

(a) Railways Act (1890), S. 72 — Risk Note A — Short delivery — Leakage in transit — Railway, when can be absolved from liability.

For the purpose of Risk Note A, shortage in weight of goods is a condition in which the goods are delivered. It does not follow, however, that once Risk Note A has been executed every case of short delivery will be covered by the saving clause. Before the saving clause can have operation, it must appear prima facie that the loss which actually occurred was in some way connected with the defective condition of the packing. [Paras 7 and 10]

A consignment of rape seed bags under 'Risk Note A' was found on delivery to be short in weight as a result of cuts caused in certain bags through flap-door gaps. The consignee sued for compensation for loss. The defendant Railway failed to prove that the loss was in some way connected with the defective condition of the goods or the shortage was due to circumstances beyond their control :

Held, that the Railway could not claim the special protection afforded under the clause in Risk Note A and therefore it was liable to pay compensation,

[Paras 11 and 13]

Annotation : ('43-Man.) Railways Act, S. 72, N. 5, 22.

(b) Limitation Act (1908), Arts. 30, 31—Applicability —Short delivery — Suit for compensation for loss of goods in transit.

Article 31 applies to all cases of non-delivery other than those due to loss of the goods. Hence a suit for compensation for loss of goods in transit and the consequent short delivery would be governed by Art. 30 and not by Art. 31 and in the absence of any evidence to show as to when the loss actually occurred the date of the loss must be taken to be the date on which the loss was first discovered for purposes of starting point of limitation. [Paras 14, 15 & 16]

Annotation : ('42-Com.) Limitation Act, Art. 30, N. 1 and 7 and Art. 31, N 2.

(c) Limitation Act (1908), Art. 31 — Starting point — "When the goods ought to be delivered".

Obiter.— In deciding what point of time should be held to be the time when the goods ought to be delivered for purposes of Art. 31, it is reasonable to take into account the date when the goods are despatched, the date when the goods reach the destination, the nature of the goods and the manner in which the goods are sent. It seems to be usual for the Railway Administration to send notices after the arrival of goods at the destination with a warning that if the goods are not taken delivery of within a certain period, demurrage will be charged. If and when such notice is issued, the point of time after which demurrage will be chargeable may very well be taken to be the time when the goods ought to be delivered. [Para 18]

Where a wagon full of rape seeds booked on 18th March at Delhi arrived at Burdwan on 28th March, and the consignee took delivery on 18th April without any notice of arrival of the goods from the railway, it was held that the date of delivery could not be considered to be beyond the date when the goods ought to be delivered. [Para 18]

Purushottam Chatterji— for Petitioner.

Bhabesh Narayan Bose— for Opposite Party.

Order.— 240 bags of rape seed were booked from Delhi to Burdwan on 17th March 1947, the present petitioner being the consignee. He took delivery on 18th April 1947. All the 240 bags were delivered, but of these 7 had been cut and there was a resultant shortage in the contents, of 3 maunds 35 seers, as certified by the goods clerk who gave delivery. The petitioner having sued the Railway Company for compensation for this loss, the defendants pleaded that due to the special protection afforded by a certain clause in Risk Note A under which the consignment had been sent, the plaintiff could not succeed unless misconduct on the part of the Railway administration's servants was proved and that there was no such misconduct. It was further contended that the plaintiff's claim was barred by limitation.

[2] The learned Judge of the Small Cause Court who tried the suit came to the conclusion that the defendants were entitled to protection of the clause in Risk Note A, that no misconduct had been proved and also that the suit was barred by limitation.

[3] For the purpose of the present Rule, we must proceed on the assumption that the learned Judge's finding of fact that no misconduct had been proved is correct. The other two questions namely whether the defendant was entitled to any special protection in view of the clause in Risk Note A or the question whether the suit was barred by limitation are questions of law on which it is necessary to consider whether the learned trial Court's conclusion is right.

[4] Risk Note A forms the basis of the contract in cases where articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit. The special clause runs thus:

"I/We, the undersigned do hereby agree and undertake to hold the Railway Administration . . . . . harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants."

[5] In a recent case of the Patna High Court, viz. *Governor General of India in Council* v. *Firm Bishundayal Ram Gourishankar*, A. I. R. (35) 1948 Pat. 48, Meredith J. held that the word 'loss' as used in Risk Note A cannot refer to any loss of the goods, but refers to loss arising from the condition in which the goods are delivered; that in other words the Risk Note A has no application at all to cases of failure to deliver, or pilferage, because a thing never delivered cannot be said to have been delivered in any condition, and therefore, no question arises of any loss arising from the condition in which the goods were found on delivery. It was accordingly held that the Railway Administration can never plead the execution of Risk Note A in bar to a claim based on non-delivery, on account of pilferage.

[6] In *Bansi Ram* v. *B. N. W. Rly. Co.*, 51 ALL. 480: (A. I. R (16) 1929 ALL. 124), Sulaiman J. took a different view as regards the meaning of the words "loss arising from the same". He held that while this would mean loss arising from condition in which the goods are delivered, a shortage in weight is a condition in which the goods are delivered, and is covered by the saving clause in Risk Note A.

[7] To hold that when, say X goods are consigned and (X-N) goods are delivered, really X goods are being delivered in a condition of shortage, involves some straining of the word 'delivery'. The fact, however, that the clause is clearly intended to cover cases of wastage and leakage of the contents justifies this straining, and I agree that for the purpose of Risk Note A, shortage in weight of goods is a condition in which the goods are delivered. It does not follow, however, that once Risk Note A has been executed every case of short delivery will be covered by the saving clause.

[8] It is necessary to look to the entire document to decide how far the protection of this clause in Risk Note A extends. The form opens with the words:

"To be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit."

This clause was known to and must be taken to have been consciously in the mind of the parties

at the time, the risk note was signed. When therefore in the operative portion of the document the signatory agrees to hold the Railway authorities

"free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from the misconduct on the part of the Railway Administration's servant,"

the parties must be taken to have also agreed that this would apply only where the condition in which the goods are delivered may either be due to the fact that they were already in bad condition or to the fact that they were so defectively packed as to be liable to damage, leakage or wastage.

[9] It is no doubt true that the very fact that in this case Risk Note A was executed is evidence to show that either the goods were in bad condition when tendered or they were so defectively packed as to be liable to damage, leakage or wastage in transit. The evidence indicates that this was a case of defective packing inasmuch as the bags used were old.

[10] Something more, however, is necessary before the saving clause can have operation. It must appear *prima facie* that the loss which actually occurred was in some way connected with the defective condition of the packing. That, in my opinion, the defendant has failed to show. When bags are old they may burst and wastage may occur because of that. The defendant's own papers, the U. T. M. Book however clearly indicates that this was not a case of wastage because of the bad condition of the bags; for, it runs thus: "240 bags of R/seed of which found 7 bags cut and slack through flap door gaps." I find it impossible to put any interpretation on this except that the person who wrote this concluded from what he saw of the condition of the 7 bags that they had been cut through the flap door gaps.

[11] My conclusion, therefore, is that the special protection afforded by the clause in Risk Note A is not available to the defendant in the circumstances of this case.

[12] It was, however, argued by Mr. Bose on behalf of the opposite party that in any case the liability of the defendant cannot be more than that of a bailee and so the defendant would not be liable to compensate the plaintiff unless it appeared that the shortage was due to circumstances which were within the control of the Railway Administration. The learned Advocate has drawn my attention to a passage in the judgment where the learned Judge observes:

"In the absence of such positive evidence given by the plaintiffs regarding misconduct on the part of the servants of the defendant who has given all material and necessary evidence to show that the shortage was due to the circumstances beyond the control of the Railway Administration . . . . . ."

The learned Advocate asks me to consider this as a finding of fact that in fact the Railway defendant has proved that the shortage was beyond the control of the Railway Administration. I am unable to read that passage in that manner. It does not appear that the learned Judge's attention was drawn to the question whether the liability of the defendant would be merely just that of a bailee; in any case, he does not record it as his conclusion that the defendant had proved that the shortage was due to circumstances beyond the control of the Railway Administration. His statement, to my mind amounts only to this that the defendant has given evidence which if believed would tend to show that the shortage was due to circumstances beyond the control of the Railway Administration. I must admit, however, that on going through the evidence of the two witnesses examined on behalf of the defendant, I am unable to understand what evidence the learned Judge was thinking of when he said that the defendant had given evidence to show that the Railway Administration had given all material and necessary evidence to show that the shortage was due to circumstances beyond the control of the Railway Administration. In the present case the shortage was due to presence of some gaps in the flap door. If evidence had been given that the extent of the gaps in the flap door of this wagon was such as cannot be prevented by ordinary care, I could have taken that as evidence to show the shortage was due to circumstances beyond the control of the Railway Administration. Nothing has, however, been said by the witnesses either about the extent of the gaps in this particular wagon or about the question whether such gaps can be prevented or not. The learned Advocate wanted me to assume that some gaps there must remain and argued that the mere existence of such gaps should not be considered to show any omission to take due care on the part of the Railway Administration. I do not see, however, any justification for making such an assumption in the absence of proper evidence on the record.

[13] My conclusion after a reading of the evidence is that it has not been shown that the shortage was due to circumstances beyond the control of the Railway Administration and consequently the defendant would be liable for compensation, unless the plaintiff's claim appears to be barred by limitation.

[14] On the question of limitation, the first point for decision is whether this case is to be governed by Art. 30 or Art. 31, Limitation Act.

Article 30 provides one year's limitation from the date "when the loss or injury occurs" for suits "against a carrier for compensation for losing or injuring goods." Article 31 provides the same period of one year from the date "when the goods ought to be delivered" against a carrier for compensation for non-delivery of, or delay in delivering goods. Obviously, any case of loss of goods would, at the same time, be a case of non-delivery. But there may be cases of non-delivery even without any loss. Article 31 should, therefore, be held to apply to all cases of non-delivery other than those due to loss of the goods. In view of this, it would, I think, be proper to treat this case as covered by Art. 30, Limitation Act.

[15] The question would then arise as to when the loss occurred. Obviously, this would be a matter which the carrier is in a much better position to prove than the plaintiff. We may indeed think of many cases where neither the carrier defendant nor the plaintiff is in a position to know when the loss has occured. In the present case, there is no evidence on the record to indicate when the loss did actually occur. The learned trial Court has stated in its judgment that some bags were cut during transit between Delhi and Burdwan. The learned Advocate for the opposite party has placed reliance on this statement and has argued that this showed that the loss certainly occurred some day before 28th March when the wagon reached its destination — Burdwan. I am unable to see, however, any basis in the evidence on record for the learned Judge's finding that the bags were cut during transit. This appears to be a finding without any evidence and so I cannot attach any weight to this.

[16] In the absence of any evidence on the point, it seems to me that the date of the loss should be taken to be date on which the loss was first discovered, namely, 18th April 1947. This is undoubtedly somewhat arbitrary, but there seems to be no other way in which to deal with a situation of this nature. If the time runs under Art. 30 from 18th April 1947, the suit must be held to be within time after giving the plaintiff two month's time for service of notice under S. 80, Civil P. C.

[17] I, therefore, hold that the suit was not barred by limitation.

[18] Even if Art. 31 is held to apply to this case, it seems to me that the suit is within time. Under Art. 31, limitation runs from the time "when the goods ought to be delivered." In the present case, as in most cases, no special date was fixed as the time on which delivery would be made by the carriar. In deciding what point of time should be held to be the time when the goods ought to be delivered it seems to me to be reasonable to take into account the date when the goods are despatched, the date when the goods reach the destination, the nature of the goods and the manner in which the goods are sent. Thus, if a wagon load of goods is sent, more time should be given after the despatch and the proper time for delivery than in a case where just a few bags are sent. Again, if the goods are of a perishable nature, very little time should be given for delivery after the goods have reached their destination. It seems to be usual for the Railway Administration to send notices after the arrival of goods at the destination with a warning that if the goods are not taken delivery of within a certain period demurrage will be charged. If and when such notice is issued, the point of time after which demurrage will be chargeable may very well be taken to be the time when the goods ought to be delivered. No evidence has been given in the present case whether any such notice was issued. Mr. Bose on behalf of the defendant has suggested that it may very well be that the defendant without obtaining any notice went by chance to the station on that day to see whether the goods had arrived and found that the goods had arrived. I do not think it necessary, however, for the purpose of this case to arrive at any decision as to whether any such notice was served. Even in the absence of such notice, it seems to me clear that when one wagon full of rape seed booked on 18th March at Delhi arrived at Burdwan on 28th March, the 18th of April on which delivery was taken cannot reasonably be considered to be beyond the date when "the goods ought to be delivered." I am, therefore, of opinion that even if Art. 31, Limitation Act, applies, the suit is within time.

[19] The plaintiff's suit should, therefore, succeed except that he is not entitled to the interest claimed for the period prior to the institution of the suit.

[20] Accordingly, I would set aside the order of the learned Munsif and order that the suit be decreed for the amount of Rs. 128-9 0. The plaintiff should get his costs in both the Courts.

K.S. *Revision allowed.*

A. I. R. (37) 1950 Calcutta 397 *[C. N. 147.]*

G. N. DAS AND DAS GUPTA JJ.

Premananda — Plaintiff — Petitioner v. *Dhirendra Nath Ganguly and others—Defendants—Opposite Party.*

Civil Rule No. 847 of 1949, D-/ 14 12-1949, from order of Sub-Judge, 2nd Court, Howrah, D/- 17-5-1949.

Court-fees Act (1870), Sch. II, Art. 17 (Bengal)—Suit for partition—Allegation of joint possession—

Fixed court-fee of Rs. 15 paid — Evidence dislosing plaintiff not in possession—Effect of — Court-fees Act (1870), S. 7.

The question as to what court-fees are payable on a plaint has to be decided on the allegation in the plaint and the nature of the relief claimed. Whatever may transpire in the evidence, the plaint remains the same until and unless it is amended. [Para 2]

Where in a suit for partition, a fixed court-fee of Rs. 15 was paid on the plaint on the allegation of joint possession with other co-sharers, that court-fee must be held to be sufficient so long as the plaint is not amended and *ad valorem* court-fee will not be payable on the value of the property on the ground that it transpired in the evidence that the plaintiff was not in possession. [Paras 2 & 7]

Annotation : ('49-Com.) Court-fees Act, S. 7, N. 3.

Sambhunath Banerjee (Sr.) and Ganganarayan Chandra — for Petitioner.

Sudhir Kumar Acharya — for Opposite Party.

Das Gupta J. — The petitioner instituted a suit for partition on the allegation that along with the opposite parties he was in joint possession of three plots of lands C. S. Plots Nos. 9313, 9314 and 9315 of Mouza Bali. In view of the allegation and the nature of relief claimed he paid fixed court-fees of Rs. 15. After both parties had examined their witnesses and produced documents and closed their evidence the learned Subordinate Judge heard the arguments of the parties and then passed an order directing the appointment of a commissioner to ascertain the proper valuation of the suit property being of opinion that *ad valorem* court-fees on the value of the property was payable on the plaint. It is against this order that the plaintiff has filed the application and a rule was issued on the opposite parties to show cause why this order should not be set aside The ground for the learned Subordinate Judge's decision that *ad valorem* court-fee was payable was a statement made by the plaintiff in his evidence that he was not in possession of the suit property.

[2] Mr. Banerjee for the petitioner has contended and there can be no doubt rightly, that the question as to what court fees are payable on a plaint has to be decided on the allegation in the plaint and the nature of the relief claimed. Whatever may transpire in the evidence, the plaint remains the same until and unless it is amended and a conclusion on a consideration of the evidence that the plaintiff is or is not in possession cannot affect the nature of the suit as instituted in the plaint. In this case the plaint as already stated was for partition on the allegation of joint possession with other co-sharers and so long as that plaint is not amended it must be held that the court-fees paid are sufficient, no matter what may transpire in the evidence.

[3] If and when a Court comes to the conclusion that the allegation of joint possession in the plaint is not borne out by the evidence the obvious result would be that the plaintiff's suit would fail unless the petition is suitably amended and further court fees paid. In the present case as the evidence on both parties has been closed we are in a position to see for ourselves whether the plaintiff's case of joint possession as made out in the plaint has been proved to be incorrect. Admittedly the plaintiff was recorded in the settlement operation as in possession of ore of the plots. The defendant, who was examined himself, claimed to be in possession of this plot exclusively and that the plaintiff has never been in possession. This statement of the defendant alone cannot be held to be sufficient to rebut the correctness of the settlement record.

[4] Mr. Achary, on behalf of the opposite-parties, laid much stress on the plaintiff's statement in the evidence that he never possessed the suit property. This sentence has, however, to be read with the following sentence that the suit property is lying patit. I have no doubt in my mind that what the plaintiff wants to convey by his statement 'I never possessed the suit property' was that he did not exercise any acts of actual possession such as cultivation or the like, because the land was lying patit. The position in view of the record of the plaintiff's possession in the settlement khatian, which stands unrebutted, obviously is that the possession of the other co-sharers of the suit property must be taken to be also plaintiff's possession.

[5] It may be mentioned in this connection that the defendant has nowhere said anything about ousting the plaintiff from possession. So long as there is no such ouster, plaintiff's possession remains, even though he may not be exercising any actual acts of possession.

[6] Even if, therefore, it was permissible for the learned Court below to go into the evidence, in order to decide whether court fee on the plaint was sufficient, I am of opinion that the evidence on the record does not justfy the conclusion at which he arrives that the plaintiff's allegation of joint possession has been proved to be untrue or that the plaintiff is out of possession.

[7] My conclusion, therefore, is that the learned Subordinate Judge is wrong in his opinion that *ad valorem* court-fee is payable on the plaint and that the fixed court-fee of Rs. 15 paid by the plaintiff is sufficient. I would accordingly make this rule absolute and set aside the order passed by the learned Subordinate Judge. There will be no order for costs.

G. N. Das J.—I agree.

G.M.J. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 399 *[C. N. 148.]*

SINHA J.

In re Mahaluxmi Cotton Mills, Ltd.—*Applicant.*

Ordinary Original Suit Decided on 13-5-1949.

(a) Companies Act (1913), S. 153—Creditors.

For the purposes of an application for sanctioning a scheme of arrangement under S. 153, the creditors whose names appear in the books of the company should be considered as creditors and their votes should be taken into account. Creditors whose names do not appear in the books have to show to the satisfaction of the Court that they are creditors.

[Para 11]

Annotation: ('46-Man.) Companies Act, S. 153 N. 9.

(b) Companies Act (1913), S. 153—Proxy.

At a meeting of creditors only creditors are entitled to be present. Persons who have proxy from creditors but who are not themselves creditors cannot attend the meeting. [Para 12]

Annotation: ('46-Man.) Companies Act, S. 153 N. 13.

Order.—This is an application for sanction of a scheme of arrangement under S. 153, Companies Act. The Company was incorporated in the year 1921 with an authorised capital of Rs. 20,00,000 divided into 80,000 shares of Rs. 25 each. The authorised capital is now divided into 4,00,000 shares of Rs. 5 each. The issued capital is Rs. 20,00,000 and the amount of capital paid up or credited as paid up is Rs. 19,86,898. The Registered Office of the Company is at 18, Netaji Subhas Road, Calcutta. The object of the Company is, *inter alia*, to deal in cotton and to carry on the business of ginning cotton, spinning yarn and manufacture of linen cloth and other goods.

[2] The Managing Agents of the Company are M/s Hemendra Nath Dutta & Sons Limited, a private limited company. They were so appointed on 10th March 1943 for a period of 20 years. Two of the Directors of the Managing Agency Company, viz., Hemendra Nath Dutta and Rabindra Nath Dutta are also Directors of the Company. The business of the Company is at present being carried on by a Board of Directors consisting of persons other than the said Hemendra Nath Dutta and Rabindra Nath Dutta. The present Board of Directors has suspended the said Managing Agents.

[3] On 29th November 1948, an application was presented to me for sanction of a scheme which was annexed to the petition. I admitted the petition and gave directions for holding a meeting and fixed the date of hearing for 26th January 1949. Pursuant to the directions, on 9th January 1949, the meeting was held but it is said that certain creditors whose debts were disputed created disturbances, by reason whereof the creditors could not consider and vote upon the scheme.

[4] The matter came before me on 25th January 1949. I, thereupon, gave fresh directions for holding meetings of the creditors and shareholders. I directed that creditors whose claims were disputed by the company would be entitled to attend the meeting and their votes would be separately recorded. I further directed that notice of the meeting together with a proper form of proxy and a copy of the scheme should be sent to each creditor and shareholder to his respective address as recorded in the books of the company. I also directed that any person whose claim was disputed by the company and who applied to the special officer in writing at least 10 days before the date appointed for the meeting would be entitled to be supplied with a proxy form. I fixed the hearing of the application for 23th March 1949.

[5] I have forgotten to mention that on 29th November 1948 I appointed Mr. A. B. Gupta a Chartered Accountant, to investigate the workability of the scheme and the said auditor was to submit his report on 31st December 1948. The report of the auditor was to be available for inspection by the creditors at least a week before the meeting. I also appointed Mr. S. N. Bose, as a Special Officer and ordered him to make an inventory of the books and assets of the applicant. Pursuant to the directions Mr. A. B. Gupta investigated the accounts and made a report. He reported that there was huge loss of liquid assets amounting to about Rs. 29,00,000. According to him the liabilities of the company were Rs. 44,00,000 and the available resources for meeting the liabilities was Rs. 27,00,000 and the scheme was likely to founder for want of finance.

[6] On 13th March 1949, meetings of creditors and shareholders were held. Mr. S. Banerji, a member of the Bar, acted as Chairman of the Meeting. The auditors' report as well as the opinion of M/s K. C. Roy Chowdhury & Co., Auditors, commenting on the report of Mr. Gupta were placed before the creditors and explained to them. Mr. Keshab Chandra Bose and Mr. B. M. Bagaria, Solicitors attended the meeting as holders of proxies from numerous creditors of the company. At first the entire scheme was presented to the creditors for their acceptance or rejection and it was rejected by an overwhelming majority of creditors. Votes, of the creditors were not, however, recorded. Thereafter the clauses of the scheme were considered. Mr. Bagaria proposed certain amendments. The Chairman, although he was of the opinion that Mr. Bagaria was not entitled to move any amendment permitted him to do so. The amendments were seconded by Mr. Keshab Chandra Bose who was also not a creditor. The motion of

Mr. Bagaria was supported by admitted creditors of the value of Rs. 10,965-9-3 and by disputed creditors whose claims amount to Rs. 11,96,495-7-9. The value of the creditors who opposed the motion was Rs. 4,00,755-7-10. Thereafter, one Mr. Tallaty, moved certain amendments. The motion was supported by admitted creditors of the value of Rs. 4,00-112-9-6 and disputed creditors of the value of Rs. 39,717-10-9. The motion was opposed by admitted creditors of the value of Rs. 10,715-15-3 and disputed creditors of the value Rs. 11,41,981-13-6.

[7] The Chairman reported that the scheme as amended on the motion of Mr. Tallaty was passed by the requisite majority of creditors in number as well as in value whose claims were not disputed by the company. The scheme as amended is annexed to the report of the Chairman, and marked 'G'. At the meeting of the shareholders, the scheme as amended was accepted by the shareholders of the value of Rs. 4,84,080 and opposed by shareholders of the value of Rs. 27,830.

[8] It is submitted that the scheme as amended should be sanctioned by me because it has been passed by the requisite majority of creditors and shareholders.

[9] Mr. S. C. Bose, appearing on behalf of some creditors, whose claims are disputed by the company, submits that the scheme has not been passed by the requisite statutory majority. The disputed creditors may be classed into two categories. There are creditors whose names appear in the books of the company as creditors, and to whom proxy forms were sent by the special officer pursuant to the directions given by the Court. On the date when directions were given their debts were not denied or disputed. There is another class of creditors whose names do not appear in the books of the company. The proxy forms were sent to them on their application to the special officer. The Chairman considered the creditors of both the classes I have mentioned as disputed creditors and in coming to the conclusion whether the scheme was passed by the requisite majority did not take into account both the said classes of creditors. He has only considered creditors whose debts were admitted by the company and on such consideration has reported that the scheme has been passed by the requisite majority.

[10] Another point which has been raised is whether the votes cast by Mr. Bagaria and Mr. K. C. Basu holding proxies from creditors should be taken into account. The Chairman was of the opinion that they were not entitled to be present or vote, though he allowed them to be present and recorded their votes. If the votes cast by Mr. Bagaria and Mr. Basu are taken into consideration it is clear that the scheme has not been passed by the requisite majority.

[11] I am of opinion that for the purpose of this application, the creditors whose names appear in the books of the company should be considered as creditors and their votes would taken into account. The creditors whose names do not appear in the books of the company should not be considered as creditors unless they can show *prima facie* on this application to the satisfaction of the Court that they are creditors.

[12] I am, however, of opinion that Mr. Bagaria and Mr. Basu were not entitled to be present in the meeting as holders of proxy from creditors. It has been held in England that for the purposes of a meeting of any particular class, proxies can be given only to the members of that class. In other words, at a meeting of creditors, only creditors were entitled to be present. Persons who hold proxies from creditors but who were not themselves creditors could not attend the meeting.

[13] Sir George Jessel held that it was a well-established rule that at a meeting held of a class of persons, holders of proxies who do not belong to the class are not entitled to be present or to vote. Mr. S. C. Bose contended that that rule was based on the General Order and Rules of the High Court of Chancery 1863, Rule 46 and should not be followed in India. He has also referred to adverse criticisms of the rule in Palmer on Company Precedents and Buckley on Companies Act. He also referred to a case reported in *Re General Mortgage Society (Great Britain) Ltd.* (1942) 1 ALL E. R. 414: (1942 Ch. 274).

[14] It appears, however, that the rule is one of general application. In S. 79, Companies Act, it is provided that a meeting of shareholders cannot be attended by a proxy holder who himself is not a shareholder. A similar rule appears in Art. 65 of Table A, Companies Act. In S. 115 which is the section in the Companies Act of 1929 in England corresponding to S. 79 of the Indian Act, there is no provision similar to the provision in S. 79, Companies Act. The intention of the legislature in the case of meeting of shareholders was that it must be attended by persons of the same class and not by outsiders as holders of proxies from shareholders. It is difficult to see why a different rule should apply in the case of meetings of creditors. There seems to be sound reason why meetings of creditors should be attended only by creditors and not by any outsiders. The rule was said to be well established in the time of Sir George Jesell. That rule has been followed in England except where there is any statutory provision empowering outsiders to be present at meetings of a class of persons. The case reported in *Re. General Mortgage*

Society (Great Britain) Ltd, (1942) 1 ALL E. R. 414: (1942 Ch. 274) is a case of that class. There, R. 150 of the winding-up rules clearly provided that the Official Receiver could be present at a meeting of the creditors. There would have been no necessity for such a rule unless it was well established that the meeting could not be attended by any person outside the class of persons who were holding the meeting. For these reasons, I think I should follow the decision of Sir George Jessell in preference to the criticism of the text-book writers.

[15] I am, however, of the opinion that there might have been justifiable misapprehension in the minds of creditors as to whether an outsider can be appointed as a proxy or not. It appears that there is a large number of creditors who wanted to oppose this scheme but whose votes have to be disregarded because of the fact that they appointed as proxy somebody who was not a creditor. I think I should give these creditors a further opportunity to express their wishes in regard to the scheme by appointing persons as proxies who are creditors.

[16] There has been considerable discussion as to how the scheme should be altered in order to meet the wishes of the creditors. It is more or less agreed that the scheme should be altered in order that it may be workable and fair. I have been asked to make alterations in the scheme pursuant to a clause therein which empowers me to do so. I am, however, unwilling to introduce extensive alterations into the scheme without their being considered by the creditors. I will, however, indicate the alterations which I consider to be desirable and leave it to the creditors to consider the scheme as altered by me and accept it with or without alterations. I have annexed the scheme as altered by me in my judgment.

[17] I decline to sanction the scheme as passed at the meeting. I direct a meeting of creditors and shareholders to be held on 25th June 1949. Mr. Sankar Banerjee will be the Chairman at the meeting. He will separately record, (a) the votes of creditors whose claims are admitted, (b) votes of creditors whose claims may be disputed but whose names appear in the books of the company, (c) votes of creditors whose names do not appear in the books of the company.

[18] The disputed creditors whose names do not appear in the books of the company and whose debts are disputed by the company will file before the Special Officer, a statement of their claims with particulars on or before 15th June 1949 and I will decide at the time of the hearing of this application whether they are to be treated as creditors or not for the purposes of this application.

[19] I also direct the Special Officer to make a report as to the financial position of the company and as to the workability of the scheme, the report to be filed on or before 2nd July 1949. [The rest of the portion of the judgment which is the scheme mentioned in para. 16 is not material for reporting].

D.H. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 401 *[C. N. 149.]*

DAS GUPTA AND GUHA JJ.

Nirode Mohan Roy—Objector—Appellant v. *Charu Chandra Mazumdar—Respondent.*

A. F. O. D. No. 147 of 1948, D/- 31-8-1949, against decree of D. J. Darjeeling, D/- 9-6-1948.

Succession Act (1925), S. 63 (c) — Scribe as attesting witness—Evidence Act (1872), S. 68.

A scribe can be held to be an attesting witness of the will, only if apart from having seen the document executed and having put his signature on the document in the presence of the testator, he also signed it *as a witness*. However, the mere description of himself as scribe cannot stand in the way of a finding that he signed as a witness, for, the use of the word "scribe" before or after the signature may be given by way of additional information. [Paras 19 and 20]

Annotation: ('46-Man.) Succession Act, S. 63 N. 7 pt. 1; Evidence Act, S. 68 N. 5.

Panchanan Ghose and Shambhu Nath Banerji (Sr.)—for Appellant.

Rajendra Bhushan Bakshi and Satya Priya Ghose—for Respondent.

Das Gupta J.—The question for decision in this appeal is whether the signature of one Sarat Chandra Chattopadhyay who, apart from having written the will, saw the testator execute the will and affixed his signature in the presence of the testator is sufficient attestation within the meaning of S. 63, Succession Act. The testator Chandra Mohan Roy had in the year 1924 executed a will by which he left certain properties to his two nephews (brother's sons), Kshirode Mohan Roy and Nirode Mohan Roy and left the residue to his daughter's sons. In 1926, he executed another will which is the subject-matter of the present litigation and by this will he left certain properties to Kshirode Mohan Roy and the residue to his daughter's sons. Chandra Mohan Roy, the testator, disappeared shortly after the execution of this will in 1926 and has not been since heard of by the persons who are likely to hear of him if he was living. Charu Chandra Mazumdar, who is Chandra Mohan's daughter's son, applied for letters of administration with a copy of the will annexed and citation having issued on the brother's sons, Nirode Mohan entered caveat. The grounds on which he raised objection were that the alleged will has not been executed by Chandra Mohan; that it had not been attested according to law and that Chandra Mohan at the time of the alleged will had no testamentary capacity.

[2] The learned Probate Court has come to the conclusion that the will was duly executed, attested in accordance with law and that Chandra Mohan had testamentary capacity at the time of the alleged will. It has accordingly ordered letters of administration with a copy of the will annexed to be issued to the applicant Charu Chandra Mazumdar.

[3] In this appeal by Nirode Mohan Roy, the findings of the trial Court on the question of the execution of the will by Chandra Mohan Roy or on the question of his having testamentary capacity at the time of the will are not disputed. The one point on which the appeal has been pressed by Mr. Ghose appearing on behalf of the appellant is that assuming that Sarat Chandra Chattopadhyay, the scribe of the will, affixed his signature in the presence of the testator, this would not amount to attestation within the meaning of law. Mr. Ghose contends that while it is necessary for such an act of signature to amount to attestation that the signatory must have seen the testator sign the document and must have signed it himself in the presence of the testator, these facts are not sufficient for the act to amount to attestation, but that it is also necessary that at the time the signature was affixed this signatory did so by way of saying that he had seen the execution. He admits that no words are necessary to be actually put on the document to the effect that he had seen such execution; but it is necessary, according to him, that the Court from a consideration of all the circumstances including the position of the signature in the document and the evidence of the witnesses must be in a position to hold that at the time the signature was affixed, the signatory did do so by way of saying that he had seen the execution. Mr. Ghose has tried to convince us that in this case the circumstances and the evidence do not justify such a conclusion.

[4] Mr. Rajendra Bhusan Bakshi appearing on behalf of the respondent has tried to convince us, on the contrary, that the circumstances of the case including the oral testimony of the witnesses do justify the conclusion that at the very time Sarat Chandra Chattopadhyay, the scribe of the document, affixed his signature he did so in the capacity of a witness, by way of saying that he had witnessed the execution. He has also contended that even if we are not prepared to come tc such a conclusion, this appeal should fail; for, according to him, the law does not require for the act of signing to amount to attestation that the signatory must at that very time affix the signature in the capacity of a witness. It is sufficient, according to him, if the signatory has seen the testator execute the will and has put his signature in the presence of the testator.

[5] Before coming to a consideration of the fact whether Sarat Chandra Chattopadhyay affixed his signature on this will *as a witness* or not, it will be proper to arrive at a decision on the question of law which is in dispute.

[6] On the question whether for an act of signing to amount to attestation, it is necessary in addition to the fact of the signatory seeing the testator execute the document and his affixing the signature in the presence of the testator, that the signatory must at the time of affixing any signature do so in the capacity of a witness, there has been divergence of judicial opinion. In this Court, the question came up for consideration as early as the year 1880 in the case of *Hurro Sundari* v. *Chunder Kant*, 6 Cal. 17 : (6 C. L. R. 303). It was held by Garth C. J. sitting with Mitter J. that if the Registrar and the person who identified the testatrix at the time of registration signed their names in the presence of the testarix *as attesting her own admission* that she had signed the will that would be sufficient, as an attestation, to satisfy the requirements of the law. A different note was struck a few years later by Harrington J. sitting on the Original Side of this Court in the case of *Raj Narain Ghosh* v. *Abdur Rahim*, 5 C. W. N. 451. Harrington J. held in that case that

> "in the absence of anything to show that it is incumbent upon the attesting witness to be described as such in a deed which he attests, that a person who was present and witnessed the execution and whose name appears on the document is a competent witness to prove the execution,"

and as in this case it was shown that two persons were present and saw the executant sign the deeds and one of them had been called to prove what passed, this proof was sufficient and the execution of the mortgage deeds was good. The same view was taken in the case of *Dinamoyee Debi* v. *Bon Behari*, 7 C. W. N. 160 and in the later case of *Jagannath* v. *Bajrang Das*, 48 Cal. 61 : (A. I. R. (8) 1921 Cal. 208). In this last mentioned case, objection was clearly taken that where a person who is present and witnesses the execution of a deed is therein described merely as the writer of the deed, he is not an attesting witness within the meaning of the law. This objection was rejected by the learned Judges. The Privy Council decision in *Shamu Patter* v. *Abdul Kadir*, 39 I. A. 218 :(16 I. C. 250 P. C.), was cited in that case but the learned Judges of this Court held that the Privy Council case turned on the question whether a person could attest a document on an acknowledgment by the executant that the signature on the document was his and did not feel themselves bound

by the other observations of their Lordships of the Privy Council on what amounted to attestation.

[7] The same view of the law has been taken in a number of decisions of other High Courts. In the case of *Radha Kishen* v. *Fateh Ali*, 20 ALL. 532 : (1898 A. W. N. 148), it was held that a deed might be legally proved by the evidence of the scribe who had signed his name, but not explicitly as an attesting witness, on the margin and had been present when the deed was executed. It appears that the learned Subordinate Judge from whose decision the appeal was made to the High Court considered that "as the scribe was not an attesting witness, his evidence was not legally sufficient to prove the bond." The Court held that if the Munsif and the Subordinate Judge believed the evidence of the scribe they were quite at liberty on that evidence alone to find that the bond had been executed. It is not very clear from this report what in fact the evidence of the scribe was, but apparently the evidence merely showed that the scribe had seen the executant execute the bond and had himself signed in the presence of the executant, and did not show that he had signed as an attesting witness.

[8] In *Paramasiva Udayan* v. *Krishna Padayachi*, 41 Mad 535: (A. I. R. (5) 1918 Mad. 491), which was also cited in support of this view, it appears that the learned Judges refused to accept a proposition that merely because a person had called himself a scribe, he was incapable of being regarded as an attesting witness. An observation occurs in one part of the judgment which was delivered by Seshagiri Ayyar J. that "the essence of attestation is that the person must have seen the document executed." This judgment was mainly directed to show that it would be wrong to say that under no circumstances could a scribe be an attesting witness. The question which now demands our consideration namely whether it is also necessary that the scribe should sign as an attesting witness does not appear to have been directly considered there. Another decision of the Madras High Court which has been cited before us is that in *Veerappudayan* v. *Muthukarappan Thevan*, 24 M. L. J. 534 : (19 I. C. 589) where it was held that when the writer of a document signs his name below the executant's, whether he can be regarded as an attesting witness depend on the facts and circumstances of each case and that to be so regarded it is not necessary that he should describe himself as a witness or that there should be a testimonium clause, provided it appears that he intended to attest the execution. An observation on which much reliance was put by the learned Advocate for the respondent runs thus :

"Where he subscribes his name at the time of execution it would not be improper to presume that he intended to attest the execution."

[9] As has been noticed, in the very first case which came before this Court namely the case of *Hurro Sundari* v. *Chunder Kant*, 6 Cal. 17 : (6 C. L. R. 303), Garth C. J. took care to mention that to prove attestation it must be shown that the persons, namely in that case, the Registrar and the identifying witnesses, signed their name in the presence of the testatrix " *as attesting her own admission* that she had signed the will". This view that it was necessary that the signature should be *as attesting* the admission of execution was strongly underlined (here italicised by Rankin C. J. in *Abinash Chandra* v. *Dasarath*, 32 C. W. N. 1228: (A. I. R. (16) 1929 Cal. 123). The question which came up for consideration in this case was whether a person who was in fact the scribe and had affixed his signature—apart from another signature on the margin to the effect that he had read the document out to the executant and also that he had put in certain alterations as the executant desired—underneath the word "scribe", is an attesting witness so as to satisfy the requirements of the law. It was held that unless it was further clear that this signature was by way of saying at the time that he has seen the execution of the document, he is not an attesting witness. Rankin C. J. delivering the judgment of the Court discussed in some detail the definition of "attested", as given by Act XXVI [26] of 1926 amending the Transfer of Property Act. His Lordship pointed out that a man's name may be put on an instrument by way of authenticating a statement that the supposed testator did not execute ; it may be put by way of professional advertisement to show that he acted as the scribe or by way of showing that he acted as the scribe for other purposes than professional advertisement ; it may be put down for authenticating a particular correction in the body of the deed ; and proceeded to say that in all these cases, it seemed wrong to say that because the man's signature is on the document at all disregarding the purpose for which it is on the document and disregarding altogether what his signature is put to authenticate—the man in question is an attesting witness. His Lordship then said :

"To take the ordinary case, a man is an attesting witness when he has seen the execution of the instrument and has put his name on the document by way of saying at the time that he has seen the execution of the document."

[10] In a recent decision of this Court reported, *In the goods of Gokulchand Gandhi*, I. L. R. (1944) 2 Cal. 388 : (A. I. R. (33) 1946 Cal.

168), Sen J. sitting singly accepted this view of the law.

[11] This view found favour with the learned Judges of the Bombay High Court in *Ranu* v. *Laxmanrao*, 33 Bom. 44: (1 I. C. 461). Their Lordships referred to the observation of Lord Campbell in the English decision in *Burdett* v. *Spilsbury*, (1843) 10 C. & F. 340: (59 R. R. 105):

"What is the meaning of an attesting witness to a deed: Why, it is a witness who has seen the deed executed and who signs it as a witness,"

and said this was the meaning of attesting witness in S. 68, Evidence Act. On this view of the law, they held that where the writer of the deed in concluding the writing of the body of the document stated that it was written by him he could not be treated as an attesting witness. This decision was followed by the same Court in *Dalichand* v. *Lotu Sakharam*, 44 Bom. 405: (A. I. R. (7) 1920 Bom. 249) and it was held that a writer of a document who puts his signature at the end of a document could not be treated as an "attesting witness" unless he actually signed as an attesting witness in the document. The Bombay High Court has accepted this view of the law, again in a very recent decision in *Timmavva* v. *Channava Appaya*, 50 Bom. L. R. 260: (A. I. R. (35) 1948 Bom. 322). Reference has been made in the judgment of this case to a Privy Council decision, *Barnard and Co.* v. *Alak Manjary Kuari*, 26 Bom. L. R. 737: (A. I. R. (12) 1925 P. C. 89), where this view is said by the learned Judge to have been indirectly accepted.

[12] The Allahabad High Court which in the earlier case of *Radha Kishen* v. *Fateh Ali Ram*, 20 ALL. 532: (1898 A. W. N. 148), had taken a different view, accepted in the later decision of *Badri Prasad* v. *Abdul Karim*, 35 ALL. 254: (19 I. C. 451), the view that to be an attesting witness within the meaning of S. 68, Evidence Act, the witness must have seen the document executed and have signed it as a witness. Reliance was placed among others on the English decision *Burdett* v. *Spilsbury*, (1843) 10 C. & F. 340: (59 R. R. 105) mentioned above.

[13] It seems clear on a consideration of these authorities that though even in recent years a discordant note has now and then been struck, the view that has prevailed in almost all the High Courts in recent years is that in order to be an attesting witness a person need not only see the execution and sign in the presence of the executant but must also sign as a witness. In view of the divergence of judicial opinion mentioned above, I have tried to approach the question myself, as if there was no authority to influence my decision. I have examined for this purpose the phraseology of S. 63, Succession Act which runs thus:

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will ..... and each of the witnesses shall sign the will in the presence of the testator ....."

It seems to me of some importance that although in the latter part of the section the word 'sign' is used, in the clause "each of the witnesses shall sign the will", a different word 'attested' was used in the earlier portion. This difference will be meaningless except on the view that 'attested' means something more than mere signature of a person who has seen the testator sign. We often use the words "attested by me" when putting a signature below the signature of some other person whom we have seen signing. The word 'attest' in such a context can only mean that I have put the signature as testifying to the fact that I have seen the person sign. It is clearly not necessary for a person to be an attesting witness within the meaning of law that words of this nature, "attested by me" or any other words should be used. But the deliberate use of the words 'attested' in preference to the word 'signed' will be meaningless unless it be held that whether or not any words to indicate attestation are there it must appear to the Court that the person has in fact signed in the capacity of a witness.

[14] It seems to me that all doubts in this matter are set at rest by the decision of the Privy Council in *Shamu Patter* v. *Abdul Kadir*, 39 I. A. 218: (16 I. C. 250 P. C.). As I have already indicated above, Newbould and Panton JJ. in *Jagannath* v. *Bajrang Das*, 48 Cal. 61: (A. I. R. (8) 1821 Cal. 208), did not consider this Privy Council decision of any assistance to them. With great respect to their Lordships, I am unable to take the same view. The point directly in issue in that case undoubtedly was whether the Transfer of Property Act, S. 59, providing that a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses is complied with when the witness not having been present at the execution of the instrument by the mortgagor attested subsequently thereto on his acknowledgment of his signature. It is hardly necessary to state that this case came up before their Lordships before the recent amendment of 1926 by which attestation of a mortgage deed may take place on acknowledgment by the executor. Their Lordships of the Privy Council held in that case that the requirements of S. 59 were not complied with when the witness without having been present at the execution attested subse-

quently on his acknowledgment. In course, however, of the discussion of the law, their Lordships made an observation which seems to me of very great importance for our present purpose. It is at p. 226 of the report :

"Section 68, Evidence Act (I (1) of 1872), which declares that 'if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution,' appears to their Lordships to indicate that the Indian Legislature used the word 'attested' in the sense in which it has been construed through a series of decisions in the English Courts."

In an earlier part of the decision, namely, at p. 225 their Lordships quoted on the one hand the opinion of Dr. Lushington in *Bryan* v. *White*, 2 Rob. 315 that "attest means that persons shall be present and see what passes, and shall, when required, bear witness to the facts" and the observation of the Lord Chancellor in *Burdett* v. *Spilsbury*, (1843) 10 Cl. & F. 340: (159 R. R. 105): "The party who sees the will executed is in fact a witness to it; if he subscribes as a witness he is then attesting witness."

[15] It is true that in *Bryan* v. *White*, 2 Rob. 315, Dr. Lushington did not, in his definition of "attest", include the requirement that the signature shall be as a witness. There can, however, be no doubt that under the English law, as it stood at the time of the decision of their Lordships in *Shamu Patter's case*, 39 I. A. 218 : (16 I. C. 250 P. C.), it was already settled that to be an attesting witness it was necessary also that a person should sign as a witness. This is clear from the speeches of Lord Campbell and the Lord Chancellor in *Burdett* v. *Spilsbury*, (1843) 10 Cl. & F. 340 : (159 R. R. 105). Lord Campbell in the later part of his speech said :

"What is the meaning of an attesting witness to a deed : Why, it is a witness who has seen the deed executed, and who signs it as a witness. He is a good attesting witness, although there should not be upon the deed itself, a memorandum saying that it is signed, sealed and delivered in his presence."

The Lord Chancellor said :

"The party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness."

[16] In my judgment, we have the high authority of the Privy Council for holding that the Indian Legislature used the word "attested" in S. 59, T. P. Act in the sense in which it has been construed in the English Courts. It has not been suggested to us that the word should not be taken in the same sense in S. 63, Succession Act. I can see no justification for a view that any distinction should be made between the meaning of the word as used in S. 59, T. P. Act and S. 63, Succession Act.

[17] The position thus is that we have to take the word "attestation" in the same meaning as settled by the English decisions; and there can be no doubt after the House of Lords case *Burdett* v. *Spilsbury*, (1843) 10 Cl. & F. 340 : (159 R. R. 105), that the law as settled in England is that to be an attesting witness a person must also sign as a witness though it is not necessary that there should be any words to that effect in the deed itself.

[18] In a later decision of the Privy Council, *Sarkar Barnard and Co.* v. *Alak Manjary Kuari*, A.I.R. (12) 1925 P. C. 89 : (26 Bom. L. R. 737), this question whether it is necessary for an attesting witness to sign as a witness did come up for consideration. It was held by the High Court of Patna that a person not having subscribed as a witness was not an attesting witness and was held on that ground that the mortgage bond had not been attested by at least two witnesses and that it could not be enforced against the mortgagors. Lord Shaw delivering the judgment of the Privy Council disposed of this appeal in these words :

"This appeal has been presented *ex parte*. Everything in its favour that could be said has been said. Their Lordships are of opinion that it is a hopeless appeal and will humbly advise His Majesty to dismiss it accordingly."

In my view, this case should also be taken to be authority for the proposition that a person who does not subscribe as a witness is not an attesting witness within the meaning of the law.

[19] My conclusion, therefore, is that Sarat Chandra Chattopadhyay can be held to be an attesting witness of the will, only if apart from having seen the document executed and having put his signature on the document in the presence of the testator, he also signed it *as a witness*. The learned District Judge does not appear to have gone into this question whether the signature was affixed by Sarat Chandra Chattopadhyay as a witness. In coming to a conclusion on this very important question of fact namely whether Sarat Chandra Chattopadhyay, the scribe of the document, affixed his signature as a witness or not, we have to consider the position of his signature on the document itself and the evidence of Sarat Chandra Chattopadhyay himself and the evidence of the only other person who claims to have been present at the time of the execution and at the time when Sarat Chandra Chattopadhyay put his signature, namely, Surendra Nath Saha. Surendra Nath Saha has said this :

"The will was then handed over to Chandra Babu who again read the will. Then Chandra Babu signed the will in my presence and Sarat Babu. Then myself and Sarat Babu signed our names as witnesses in the will in the presence of the testator."

If this was all, I should have been prepared to hold that Sarat Babu had affixed his signature as a witness in the will. Sarat Chandra Chatto-

padhyay has, however, been himself examined in this case and in reply to an interrogatory : "In what capacities did you sign the will ?" made the statement "I put my signature to the will as the scribe." I find it difficult to agree with the learned Advocate for the respondent that Surendra Nath Saha's statement as to the capacity in which Sarat Chandra Chattopadhyay signed it should be accepted in preference to Sarat's own statement on the point. It is important to notice in this connection that Sarat Chandra Chattopadhyay has not himself made any statement as regards the time when he affixed his signature. There is nothing in his deposition to show that he affixed his signature after the testator had put his signature.

[20] Stress was laid by the learned Advocate for the respondent on the fact that the line in which the word "*isadi*" appears is above the line in which the signature of Sarat Chandra has been put. He wants us to conclude that Sarat Chandra having put his signature in this line below the position of the word "*isadi*" did at the time intend to sign as a witness. I am unable to draw any conclusion from the fact that the word "*isadi*" has been written by Sarat Chandra. It seems to me usual that the word "*isadi*" should be written by the scribe in the document whether or not he is himself a witness. I would myself have expected to see the word "*isadi*" written by the scribe himself even where he does not happen to be present at the time of the execution. Some inference favourable to the respondent's case might have been drawn if the signature of Sarat Chandra had appeared immediately below the word "*isadi*" or in the midst of a group of signatures of attesting witnesses or if it had appeared immediately above the signature of Surendra Nath Saha, admittedly an attesting witness, or below his. The position of the signature of Sarat Chandra Chattopadhyay as I see it in this document in a line below the line in which the word "*isadi*" occurs but a good deal to the left does not, in my judgment, justify the conclusion that Sarat Chandra Chattopadhyay has signed as a witness. He himself has prefaced his signature by the word नि० read by him at the time of his deposition as लि०. Whether it is नि० or लि०, there is no doubt that he is thereby describing himself as the scribe of the document. I entirely agree with the learned Advocate for the respondent that the mere description of himself as scribe cannot stand in the way of a finding that he signed as a witness, for, as was pointed out by Rankin C. J. in *Abinash Bidyanidhi's case*, 32 C. W. N. 1228: (A.I.R. (16) 1929 Cal. 123) and by other learned Judges in some other cases that the use of the word "scribe" before or after the signature may be given by way of additional information. I do not therefore draw any conclusion from the mere fact that Sarat Chandra Chattopadhyay prefaced his signature by the word लि०. The most important fact in the decision of this matter seems to me to be this that Sarat Chandra himself in reply to the definite question "In what capacities did you sign the will," has made the clear and unambiguous statement that he signed it as the scribe. There is nothing in his evidence to indicate that he had been won over by the other side or that for reasons of his own he was not prepared to support the propounder of the will. On the contrary the statement he has made on the question of testamentary capacity of the testator, makes it clear that he was willing and ready to support the propounder of the will. When in spite of this we find him making the clear statement in reply to a clear question that he signed the will as a scribe, I am unable to think of any reason why his evidence on this point should not be taken as the full truth.

[21] My conclusion on a consideration of the evidence of the witnesses and the position of the signature in the document in reference to the position of the word "*isadi*" and the signature of the other witness is that Sarat Chandra Chattopadhyay signed the documeut as a scribe and not as a witness.

[22] The inevitable conclusion, therefore, is that this will was attested only by one witness Surendra Nath Saha and was not attested by two witnesses as required by law.

[23] I would, therefore, allow the appeal and set aside the order of the learned District Judge and order that the application for letters of administration be rejected. The appellant will get his costs throughout. The hearing fee in this Court is assessed at five gold mohurs.

[24] **Guha J.**—I agree.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 406 *[C. N. 150.]*

R. P. MOOKERJEE AND DAS GUPTA JJ.

Debaprosad Bose—Appellant v. *The King.*

Criminal Appeal No. 144 of 1948, D/- 21st December 1948.

(a) Criminal P. C. (1898), S. 297 — Charge to jury —Misdirection—Resting onus of proof wrongly on accused—Not explaining necessary elements of offence.

Where in a trial for an offence under S. 366, Penal Code, the Judge stated in his charge that the onus as regards establishing the age of the girl rested on the accused and did not indicate, while explaining the elements of the offence, the effect of the girl's leaving the protection of the guardian before she was taken away by the accused, the charge is bad for misdirection on material points. [Paras 4, 5 & 6]

Annotation: ('49-Com.), Criminal P. C., S. 298 N. 9.

(b) Penal Code (1860), S. 361 —'Taking'—Meaning—Leaving guardian's protection due to previous arrangement with accused.

The word "taking" as used in S. 361, Penal Code, does not mean a continuing or a continuous act. The "taking" which constitutes an offence is completed as soon as the girl is removed from the keeping of the lawful guardian. The mere fact that a minor leaves the protection of her guardian does not put her out of the guardian's keeping. If, however, it is proved that a minor had abandoned her guardian with no intention of returning back she cannot, thereafter, be deemed to continue in the keeping of the guardian. What will be deemed to be sufficient to constitute an abandonment of a guardian by minor girl depends on the facts of each particular case. Even where there is some evidence that the girl, at the time when she left the protection of her guardian, did not intend to come back to her father's place but the evidence further discloses that but for something which the accused consented to do and did ultimately do the minor would not have, in the natural course of events left the house of her guardian, then there would be a sufficient taking by the accused in the eye of law. [Paras 12 & 13]

Thus, where a girl leaves her house on account of the previous arrangement with the accused and meets him in a garden from where he takes her, the accused's action amounts to taking her away from the keeping of her lawful guardian. [Para 14]

Annotation: ('46-Man.), Penal Code, S. 361 N. 1, 2.

(c) Penal Code (1860), Ss. 361, 366—Age of girl not established—No conviction.

In a criminal trial the accused must get the benefit of doubt and there can be no conviction under S. 366, Penal Code, unless it can be clearly and unequivocally stated that the age of the girl was below 16. [Para 20]

Annotation: ('46-Man.) Penal Code, S. 361 N. 6; S. 366 N. 8.

S. S. Mukherjee and Nalin Ch. Banerjee —for Appellant.

Nirmal Kr. Sen—for the Crown.

R. P. Mookerjee J. — This is an appeal by Debaprosad Bose who had been found by a majority of jury guilty under S. 366, Penal Code, and accepting the said majority verdict, the Additional Sessions Judge, 24 Parganas, convicted him and sentenced to two years rigorous imprisonment.

[2] The prosecution case is that a certain family of Banerjees lived in the Park Circus area and subsequently shifted to Hazra Road, to a house belonging to a relation. The owner of the house occupied the second floor and the ground floor was occupied partly by Banerjee and another portion of the same floor by the accused Debaprosad Bose and his family. The two families occupying the ground floor were on friendly terms. It is alleged that taking advantage of the friendly relationship, the accused Debaprosad had enticed the youngest daughter of Banerjee. It is stated that on 10th September 1947, the daughter had left the house on the plea of going to school but instead of going there, went to Deshapriya Park nearby in accordance with previous arrangements with the accused. From there she was taken to the Lakes and then to Kalighat and some form of marriage ceremony was alleged to have been gone through. Later on she was taken by the accused to Jogbani in the district of Purnea to the house of one Dr. Dhar, a brother-in-law of the accused. The accused and the girl were arrested by the police at Jogbani on 14th September 1947 and were brought down to Calcutta. After investigation Debaprosad was committed to the Court of Session, charged with offence under S. 366, Penal Code. The accused pleaded not guilty but the defence as may be ascertained from the trend of the cross-examination of the prosecution witnesses was that the girl was above 16 years at the time of the occurrence and that further she had not been enticed away by the accused but she had voluntarily left her father's house and had married him.

[3] On behalf of the appellant it is argued that there are serious mis-directions in the Judge's address to the Jury.

[4] In the first place, the learned Judge while placing the evidence as to the age of the girl stated

"if the accused comes out with a positive version of his own it is for him to prove it. This does not necessarily mean that he himself lead the defence witnesses. The accused may prove his case from cross-examination of the prosecution witnesses or from the surrounding circumstances of the case and the failure to prove the version of his case will not relieve the prosecution of the burden of proving the guilt of the accused and the prosecution will have to succeed on the strength of his own case."

The conclusion arrived at in the first sentence quoted above that the onus is on the accused if he comes out with a positive version of his own is wholly misconceived. Though towards the end of that paragraph reference is made to the onus on the prosecution to prove the guilt, there was a clear misdirection as in the beginning as the learned Judge had rested the onus on the accused. In any view, this introduced a confusion which a lay Jury could not very well appreciate.

[5] While referring to the elements necessary for attracting the provisions of S. 366, Penal Code, the learned Judge did not clearly indicate the effect of the girl leaving her father's place with the intent not to return again and thereafter meeting the accused at Deshapriya Park from where she was taken away by the accused. It is urged that the Jury was not given any indication of the legal position that to make out an offence under S. 366, Penal Code, kidnapping must be from lawful guardianship and if the girl had already left the protection of her guardian it was for consideration whether the person taking her away subsequently from another place was sufficient to make out an offence of kidnapping.

[6] There are other items in the charge which also had been commented upon but it is not necessary for our present purpose to enter into greater detail at this stage as in our opinion, the first two points made are sufficient for holding that the Judge's charge to the Jury was bad for misdirection on material points which had affected the proper trial in the Court of Session.

[7] We have therefore to consider whether on an examination of the legal position and the evidence in the case, the conviction can stand. Two points require careful consideration: (1) whether the essential conditions to prove kidnapping had been made out and (2) whether the prosecution has been able to prove that the age of the girl was less than 16 years.

[8] Under S. 361, Penal Code :

"whoever takes or entices any minor . . . under 16 years of age if a female . . . . out of the keeping of the lawful guardian of such minor . . . without the consent of such guardian is said to kidnap such minor or person from lawful guardianship."

[9] To attract the provisions of S. 361, there must be a positive act of the person taking away the minor from and out of the keeping of the lawful guardian. It is urged that if the girl voluntarily goes away with a man or if she leaves the protection of her guardian and then is subsequently taken away by a person from another place that person does not commit an offence of kidnapping the girl.

[10] In order to support a conviction for kidnapping a girl from lawful guardianship the ingredients to be satisfied are : (1) That the girl was under 16 years of age. (2) Such minor was in the keeping of a lawful guardian. (3) The accused took or enticed such person out of such keeping and such taking was done without the consent of the lawful guardian.

[11] We shall consider later on the question whether the prosecution has been able to prove that the girl was under 16 years of age. It is admitted that while the girl was staying with her father she was in the keeping of a lawful guardian. The question which we have to decide is whether on the evidence the accused had taken or enticed the person out of such keeping and if so, whether the evidence is clear that that was so done without the consent of the lawful guardian.

[12] About the question whether the accused took the girl out of the keeping of a lawful guardian may now be considered. The word 'taking' as used in this section does not mean a continuing or continuous act. The 'taking' which constitutes an offence is completed as soon as the girl is removed from the keeping of the lawful guardian. (*Nemai Chattoraj* v. *Queen-Empress*, 27 Cal. 1041 at p. 1047 : (4 C. W. N. 645 F. B.), *Rekha Rai* v. *King Emperor*, 6 Pat. 471 : (A. I. R. (15) 1928 Pat. 159 : 29 Cr. L. J. 820) and *Emperor* v. *Tika*, 26 ALL. 197 : (1 Cr. L. J. 561)). The mere fact that a minor leaves the protection of her guardian does not put her out of the guardian's keeping. If, however, it is proved that a minor had abandoned her guardian with no intention of returning back she cannot, thereafter, be deemed to continue in the keeping of the guardian. What will be deemed to be sufficient to constitute an abandonment of a guardian by a minor girl depends on the facts of each particular case. It cannot be that whenever a child, being taken to task by the guardian, leaves the guardian's house with the mental reservation that he or she will not be returning back to be under that guardian it must in the eye of law be taken to put an end to the protection of the guardian at the sweet will of the minor. If it is shown that such conduct is due to a mere petulant outburst in consequence either of a quarrel with her relations or because of the guardian repremanding her for her conduct that will be a relevant question to be considered for deciding whether her conduct was sufficient to put an end to the ties of guardianship. *Vallient* v. *Eleazar*, 30 C. W. N. 215 : (A. I. R. (13) 1926 Cal. 467 : 26 Cr. L. J. 977).

[13] Even where there is some evidence that the girl, at the time when she left the protection of her guardian, did not intend to come back to her father's place but the evidence further discloses that but for something which the accused consented to do and did ultimately do the minor would not have, in the natural course of events, left the house of her father then there would be a sufficient taking by the accused in the eye of law for attracting the provisions of S. 363, Penal Code: *Abdul Sathar* v. *Emperor*, 54 M. L. J. 456 : (A. I. R. (15) 1928 Mad 585 : 29 Cr. L. J. 635).

[14] We have now to apply the principles stated above as applicable to the facts of the present case. The evidence as led shows that there was between the girl and the accused an arrangement from before that she would leave her father's house to meet the accused in the Park from where she would be taken away. When under this arrangement she was leaving the protection of her father, even if it be with the intention of not returning again, that will not be sufficient to put an end to the ties of guardianship. The importance and significance of the previous arrangement between the girl and the accused must not be overlooked. We have to consider the surrounding circumstances under which the incident took place and then come to a conclusion whether the girl would have left

the father's house had it not been for the previous arrangement with and the readiness of the accused to take her away, though not from the doorsteps of the father's house but from some distance. On the facts of this present case, we must hold that the previous arrangement with and the promise by the accused made it possible for the girl to leave her father's place. The expression of the intention of not returning to her father's place was due to the "enticing" by the accused and she must be held to have been taken away by the accused from the keeping of a lawful guardian, and if it be found that she was below 16 on the date when she was taken the accused would be guilty of the offence charged.

[15] With regard to the question whether the girl was under 16 on the date she was taken away the evidence stands as follows: According to the mother of the girl she was about 13 and is alleged to have attained puberty, the January previous. This is supported by the father of the girl. The age mentioned in the admission form Ex. 9 when she was admitted in the Lake School for girls makes her at the time of the occurrence a little over 13 years. The mother cannot give the dates of birth of any one of her other children and the statement that this daughter had attained puberty only in January previous is falsified by the letter Ex. A which shows that she had attained puberty much earlier and while the family was living in Linton Street in the Park Circus area and before they had removed to the place of occurrence. It is not possible to come to a definite conclusion about her age on the evidence of the parents themselves as there are contradictions and there was a deliberate attempt by the parents to understate the age. The statement of the age in the admission form Ex. 9 was filled up by Ramola, a cousin of the girl, and that cousin was not a competent person to state the age; the statement by the mother that she was present at the time of her admission cannot be accepted as correct, as had she been present it would not have been Ramola but the mother who would have been required to sign the declaration form.

[16] The father of the girl stated that a Post Office Savings Bank Account had been opened in the name of this daughter and had that Pass Book been produced in Court it could have been ascertained as to what date had been given by the father in the Post Office. Such a statement for opening an account in the Post Office is required under the Post Office Rules to be made by the guardian himself and that would have been a very important piece of evidence but that has not been produced. The birth certificates of this girl or of the other children were also either not available or not produced. The oral evidence as given by the parents is not in our opinion sufficient to prove the age of the girl being less than 16.

[17] We are, therefore, left with the evidence of the Radiologist Dr. Brojeswar P. W. 6 who took a number of skiagrams of the girl. His opinion is that the girl is between 15 and 16 and below 16. This evidence does not support the case as made by the parents that the age was near about 13. As found in the various books of medical jurisprudence Hindu girls in Bengal generally attain puberty between the ages of 12 and 14 and taking the attainment of puberty as and when Ex. A was written her age at the relevant time will be between 15 and 17.

[18] The ossification test for determining the age of a girl has been applied in different parts of the world and various charts have been published by different authorities giving the result of the examination of a large number of cases. Ossification is a sign for determining age as is found in particular subjects when the ossification is completed. It must, however, be stated that owing to variation in climatic, dietetic, hereditary and other factors of the people of different places it is not possible to formulate a uniform standard for determination of age of the union of epiphyses for the whole of the sub-continent of India. The result of investigations in Europe, America and Australia would not be of much assistance as in the case of Indians the union of epiphyses takes place 2 to 3 years in advance of the age-incidence in Europe and in the case of females it is stated to be even earlier than in males.

[19] Even in India we have different tables prepared by the authorities in different provinces and even in Bengal there are at least 2 if not 3 different tables giving different results. The ossification of particular bones which takes place before 14 will not be of material assistance in determining the age of a girl who is nearer 16 and even in the case of the bones of which the appearance and fusion take place near about 16 are not of much assistance as there is a variation between tables given by Dr. Galstaun and Dr. Basu. Different results are reported to have been obtained by the experts and we have not been told to what extent the data used by them were responsible for the different results. The tables appearing from pp. 30 to 33 in Modi's Medical Jurisprudence and Toxicology 9th Edn. indicate the risk of fixing age in the present case only on the ossification result particularly when the age is found to be near about 16. It becomes impossible to be dogmatic that the age will be a few months below 16 or few months above 16.

[20] In a criminal trial the accused must get the benefit of doubt and there can be no conviction unless it can be clearly and unequivocally stated that the age of the girl was below 16. In view of the expert evidence in this case and particularly of the absence of any authoritative table applicable to Bengali girls we must hold that the accused would have the benefit of doubt and be acquitted. We may indicate in passing that the factum of any marriage ceremony having been at all gone through, far less being legal or sufficient in law, has not been proved.

[21] We cannot leave this case without certain observations about the provisions contained in Ss. 361 to 363, Penal Code. It is up to this Provincial Government to take up immediately the duty of carrying on investigation about appearance and fusion of the epiphyses of Bengali boys and girls so that there may be one authoritative table on which experts may depend and the Court may rely upon such tables. The question whether an offence under these provisions had been committed or not depends upon the determination of the age and sufficient data should be made available to assist the Court to administer justice.

[22] The result is that the appeal is allowed. The conviction and the sentence of the appellant are set aside and he is acquitted of the charge made against him. The appellant will be discharged from his bail bond.

[23] **Das Gupta J.**—I agree.

D.R.R. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 410 *[C. N. 151.]*

ROXBURGH J.

Mohanta Lal Das — Complainant — Petitioner v. *Monmohan Sarma and others — Accused—Opposite Party.*

Criminal Revision No. 46 of 1950, D/- 14-2-1950.

Penal Code (1860), Ss. 441 and 448—"Unlawfully remains there."

Where the accused took possession of the rooms belonging to the complainant when the latter had left for another place for a short while but refused to vacate them when, on his return, the complainant asked him to vacate, the latter part of S. 441 applies and the accused is guilty under S. 448. [Para 4]

Annotation : ('46-Man.) Penal Code, S. 441, N. 13; S. 448, N. 1.

J. M. Banerjee and Miss Jyotirmayee Mitra—for Petitioner.

H. N. Ray Choudhury—for Opposite Party.

Order. — This is a Rule against an order of acquittal in a case under S. 448, Penal Code.

[2] The prosecution case was that the accused opposite party were three tenants, each in respect of one shop room in a building at Workshop Road, Kanchrapara, paying a rental of Rs. 30 per month. Behind these shop rooms, the complainant was constructing three other rooms. While the work was in progress and before it was complete, the complainant left during the Pujah holidays of 1948 for a short while. On return he found that the opposite parties had broken open the padlocks of the three rooms under construction, removed a number of tools, some loose doorframes, bags of sand and other things kept inside the rooms and forcibly trespassed into the rooms. On the complainant asking them to vacate the rooms they abused him and threatened him with assault.

[3] The learned Magistrate has held that as the complainant was not at the time on the spot in actual physical possession of the rooms and had mere juridical possession, S. 448 cannot apply to the present case. He makes some reference to S. 530, Criminal P. C., apparently meaning S. 522, Criminal P. C., and seems to be of opinion that unless the trespass in question is achieved in conditions which would make S. 522 of the Code applicable and justify an order for restoration, then there is no criminal trespass at all.

[4] Clearly, his reasons for holding the accused not guilty are erroneous. He also has held that as the only object of the trespassers was to take possession of the rooms, and as they did not intend to intimidate, insult or annoy the complainant, no case of trespass has been made out. He has presumably some support for this view on the basis that when the trespass was made the complainant was not actually present, but he overlooks the latter part of the definition of trespass in S 441, Criminal P. C. There can be no doubt, on the complainant's case, of their intention to annoy and intimidate him when on his return he asked the trespassers to leave the premises. I have been referred to the decisions in the cases of *Satish Chandra* v. *The King*, 53 C. W. N. 402 : (A. I. R. (36) 1949 Cal. 107 : 50 Cr. L. J. 161), *Soita Biswal* v. *Dochhi Stri*, 12 C. W. N. 269 and *Debi Prosanna Ghose* v. *Joy Narain*, 53 C. W. N. 822. In each of these cases, there are special features which take them outside the terms of S. 441. Every trespass does not necessarily amount to a criminal trespass. These cases are instances where it has been pointed out that the circumstances did not establish criminal trespass. The reasons given here by the learned Magistrate are in no way supported, in my opinion, by any of those decisions. In fact, if they hold good, the provisions of S. 447, Criminal P. C. would be rendered, in my opinion, almost entirely nugatory.

[5] The Rule is accordingly made absolute. The order of acquittal is set aside and the case is remanded for trial by the Sub-Divisional

Magistrate, Barrackpore, or by some other Magistrate to whom he may transfer the case other than Mr. B. N. Sen.

D.H. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 411 *[C. N. 152.]*

HARRIES C. J. AND BANERJEE J.

Basantilata Dhar — Petitioner v. *Amar Nath Haldar and others—Opposite Party.*

Civil Rule No. 823 of 1949, D/- 14-3-1950, from order of Sub-J., 6th Court, Alipore, D/- 1-3-1949.

(a) Soldiers (Litigation) Act (1925), S. 11—Scope —Soldier's suit dismissed for default—Application to set aside dismissal — Period of service prior to dismissal of suit not to be excluded.

The plaintiff was a soldier serving under war conditions from 23rd May 1942 to 25th November 1946. His suit was dismissed for default on 14th December 1942. He applied for setting aside the order of dismissal on 15th July 1947:

***Held*, that the words "the time during which the soldier has been serving under war conditions" in S. 11 should not be construed in a literal sense and therefore the whole of the period of plaintiff's service including the one prior to the dismissal of the suit could not be excluded. The plaintiff was entitled to exclude only the period he was in service after the order of dismissal of suit in computing limitation for setting aside the order of dismissal. [Paras 9]**

Annotation : ('46-Man.) Soldiers (Litigation) Act, S 11, N 1.

(b) Civil P. C. (1908), S. 115—Question of limitation—Wrong decision under misconception of law—High Court would set aside order in revision. [Paras 13, 14]

Annotation: ('44-Com.) Civil P.C., S. 115, N. 10, 13.

P. C. Mallick and U. C. Mallick —for Petitioner.

Radhika Charan Chatterjee— for Opposite Party.

Banerjee J.— This is an application under S. 115, Civil P. C., against a decision of the learned Subordinate Judge, 24 Parganas, whereby he set aside an order of dismissal of a suit made on 14th December 1942, and restored the suit to file for hearing.

[2] The only question that arises in this case is a question of limitation and depends on the construction of Ss. 10 and 11, Indian Soldiers' (Litigation) Act (IV [4] of 1925). The relevant portions of the sections are as follows :

Section 10: "(1) In any proceeding before a Court in which a decree or order has been passed against any Indian Soldier whilst he was serving under war conditions or at any time after the 1st day of April 1925, whilst he was serving under any special conditions, the soldier may apply to the Court which passed the decree or order for an order to set aside the same, and, if the Court after giving an opportunity to the opposite party of being heard, is satisfied that the interests of justice require that the decree or order should be set aside as against the soldier, the Court shall, subject to such conditions, if any, as it thinks fit to impose, make an order accordingly.

(2) No such application shall be entertained unless it is made within two months from the expiry of the first period of thirty days after the date of the decree or order, or where the summons or notice was not duly served on the apalicant, after the date on which the applicant had knowledge of the decree or order, during no part of which the soldier was serving under special conditions :

Provided that the provisions of S. 5, Limitation Act, 1908, shall apply to such applications."

* * * * *

Section 11 : "In computing the period of limitation prescribed by the Indian Limitation Act, 1908, or any other law for the time being in force, for any suit, appeal, or application to any Court any party to which is or has been an Indian Soldier, the time during which the soldier has been serving under war conditions since 4th August 1914, or under any special conditions since 1st April 1925, shall be excluded."

* * * * *

[3] The suit was adjourned several times at the instance of the plaintiff. It was fixed several times peremptorily. The plaintiff did not appear. On 14th December his pleader said that he had no instructions. The suit was dismissed for default.

[4] On 15th July 1947 the plaintiff made an application for setting aside the order of dismissal.

[5] The plaintiff was a soldier serving under war conditions from 23rd May 1942 to 25th November 1946 when he was discharged.

[6] It was alleged in the petition that after his discharge he had an attack of gastritis and suffered from 7th December 1946 to 27th June 1947. But no point has been made before us on the ground of his illness.

[7] The learned Subordinate Judge made the order on 1st March 1949 allowing the application for setting aside the dismissal dated 14th December 1948. From this order the present application has been made.

[8] The total period, the plaintiff served under war conditions, is 4 years 6 months and 3 days. The question is whether the whole of this period should be excluded in computing the period of limitation. The Court below has excluded the period. The Judge construed the words in S. 11, "the time during which the soldier has been serving under war conditions" in a literal sense.

[9] There seems to be no justification for excluding the period prior to 14th December 1942. During this period the plaintiff was not prevented from making this application by reason of his service. I can understand exclusion of the period he was in service after the order of dismissal. How can the prior period affect the question I do not see.

[10] A too literal adherence to the words of the section would produce an adsurdity and injustice. Take for example the following case. A soldier who had been serving under war conditions for 6 years prior to an order of dismissal, is discharged a day after that. Is the soldier entitled to get exclusion of the 6 years minus a

day, in computing the period of limitation? That is absurd.

[11] The Act was passed to provide for special protection of soldiers and not to grant them licence to do whatever they like. It is quite intelligible why time should not run against a soldier if he was serving under war conditions since commencement of limitation, why should the previous period be excluded ?

[12] It is not in dispute that if the time before the order of dismissal is not excluded, the application is out of time.

[13] It seems to us that the construction put upon the words by the learned Judge is not correct and he has exercised a jurisdiction under a misconception of the law. In other words, he has exercised a jurisdiction not vested in him by law.

[14] Therefore the learned Judge's order should be set aside. The petition is allowed and the Rule is made absolute with costs.

[15] **Harries C. J.**— I agree.

K.S. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 412 *[C. N. 153.]*

SEN AND CHUNDER JJ.

Kalu Mandal and others — *Appellants* v. *The State.*

Criminal Appeal No. 224 of 1949, D/- 2-2-1950.

(a) Criminal P. C. (1898), S. 154—First information report — Use of, for corroboration and contradiction—Evidence Act (1872), Ss. 145 and 157.

The General Diary entry and the First Information Report cannot be dealt with as substantive evidence. They may be put in evidence under S. 157, Evidence Act, to corroborate only the testimony of the person who gave the information incorporated in the General Diary or the First Information Report and not for the purpose of corroborating the evidence of any one else. They also may be considered for the purpose of contradicting the evidence of such person in accordance with the provisions of S. 145, Evidence Act. [Para 4]

Annotation : ('49-Com.) Criminal P. C., S. 154, N. 10, Pts. 1 and 7 to 9; ('46-Man.) Evidence Act, S. 145, N. 6, Pt. 4 ; S. 157, N. 6, Pts. 1 and 6.

(b) Criminal P. C. (1898), S. 297—Charge to jury — Several accused—Duty of Judge.

When a Judge is trying several accused persons he should tell the jury in clear terms that they should consider the case of each accused separately and independently. Further, he himself should deal with the case of each accused separately and place before the jury the evidence, the circumstances and the contentions of the prosecution and the defence with respect to each accused separately. [Para 6]

Annotation : ('49-Com.) Criminal P. C., S. 297, N. 7, Pts. 1 and 2.

S. S. Mukherjee — for Appellants.

N. K. Sen — for the State.

Sen J.—The appellants Kalu Mandal, Yasin Mandal, Abdul Sattar Mandal and Fakir Ahmed have been found guilty of committing the offence of rioting and sentenced to rigorous imprisonment for one year. They have also been found guilty of having committed culpable homicide punishable under the first portion of S. 304, Penal Code, and sentenced to undergo rigorous imprisonment for three years. The accused Golam Mandal has been found guilty of abetment of the aforesaid culpable homicide and sentenced to undergo rigorous imprisonment for three years. The appellants were tried by Sri N. Chakravarty, Sessions Judge of Nadia and a jury. Against this order of conviction and the sentences the present appeal has been laid.

[2] The case for the prosecution briefly is as follows : On 11th April 1949, the appellants together with one Hasim, who is absconding, came upon the land of one Maharani Bibi and forcibly plucked cocoanuts from the trees growing thereon. Maharani Bibi and a relation of hers called Ambar, since deceased, protested. Upon this Ambar was set upon and beaten with various weapons by some of the appellants and as a result of the beating he died. Immediately after the beating Prosecution Witness 2 Shamsul Huq went to the *thana* and lodged an information which was recorded in the General Diary by literate constable Prafulla Sen, Prosecution Witness 9, there being no other officer there. This General Diary entry is Ex. 2. Ambar was attended by doctors but he died. Thereupon another information was lodged at about 3 A. M. which was treated as the first information report by Ramani Mohan Bhattacharjee the officer in charge. It is Ex. 3. Thereafter the investigation started. There was a *post mortem* on the body of Ambar and it was found that he died as a result of the injuries received. These in short are the facts upon which the case for the prosecution depends. The defence taken is as follows: Maharani Bibi has only a very small share in the land. Eight annas of that land belonged to one Panchkari Kazi. On his death it devolved upon his sister. That sister died and her daughter inherited a portion of the land and sold her share to Hasim, son of Kalu. Hasim as I have stated before, is absconding. The appellants went on the land legitimately and they were resisted by Ambar and others. There was a fight in the course of which Kalu got an injury on the head. Broadly speaking, the defence taken may be said to consist of a plea of the right of private defence of property and person. I may state here that no evidence was adduced on behalf of the defence either as regards the occurrence or as regards the claim of Hasim to a portion of the property with respect to which the occurrence is said to have taken place.

[3] In view of the very unsatisfactory nature of the charge to the jury, we are of opinion that the order of conviction and the sentences must

be set aside. We also think that having regard to the nature of this thoroughly bad charge it would serve no useful purpose to discuss the evidence in detail or to deal with the discrepancies in the evidence. We feel that after this charge it would be impossible for any jury to have a correct grasp of the evidence or of the points which they would have to decide before delivering their verdict. That being so, we think that the proper course would be to direct a retrial of the case.

[4] I wish in this connection to point out certain glaring defects in the charge. It would be tidious and it would take a very long time if I were to point out all the defects in the charge; they are far too numerous. The first point which I would impress upon the learned Judge relates to the way in which he has treated the entries made in the General Diary and in the first information report. If the learned Judge had taken some slight trouble to acquaint himself with the important provisions of the Evidence Act he would have been aware of the fact that the General Diary entry and the first information report cannot be dealt with as substantive evidence. They may be considered for the purposes of corroboration under S. 157, Evidence Act, if all the provisions thereof are complied with. In this connection I would point out that they may be put in evidence to corroborate only the testimony of the person who gave the information incorporated in the General Diary or the first information report and not for the purpose of corroborating the evidence of any one else. They also may be considered for the purpose of contradicting the evidence of the person who gave the information incorporated in the General Diary or the first information report in accordance with the provisions of S. 145, Evidence Act.

[5] Throughout his charge the learned Judge has dealt with the General Diary entry and the first information report as if they constituted substantive evidence. He has also committed a further error in treating these entries as corroborating the evidence of witnesses who had nothing to do with the making of these entries. It is regrettable that we have had to point this out to the learned Judge on more than one occasion and we trust that he will take some pains to understand the law of evidence regarding this point. Owing to this error which in our opinion is a very serious one the jury were hopelessly misguided and the verdit of a jury, so misguided cannot possibly be supported.

[6] I would also point out to the learned Judge that when he is trying several accused persons he should tell the jury in clear terms that they should consider the case of each accused separately and independently. Further, he himself should deal with the case of each accused separately and place before the jury the evidence, the circumstances and the contentions of the prosecution and the defence with respect to each accused separately. This has also been pointed out to this particular learned Judge more than once. He has either not been able to comprehend what has been explained to him on previous occasions or he had deliberately failed to follow these directions. In the present case we find that he makes a mere pretence of following these directions by adopting a device which does not carry out these directions. What he does is this: He heads a particular paragraph with the name of a particular accused person and then instead of dealing with the case of that particular accused person he merely says that the jury should remember what he has previously said about that particular accused person in the earlier part of his somewhat jumbled charge. This is not the way in which the case of an accused should be dealt with separately. These are a few of the defects of the charge but they are sufficient in our opinion to vitiate the findings of the jury.

[7] We accordingly set aside the order of conviction and the sentences and send the case back for retrial according to law and in the light of the observations made above.

[8] The appellants will continue on the same bail pending the retrial.

[9] **Chunder J.** — I agree.

V.R.B. *Re-trial ordered.*

A. I. R. (37) 1950 Calcutta 413 *[C. N. 154.]*

HARRIES C. J. AND BACHAWAT J.

Kanai Lal Dwary—Appellant v. *The State.*

Criminal Appeal No. 211 of 1949, D/- 20-2-1950.

(a) Criminal P. C. (1898), Ss. 297, 164—Retracted confession—Evidentiary value—Direction to jury—Evidence Act (1872), S. 24.

Merely telling the jury that the retracted confession of a co-accused was of little evidentiary value against a co-accused is not sufficient. The jury should be told that its evidentiary value is such that no conviction could be based upon it alone and that at most it can only be regarded as a weak corroboration of other evidence. [Para 5]

Annotation : ('49-Com.) Criminal P. C., S. 164, N. 18. Pt. 9; S. 297 N. 9; (46-Man.) Evidence Act, S. 24, N. 9.

(b) Criminal P. C. (1898), S. 297—Test identification—Direction to jury—Evidence Act (1872), S. 9.

A Judge ought to tell the jury that, if they are of opinion that the accused and the witnesses had been in Court for hours before the test identification, then they should attach no importance whatsoever to the identification of the accused. Merely telling the jury that they have to be satisfied and not making it clear

what they have to be satisfied about is not a sufficient direction upon a point of this kind. [Para 11]

Annotation: ('49-Com.) Criminal P. C., S. 297, N. 9; (46-Man.) Evidence Act, S. 9, N. 5.

(c) Criminal P. C. (1898), S. 164 — Statements made by witnesses at test identification — Admissibility—Evidence Act (1872), S. 145.

It is usual for a Magistrate to record statements made by witnesses at test identification parades. But that does not mean that those statements are admissible in evidence. They are statements made under S. 164, Criminal P. C., to a Magistrate after investigation has commenced. They are not confessional statements and are not recorded as such. That being so, they can only be admissible to contradict a witness and not as substantive evidence. [Para 12]

Annotation : ('49-Com.) Criminal P. C., S. 164, N. 10 ; (46-Man) Evidence Act, S. 145, N. 5.

Sudhansu Sekhar Mukherji and Sukumar Mitra —for Appellant.

B. M. Sen—for the State.

Harries C. J.—This is an appeal by one Kanai Lal Dwary who was tried by a learned Assistant Sessions Judge and jury upon a charge of dacoity. The jury unanimously found the appellant guilty under S. 395, Penal Code, and the learned Judge agreeing with the verdict convicted the appellant under that section and sentenced him to five years' rigorous imprisonment. It is from that conviction and sentence that the present appeal has been preferred.

[2] The charge against Kanai was that he and others on 17th March 1949, committed dacoity in the house of one Durgadas Nandi at Kanchannagar. A number of dacoits are said to have broken into the house and looted cash and property to the value of Rs. 1300.

[3] At the trial the factum of dacoity was not contested and the only point at the trial was whether or not Kanai and four others who were standing their trial, were amongst the dacoits and had been satisfactorily identified by the witnesses. The only other piece of evidence against the accused was a confession by one Tej Bahadur which had been subsequently retracted.

[4] Mr. Sudhansu Mukherji who has appeared on behalf of the appellant has confined his argument to the summing up of the learned Judge with regard to the evidence against his client.

[5] The learned Judge very rightly pointed out that the retracted confession of Tej Bahadur was of little evidentiary value against the appellant Kanai. The learned Judge, I think, should have gone further than that and should have told the jury that the retracted confession of Tej Bahadur implicating Kanai was not evidence upon which the jury could convict Kanai. The implication of Kanai by Tej Bahadur was at most a circumstance which the jury could take into account by way of assuring them of the truth of other evidence. In short, the retracted confession of Tej Bahadur at most would only afford some weak corroboration of any other admissible evidence against the appellant. Merely telling the jury that the retracted confession was of little evidentiary value is not to my mind sufficient. The jury should be told that its evidentiary value is such that no conviction could be based upon it alone and that at most it can only be regarded as a weak corroboration of other evidence.

[6] The only other evidence against the appellant Kanai was the evidence of two witnesses—Abhoy and Jatin. Abhoy (P. W. 11) and Jatin (P. W. 10) stated that they were villagers who had recognised these two dacoits. Admittedly they did not know the appellant and their evidence of identification was sought to be corroborated by evidence relating to a test identification.

[7] Kanai who was practically a one eyed man was put up for identification and it is said that he was identified by Abhoy and Jatin. Had the test identification been a satisfactory one there can be no question that the identification of Kanai by these two witnesses at such a parade would afford valuable corroboration of their evidence that they had recognised this appellant during the dacoity. However the evidence relating to this test identification is most unsatisfactory and it appears to me clear that as far as Kanai was concerned the test identification was a farce. The learned Judge did warn the jury about the disquieting features of this test identification parade, but in my view he did not place the matter strongly enough to the jury.

[8] The test identification parade was carried out by a Magistrate who is referred to as Radha Syam Babu in the summing up. In his evidence he stated that it had been reported to him by the police that Kanai and another accused person had been in Court for hours before the test identification and further that the two witnesses Abhoy and Jatin had also been in Court. If the accused and the witnesses had been in the same Court for some hours before the test identification parade then quite obviously the two witnesses would know that this practically one eyed man Kanai was alleged to have been in the dacoity.

[9] A test identification, when witnesses have already seen an accused person, is worth nothing at all and it appears to me, having regard to the admissions made by the learned Magistrate, that the witnesses must have seen this rather peculiar looking appellant before they were asked to identify him at the parade.

[10] As I have said the learned Judge did warn the jury about this parade. But it ap-

pears to me that his warning was neither clear nor strong enough. Having mentioned the facts that I have stated the learned Sessions Judge observed as follows:

"The witnesses came to Court between 11 a.m. and 12 noon and the identification took place at 5 p.m. You are to consider if in view of the statement of Radhashyam Babu, the Magistrate who held the test identification parade, that identifying witnesses had occasion to see the accused Kanai and Niranjan before the test identification parade. You must be satisfied on this point before you can hold that recognition in test identification parade was correct and genuine."

[11] What the learned Judge meant by saying "you must be satisfied on this point before you can hold" etc., is difficult to say. It appears to me that the learned Judge ought to have told the jury that, if they accepted the learned Magistrate's statement that the accused and the witnesses had been in Court for hours before the test identification, then they should attach no importance whatsoever to the identification of the appellant who, as I have said, was a rather distinctive looking person, being practically one-eyed. Merely telling the jury that they had to be satisfied and not making it clear what they had to be satisfied about is not to my mind a sufficient direction upon a point of this kind. The learned Judge should have made it clear that if the jury were of opinion that the witnesses had seen the accused before the identification or were in any doubt about the matter, then the evidence as to the identification at the test identification parade should be rejected altogether and the jury should further have been told that without evidence of a satisfactory test identification, their evidence of identification given in the witness box was worth little or nothing at all. It appears to me that on the facts of this case the jury should have been very carefully warned that it would be highly dangerous to accept the evidence of identification and should have been further warned that without such evidence the implication of Kanai by the retracted confession of Tej Bahadur was to all intents and purpores worthless. The failure to make the position clear with regard to the test identification is to my mind most material and may well have led to a miscarriage of justice in this case.

[12] Mr. Sudhansu Mukherji also pointed out that the Magistrate who conducted the test identification parade was allowed to give evidence as to what witnesses told him when they identified a particular suspect. It is I know usual for a Magistrate to record statements made by witnesses at test identification parades. But that does not mean that those statements are admissible in evidence. They are statements made under S. 164, Criminal P. C., to a Magistrate after investigation has commenced. They are not confessional statements and are not recorded as such. That being so, they can only be admissible to contradict a witness. It is true that a statement was used to contradict one of the witnesses against Kanai, but the evidence was admitted by the learned Judge as if it was substantive evidence against the accused. The evidence should not be admitted in chief and should only be admitted for one purpose, namely, to contradict the person who is alleged to have made a statement to the Magistrate.

[13] Having regard to the failure of the learned Judge to warn the jury sufficiently of the unsatisfactory nature of the test identification parade, I think we are bound to hold that there was in this case a misdirection on material matters which vitiated the verdict.

[14] The question arises what course should the Court follow having set aside the conviction and sentence. We could of course order a new trial. But having regard to the evidence in this case I do not think any jury could be asked to convict upon such evidence. That being so, it appears to me that the proper course is to acquit the appellant.

[15] In the result, I would allow this appeal, set aside the conviction and sentence and aqcuit the appellant. The appellant who is on bail need not surrender to his bail and his bail is cancelled.

[16] **Bachawat J.**—I agree.

V.R B. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 415 *[C. N. 155.]*

HARRIES C. J. AND BACHAWAT J.

Kalna Municipality — Plaintiff — Petitioner v. *Province of West Bengal — Defendant — Opposite Party.*

Reference No. 1 of 1949, D/- 1-3-1950, by Munsif, Kalna, in S. C. C. Suit No. 347 of 1948.

(a) Provincial Small Cause Courts Act (1887), S. 15 and Sch. II, Art. 13 — Suit for recovery of municipal taxes—Jurisdiction of Small Cause Court —Municipalities —Bengal Municipal Act (XV [15] of 1932), S. 167.

A suit by a Municipality to recover arrears of taxes which are due to the Municipality by force of a statute and not by reason of any interest in immovable property is not a suit coming within Sch. II Art. 13 when the plaintiff merely claims a money decree without claiming any charge given to it under S. 167, Bengal Municipal Act, and the Small Cause Court will have jurisdiction to entertain and decide the suit by virtue of S. 15. [Paras 8 and 10]

Though by virtue of S. 167, Bengal Municipal Act, the Municipality has a charge on the holding in respect of which the taxes are claimed, the Municipality is en-

titled to recover them as a simple money-decree and is not bound to enforce its rights as a charge holder.
[Para 9]

(b) Civil P. C. (1908), S. 7—Jurisdiction of Small Cause Court to try suit if controlled by jurisdiction to execute decree.

The mere fact that a Small Cause Court is debarred by S. 7 from executing a decree against immovable property does not mean that it is also debarred from trying the suit inasmuch as the question of jurisdiction of the Court as to execution of a decree has no relevance whatever as to the question whether the Court has jurisdiction to try the suit. [Para 11]

Annotation: ('44-Com.) Civil P. C., S. 7 N. 5.

Bachawat J. — This is a reference by the Munsif of Kalna under O. 46, R. 6, Civil P. C. It appears that the Chairman of the Kalna Municipality claimed arrears of taxes from the Province of West Bengal and instituted a suit before the Munsif of Kalna who is invested with Small Cause Court powers. The suit was registered as Small Cause Court Suit No. 347 of 1948. The plaintiff is claiming Rs. 8-4-0 on account of arrears of taxes and he has prayed for a decree for the amount of the claim with costs and such other relief as he may be entitled to.

[2] On 27th May 1949 the suit was heard by the learned Munsif. The learned Munsif had doubts as to whether the suit was cognizable by a Court of Small Causes. In that view of the matter he has made this reference. No one has appeared for either party on this reference.

[3] The jurisdiction of the Court of Small Causes is conferred by S. 15, Provincial Small Cause Courts Act which reads as follows:

"(1) A Court of Small Causes shall not take cognizance of the suits specified in Sch. 2 as suits excepted from the cognizance of a Court of Small Causes.

(2) Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes."

[4] Section 16 of that Act reads as follows:

"Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of a Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable."

[5] This suit is of a civil nature and its value does not exceed Rs. 500. It is therefore clear that unless this suit is a suit which is specified in Sch. 2 to the Act the Court of Small Causes has jurisdiction to hear and determine the suit.

[6] Questions have arisen in other High Courts as to whether any of the articles in Sch. 2, Provincial Small Cause Courts Act, bar the jurisdiction of the Small Causes Court in hearing and determining suits relating to taxes filed by municipalities. It was urged in several cases that Art. 13 of Sch. 2, Provincial Small Cause Courts Act, bars the jurisdiction of the Small Causes Court in such matters. That article bars the jurisdiction of the Small Causes Court from trying a suit respectively called *malikana* and *hakk*, or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immovable property in an hereditary office or in a shrine or other religious institution.

[7] In dealing with this question, Fazl Ali J. in the case of *Municipal Commissioners, Ranchi* v. *Mt. Mungia*, A. I. R. (19) 1932 Pat. 220: (139 I. C. 104) observed as follows:

"The first point to be determined is whether a Municipality has any such 'interest in any immovable property' as is referred to in Art. 13. Mr. Shiveshwar Dayal, who appears in support of the application, contends that the Municipality has no 'interest in immovable property' and clinches his argument by referring to the fact that in case any of the holdings which were to be sold are acquired by the Land Acquisition Department the Municipality could not claim any share in the proceeds of the sale or the compensation that might be payable upon such acquisition. Now although I recognise that the term 'interest' is wider than 'proprietary interest', yet having regard to the context in which the expression is used, it is in my judgment difficult to hold that the municipality has any such interest in the holdings situated within the municipal area as is contemplated by the use of the expression in Art. 13."

[8] We respectfully agree with that observation. In order that Art. 13 of Sch. 2 may apply the plaintiff must be claiming certain dues which are payable to him by reason of his interest in immovable property. It is quite clear that the taxes which are being claimed by the plaintiffs municipality here are not being claimed by reason of an interest of the municipality in the immovable property. The tax is due to the municipality by force of a statute, and not by reason of any interest of the municipality in the immovable property.

[9] The learned Munsif in his letter of reference has referred to S. 167, Bengal Municipal Act which reads as follows:

"The sum due on account of any rate under this Act from any person in respect of any holding shall, subject to the prior payment of the land revenue (if any) due to the Government or of rent (if any) due to a landlord under the Bengal Tenancy Act 1885, thereupon, be a first charge upon the said holding."

It is true that by virtue of that section the municipality has a charge on the holding in respect of which the municipality is claiming the rate. But the municipality is entitled to file a suit to recover the money due to it and to ask for a simple money decree. It is not bound to enforce its rights as a charge-holder. Whether it will be open to the municipality later on to enforce the charge by a separate suit it is not necessary for this Bench to determine. The answer to that question will depend upon the true construction of O. 2, R. 2, Civil P. C., and O. 34, R. 14 of that Code.

[10] The jurisdiction of the Court will depend upon the allegations made in the plaint. Here the only allegations made in the plaint are that a certain sum of money is due to the plaintiff municipality on account of arrears of arrears of taxes. The plaintiff is claiming a simple money decree to recover the arrears of taxes. It is to be noticed that in the plaint no reference has been made to S. 167, Bengal Municipal Act. It is quite clear that the plaintiff municipality does not intend in this suit to enforce the charge which is given to them by S. 167, Bengal Municipal Act. As the plaint stands it is a simple money claim and by reason of S. 15, Provincial Small Cause Courts Act, the Small Cause Court will have jurisdiction to entertain and decide the suit.

[11] The learned Munsif in his letter of reference has also referred to S. 7, Civil P. C., which *inter alia* provides that so much of the body of the Code as relates to the execution of decrees against immovable property shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887. The learned Munsif seems to have been of the opinion that inasmuch as he is debarred from executing a decree against immovable property he is also debarred from entertaining and deciding the suit. In our judgment, the question of the jurisdiction of the Court as to execution of a decree has no relevance whatsoever as to the question whether the Court has jurisdiction to try the suit. The learned Munsif has not been called upon at present to execute any decree which may or may not be passed by him. The only question at present before him is whether the suit which has been filed in his Court can be proceeded with.

[12] In our judgment it is clear that the Court of Small Causes has jurisdiction to hear and determine the suit and we, therefore, direct that the Munsif do proceed with the suit before him.

[13] **Harries C. J.**—I agree.

K.S. *Answer accordingly.*

A. I. R. (37) 1950 Calcutta 417 *[C. N. 156.]*

R. P. MOOKERJEE AND DAS GUPTA JJ.

Corporation of Calcutta—Complainant—Petitioner v. *Sub Post Master, Dharamtola Post-Office—Accused—Opposite Party.*

Criminal Revn. No. 378 of 1948, D/-7th April 1949.

(a) Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 386 — Heading to section to be regarded as preamble to it — Section 386 is attracted with reference to storing in premises limited by the heading to such section—Interpretation of Statutes.

The headings prefixed to a section or a set of sections in modern statutes are regarded as preambles to those sections. It is now a settled rule that the function of preamble is to explain what is ambiguous in the enactment and it may either restrain or explain it as best suits the intention. On the plain reading of S. 386 that section is not of general application. Even if there be any doubt as to the proper effect and scope of the section, the Court has to refer to the special heading "Factories, trades and places of public resort" and it must be held that S. 386 will be attracted not with reference to storing in every premises, but only in those which are limited by the description given by the sub-heading. [Paras 4 and 5]

(b) Interpretation of Statutes — Provisions clear and unambiguous — Court has nothing to do with their reasonableness or otherwise — Two meanings possible — Reasonable intendment would be more acceptable.

If the provisions are clear and unambiguous, a Court of law has nothing to do with the reasonableness or unreasonableness of such statutory provisions, except so far as it may help it in interpreting what the legislature has said. But while interpreting a provision in a statute when two meanings are possible and one of the interpretations is neither convenient nor reasonable, then such intendment as would make the provision reasonable and just, would be more acceptable than the other. [Para 5]

(c) Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 386 — Statute providing for license for carrying on trade—Consideration whether person concerned earned profit irrelevant—Storing of grain in certain premises by Post and Telegraphs Department for benefit of employees without license—Section 386 attracted.

In taxing statutes, as under the Income-tax Act, where the making of profits makes a person liable for the tax, "trade" must always be considered in the context of earning profits. But where a statute provides for a license or a permit being taken out for carrying on a business or a trade it is neither necessary nor relevant to consider whether the persons concerned actually earn a profit or even intended to make a profit out of the trade or carried on the business from some motive or other for benefiting the public or a section thereof by selling at a loss. In enacting S 386 the intendment of the legislature was to regulate and restrict, for the sake of health and convenience of the public, storing of particular articles meant to be utilised for trade. Where the Post and Telegraphs Department of the Government stored grains in a certain premises for the benefit of the employees of that Department without taking a license:

Held, that S. 386 was attracted. [Paras 7 and 8]

(d) Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 386 — Crown bound by statute if expressly named or by necessary implication—Crown not named in Act and hence not bound by S. 386.

When the Crown is expressly named in a particular statute the Crown is bound thereby. If it were manifest in the terms of the statute that it was the intention of the legislature that the Crown should be bound the result would be the same as if the Crown had been expressly named. This principle has not been limited only to provisions affecting rights to property of Crown. Hence the Crown is not affected by the provisions contained in S. 421, Calcutta Municipal Act as it cannot be said that by necessary implication the Crown is bound by this section of the Act. Hence where the storing and sale are by and on behalf of the Central Government, as the Crown is not expressly named in the Calcutta Municipal Act the Crown is not bound by the provisions of S. 386 : A. I. R. (34) 1947 P. C. 34, *Foll.* [Paras 9, 12 and 14]

N. K. Basu and Pashupati Ghose—for Petitioner.
P. B. Mukherjee and N. C. Talukdar
—for Opposite Party.

Order. — This rule was issued against an order of acquittal passed by the Municipal Magistrate, Calcutta and raises some very important questions of law.

[2] A complaint was filed on behalf of the Corporation of Calcutta against the opposite party station *inter alia* that premises No. 43, Dharamtola Street, Calcutta was being used or permitted to be used as grains, flour and atta shop without taking out a license for the year 1945-46 under S. 386, Calcutta Municipal Act. Summons was accordingly issued against the opposite party. The learned Magistrate by his order dated 1st March 1948 held that the storing of grains in the premises was by the Post and Telegraphs Department of the Government for the benefit of the employees of that Department, and not for trade, and to that purpose could not be taken to be "storing" as contemplated under S. 386 (1) (a), Calcutta Municipal Act; and that the prosecution was also bad in law as the relevant provisions could not bind the Crown. The Magistrate accordingly acquitted the accused of the charges.

[3] Mr. Basu appearing on behalf of the Corporation contends that S. 386 read with Sch. 19, Calcutta Municipal Act, is attracted if any one of the different items mentioned in the Schedule are stored, irrespective of the fact whether such storing is for purposes of trade.

[4] Chapter 26, Calcutta Municipal Act, is headed as for "Inspection and Regulation of premises, and of factories, trades and places of public resort." This chapter is sub-divided into two parts. Sections 380 to 384 are under the sub-heading "Premises generally." Sections 385 to 391 are under the sub-heading "Factories, trades and places of public resort." It is contended on behalf of the Corporation that the provisions of S. 386 are to be interpreted without any reference to the sub-heading "Factories, trades and places of public resort." This contention cannot be upheld. The headings prefixed to a section or a set of sections in modern statutes are regarded as preambles to those sections. It is now a settled rule that the function of the preamble is to explain what is ambiguous in the enactment and it may either restrain or explain it as best suits the intention. *In re Carlton*, (1945) Ch. 372: 114 L. J. Ch. 289; citing *Corporation of the City of Toronto* v. *Toronto Railway Co.*, (1907) A. C. 315 at p. 324 : (76 L. J. P. C. 57).

[5] On an examination of S. 385 and those follow it, it is clear that each one of those section relates to either factories, trades and places of public resort. If the provisions of S. 386 are not taken to be limited and applicable only to factories, trades and places or public resort the result would be that whenever anything is stored, however small the quantity and for whatever purpose such storing may be made, a license will have to be taken out: Every householder must then take out a licence for keeping in his house even small quantities of articles for ordinary and daily use— an interpretation which is neither reasonable nor can be deemed to be convenient to the society at large. If the provisions are clear and unambiguous, a Court of law has nothing to do with the reasonableness or unreasonableness of such statutory provisions, except so for as it may help it in interpreting what the legislature has said. (*Cooke* v. *Charles A. Vogeler Co.*, (1901) A.C. 107. But while interpreting a provision in a statute when two meanings are possible, and one of the interpretations is neither convenient nor reasonable, then such intendment as would make the provision reasonable and just, would be more acceptable than the other. Coke on Littleton 97A. In our view, on the plain reading of S. 386 that section is not of general application. Even if there be any doubt as to the proper effect and scope of the section, we have to refer to the special heading "Factories, trades and places of public resort" and it must be held that S. 386 will be attracted not with reference to storing in every premises, but only in those which are limited by the description given by the sub-heading.

[6] It is conceded that grains etc., in the premises are stored. But it is contended that such storing is not for purposes of trade, inasmuch as, these articles are meant for distribution amongst the employees of a particular Government Department at concession rates and such transactions, it is argued cannot be deemed to be in course of trade or business. 'Trade' in its primary sense means the exchange of goods for goods or goods for money. Reference is made to the *Municipal Commissioners of Barnagore* v. *Barnagore Jute Factory Ltd.*, 41 C. W. N. 662: (A. I. R. (24) 1937 Cal. 324) as an authority for holding that trade must always connote transactions with a view to earn profit only. In the case cited above S. 123, Bengal Muncipal Act (Bengal Act XV [15] of 1932) read with cl. 1 of Sch. 4 of that Act, fell to be considered. Clause 1 is in the following terms:

"Company transacting business within the Municipality for profit or as a benefit of society."

The test to be applied in that case was whether the concern transacted any business "for profit or not." This case, therefore, is no direct authority for the wider proposition that trade must always mean a transaction for profit.

[7] In *Burmah Shell Oil Storage & Distributing Co.* v. *Howrah Municipality*, 40 C. W. N. 766 : (A. I. R. (23) 1936 Cal. 477) this Court has occasion to consider S. 175, Calcutta Municipal Act, which requires a license to be taken out by a person who carries on a profession, trade or calling indicated in Sch. VI of the Act. Jack J. observed that though "trade" under S. 175 is used in its ordinary sense viz., exchange of goods for money or goods for goods with the object of making a profit, a statutory provision for taking out a licence is intended to control the carrying on of a trade simpliciter and is not meant to be a tax on the profits. In taxing statutes, as under the Income-tax Act, where the making of profits makes a person liable for the tax, "trades" must always be considered in the context of earning profits. But where a statute provides for a license or a permit being taken out for carrying on a business or a trade it is neither necessary nor relevant to consider whether the persons concerned actually earn a profit or even intended to make a profit out of the trade or carried on the business from some motive or other for benefiting the public or a section thereof by selling at a loss. The word "trade" is one of a very general application, and must always be considered along with the context in which it is used. Halsbury, Laws of England, Vol. 32 pp. 303-4.

[8] In the case now before us the intendment of the Legislature was to regulate and restrict, for the sake of health and convenience of the public, storing of particular articles meant to be utilised for trade. So far as the particular provisions are concerned, it is immaterial whether the persons storing intend to or actually derive profit or not. The primary and dominant purpose of the statute is to be taken into consideration. In this view, it must be held, on the facts admitted, that the articles were stored for trade, and accordingly S. 386, Calcutta Municipal Act, is attracted unless its application is otherwise barred.

[9] It is urged on behalf of the opposite party that the storing and sale in this case or by and on behalf of the Central Government and as the Crown is not expressly named in the Calcutta Municipal Act the Crown is not bound by the provisions. Reference is in this connection made to *Province of Bombay* v. *Municipal Corporation of the City of Bombay*, 73 I. A. 271 : (A.I.R. (34) 1947 P. C. 34) which overruled the judgment of the Bombay High Court reported in *Province of Bombay* v. *Municipal Corporation of the City of Bombay*, I.L.R. (1944) Bom. 95 at p. 101: (A. I. R. (31) 1944 Bom. 26). In this case the Bombay Corporation had under Ss. 222 (1) and 265, City of Bombay Municipal Act, 1888 (the corresponding sections of the Calcutta Municipal Act, Bengal Act III [3] of 1923 being Ss. 244 and 252) attempted to lay watermains along Antop Hill Road, the property in which road belonged to Government. The test to be applied for deciding whether the Crown is bound by a statute or not, was held to be in no way different in the case of the Indian Legislature from that which has long been applied in England. It is incontrovertible that when the Crown is expressly named in a particular statute the Crown is bound thereby but difficulty arises when it has to be ascertained whether the Crown is bound by "necessary implications." The Judicial Committee also held that if it were manifest in the terms of the statute that it was the intention of the Legislature that the Crown should be bound the result would be the same as if the Crown had been expressly named.

[10] On behalf of the Bombay Municipal Corporation, it had also been contended before the Judicial Committee that whenever a statute is enacted "for the public good" the Crown, though not expressly named, must be held to be bound by its provisions and as the Act was manifestly intended to secure public welfare it must bind the Crown. Though this proposition is supported by early authority and is to be found in Bacon's Abridgement and other text books the Judicial Committee held that that view could not now be regarded as sound, except in a strictly limited sense. Reference was made to *Gorton Local Board of Health* v. *Prison Commissioners* (1904) 2 K. B. 165 (n) and the *Attorney-General* v. *Hancock*, (1940) 1 K. B. 427 : (1940-1 ALL E. R. 32) as instances where the Crown was held not to be bound although the statute in question was clearly for the public benefit. Their Lordships further observed as follows :

"Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficient purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound, Their Lordships will add that when the Court is asked to draw this inference, it must always be remembered that that, if it be the intention of the Legislature that the Crown shall be bound, nothing is easier than to say so in plain words."

The distinction made in Scottish cases, between property held *jure corona* and other property of the Crown, was further held as not to have been adopted in England and does not seem to their Lordships to be in accordance with a body of English authority which, where an ancient doctrine of the common law of England is in question, ought in their Lordships' opinion to prevail. The law of England and of India

was held to be the same, and their Lordships could find no reason to say by necessary implication the Crown was bound by the relevant sections of the Bombay Municipal Act.

[11] Mr. Basu appearing on behalf of the petitioner Corporation contends that the case before the Judicial Committee as also the decisions the *Hornsey Urban District Council* v. *Hennell* (1902) 2 K. B. 73 : (71 L. J. K. B. 479) and *Attorney-General* v. *Hancock*, (1940) 1 K.B. 427 : (1940-1 ALL E. R. 32) refer to instances — where the relevant statutory provisions interfered with the right to property of the Crown but in the case now before us there is no question of any interference with any right to property. The provisions under consideration require certain licenses to be taken out ; these provisions, it is urged do not in any way affect rights over property or prerogative of the Crown. No doubt this aspect of the question was not argued before the Judicial Committee in the *Province of Bombay* v. *Municipal Corporation of the City of Bombay*, 73 I. A. 271 : (A. I. R. (34) 1947 P. C. 34). Our attention is particularly drawn to the observations in *Attorney-General* v. *Hancock*, (1940) 1 K. B. 427 at p. 439: (1940-1 ALL E R. 32):

"The Rule is now well written and clear that if an Act of Parliament when otherwise divest the Crown of its property, rights, interest or prerogative, it is not to be construed as applying to the Crown unless the Crown has been mentioned either expressly or by necessary implication."

It is further pointed out that the relevant provisions of the Calcutta Municipal Act which are now before us for consideration only deal with the mode or manner of carrying on a business or trade and not with the carrying on the business itself.

[12] Although this particular line of argument now advanced before us was not considered by the Judicial Committee, its decision, however, is in very general terms and is not in any way limited to proceedings affecting rights to property or prerogative of the Crown. The judicial Committee came to the conclusion as stated above without making any distinction between provisions affecting rights to property or otherwise. It was laid down that the law is not in any way different in the case of Indian Legislation from that which has long been applied in England. If we analyse the various decisions of the English Courts, it will be apparent that the principle has not been limited to provisions affecting rights to property only. One of the cases in point is *Cooper* v. *Hawkins*, (1904) 2 K. B. 164: (73 L. J. K. B. 113). The question in issue in this case was whether regulations regulating the speed of locomotives within certain areas applied to the running of a locomotive owned by the Crown and driven by a servant of the Crown or Crown service. Lord Alverstone C. J. referred to his early observations in *Hornsey Urban District Council* v. *Hennel*, (1902) 2 K. B. 73 : (71 L. J. K. B. 479) and applying the same tests to the facts of the later case, held that the regulations did not affect the Crown. In *Cooper* v. *Hawkins*, (1904) 2 K. B 164 : (73 L. J. K. B. 113) (*Supra*) the provisions affected the mode or manner of running a locomotive and did not affect any property belonging to the Crown. The observations of Lord Alverstone C. J., and Wills J. make it abundantly clear that the Crown is not ordinarly bound by statutory provisions and the question of right to property is not a determining factor.

[13] In our view, the decision by the Judicial Committee in the *Province of Bombay* v. *Municipal Corporation of the City of Bombay*, 73 I. A. 271 : (A. I. R. (34) 1947 P. C. 34) must be taken to be an authority on the general question as to when the Crown is bound by statutory provisions. Decisions given by the Judicial Committee are binding on us and it is not open to this Court to go into the reasons or the absence of reasons supporting the decisions of the Judicial Committee.

[14] Had the question been *res integra* and had it been open to us to consider the question untrammelled by a decision of the Judicial Committee we might have considered the reasonableness and propriety of applying the principles as enunciated by the English Courts and also how far they should be applied to Indian conditions. For some years past, the position of the Crown with regard to liability and procedure has been considered by the lawyers in England as being "antiquated and absurd as contrasted with that of ordinary individuals" and reform in this respect has been considered to be long overdue. The directions given by Lord Birkenhead L. C. in 1921 and Lord Haldene L. C. in 1924, may be referred to in this connection. With the growing nationalisation of industries and the Government itself undertaking trade and commerce, the question has assumed greater importance. The Courts, however, are not concerned with the policy underlying such legislation or reform; we are only to apply the law as it stands. As stated already we are bound by the decision of the Judicial Committee and we must hold that the Crown is not affected by the provisions contained in S. 421, Calcutta Municipal Act, as it cannot be said that by necessary implication the Crown is bound by this Section of the Act. This Rule must accordingly be discharged.

[15] On behalf of the petitioner Corporation we have been moved to grant a certificate under S. 205, Government of India Act. Section 205 re-

fers only to cases involving substantial question of law as to the interpretation of the Government of India Act or any Order in Council made thereunder, or of the Indian Independence Act or of any Order made thereunder. Questions of law raised and decided in the appeal now before us do not touch any of the Acts or Orders referred to in S. 205 of the Act. Certificate is accordingly withheld.

D.H. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 421 *[C. N. 157.]*

K. C. CHUNDER AND GUHA JJ.

Corporation of Calcutta — Complainant — Petitioner v. *Bhupal Chandra Sinha and another — Accused — Opposite Party.*

Criminal Revn. Nos. 723 and 724 of 1949, D/- 15-12-1949.

(a) Criminal P. C. (1898), Ss. 435 and 439 — Proceeding under S. 421, Calcutta Municipal Act, if one before criminal Court — Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 421.

A proceeding under S. 421, Calcutta Municipal Act, is a proceeding before a Criminal Court within the meaning of S. 435. And the High Court has jurisdiction to revise an order under S. 421 or the cognate sections by the Municipal Magistrate of Calcutta. [Paras 3 and 4]

Annotation : ('49-Com.) Cr. P. C., S. 435, N. 7.

(b) Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 421 — Order against Crown — Crown — Statute binding.

Ordinarily the Crown may not be bound by a Statute and the test is whether expressly or by necessary implication in that particular Statute the Crown has been bound. The apparent purpose of the Statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the Statute was passed and received the royal sanction, it was apparent from its terms that its beneficient purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound.

Where several maunds of whole-barley were seized from the Government Stores and the finding of the municipal Magistrate was that these were unwholesome, unfit for human consumption and also injurious to public health :

Held, that the Crown was by necessary implication to be considered as bound and the municipal Magistrate had full jurisdiction to order the destruction of the unwholesome barley. [Paras 2 and 5]

N. K. Basu and Pashupati Ghose—for Petitioner.

J. M. Banerjea — for Opposite Party.

Order.—These two rules were issued at the instance of the Corporation of Calcutta in two cases in which two managers of Govt. Stores were proceeded against before the municipal Magistrate of Calcutta under S. 421, Calcutta Municipal Act—Act III [3] of 1923.

[2] It appears that several maunds of whole-barley were seized from these two Government Stores and the finding of the learned Magistrate, after an elaborate discussion of all the evidence, is that these were unwholesome, unfit for human consumption and also injurious to public health. The learned Magistrate however, felt himself bound by two decisions, namely, the decision of the Judicial Committee in the case of *The Province of Bombay* v. *Municipal Corporation of the City of Bombay*, 73 I. A. 271 : (A. I. R. (34) 1947 P. C. 34) and that of this Court in the case of *The Corporation of Calcutta* v. *Sub-Post Master, Dharamtolla Post Office*, being Cri. Revn. No. 378 of 1948, D/- 7-4-1949 : (A. I. R. (37) 1950 Cal. 417), by our learned brothers Rama Prosad Mookerjee and K. C. Das Gupta JJ. The Magistrate following those two decisions held that he had no jurisdiction to order destruction by the Calcutta Corporation of these unwholesome barley which it appears he would himself have gladly otherwise ordered.

[3] Mr. Banerjea appearing on behalf of the opposite parties has put forward the argument that this Court has no jurisdiction to sit in revision over a Magistrate's order under S. 421, Calcutta Municipal Act. It appears that this point was raised by the Advocate-General of Bengal in the case of *Messrs. Sir Abdulla Harun & Co.* v. *Corporation of Calcutta* in Cri. Revn. No. 679 of 1948 : (A. I. R. (37) 1950 Cal. 36:51 Cr.L.J. 346) and there was a difference of opinion between our learned brothers Rama Prosad Mookerjee and K. C. Das Gupta JJ. Rama Prosad Mookerjee J. was of the opinion that there was no force in the contention that a proceeding under S. 421, Calcutta Municipal Act, is not revisable under Ss. 435 and 439, Criminal P. C. Our learned brother K. C. Das Gupta J. was of the contrary opinion. Unfortunately, as the case was decided on another point this was not placed before a third Judge ; so we do not have any conclusive authority of this Court. We have therefore, paid our utmost attention to this point and we are unable to accept the argument of the learned Advocate-General adopted by Mr. Banerjea before us. We are clearly of opinion that a proceeding under S. 421, Calcutta Municipal Act is a proceeding before a criminal Court within the meaning of S. 435, Criminal P. C. It is obvious that under S. 435, Criminal P. C. an executive act cannot be revised by this Court. The section itself is clear and therefore, we do not cite any authorities. The section itself says that it must be the proceeding of "a criminal Court". So, the whole question is whether, when acting under S. 421, Calcutta Municipal Act and like sections, the municipal Magistrate is a criminal Court or not. The Local Government which appoints the municipal Magistrate under the Municipal Act is only authorised to do so under S. 531. Whatever

other powers a Magistrate acting under the Criminal Procedure Code or under any other law may have, a Magistrate appointed a municipal Magistrate under S. 531 may be appointed only "for the trial of offences against this Act," that is to say, the Calcutta Municipal Act, "and the rules and bye-laws made thereunder". It is definitely stated that such Magistrates shall be called municipal Magistrates and then provision is made for their pay, pensions, leave, salary etc., and how this is to be realised from the Calcutta Corporation. It lays down that each of such Magistrates shall have jurisdiction over the whole of Calcutta. Therefore, a Municipal Magistrate can only be appointed for one purpose and one purpose alone, namely, trial of offences and where the Act imposes upon the Municipal Magistrates certain duties it must be in accordance with the purpose for which he is appointed and, therefore, all the sections in which the Municipal Magistrate is asked to do something are necessarily to be interpreted as sections dealing with cases of offences.

[4] Mr. Banerjea has drawn our attention to S. 488 of the Act in which certain offences are made liable to penalty by way of a fine. An offence is an act which is made punishable and punishment need not be only of fine or imprisonment. There may be other methods of punishment, namely, destruction, demolition etc. Therefore, the fact that in S. 488 of the Act provision is made for punishment with fine of certain offencee does not go to show that when penalising other acts by order of destruction at the cost of the party, of demolition etc., the Municipal Magistrate is exercising any power or function outside the Calcutta Municipal Act. There is no provision for appointment of a Municipai Magistrate as executive officer. As these are powers or functions exercised under the Act itself and as under the Act he can only be appointed for the trial of offences these proceedings before him are for trial of offences and therefore, when trying such offences he is a criminal Court and as he is a criminal Court, S. 435 applies and this Court has the power to call for records etc., and interfere under S. 439, Criminal P. C. We ar of opinion, therefore, that there is no substance in the contention that this Court has no jurisdiction to revise an order under S. 421 or the cognate sections by the Municipal Magistrate of Calcutta.

[5] We, therefore, now enter into the main point. The learned Magistrate in the present case unfortunately did not see the difference between the case then before our learned brothers Rama Prosad Mookerjee and K. C. Das Gupta, JJ., namely, *Corporation of Calcutta* v. *Sub-Post Master, Dharamtolla Post Office*. Cri. Revn. No. 378 of 1948 : (A.I.R. (37) 1950 Cal. 417) and the present case. The law is clear since the decision of the Judicial Committee in the case of *the Province of Bombay* v. *Municipal Corporation of the City of Bombay*, 73 I. A. 271 : (A.I.R. (34) 1947 P. C. 34) that ordinarily the Crown may not be bound by a Statute and the test is whether expressly or by necessary implication in that particular Statute the Crown has been bound. In the particular case then before them which was a case of not taking out a trade license by the Central Government, their Lordships Rama Prosad Mookerjee and K. C. Das Gupta JJ. came to the conclusion that neither expressly nor by necessary implication could it be said that the Crown was intended to be bound by such a section of the Calcutta Municipal Act which required such a license to be taken out. The Judicial Committee decision itself lays down the criterion when it may be said that by necessary implication the Crown is made bound in a particular Statute. It may be said here that in this Statute either under S. 421 or under other cognate sections relating to public health the Crown had not been bound. The Crown will be bound if by necessary implication it is to be held that the Crown is bound. In the Judicial Committee decision this is the test that was formulated by their Lordships :

> "Their Lordships prefer to say that the apparent purpose of the Statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged, If it can be affirmed that, at the time when the Statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound."

These words of the Judicial Committee will clearly show the distinction between the present group of cases and the group of cases with which our learned brothers were dealing. Cases of this nature which safeguard the public health of the biggest City in the East are under the powers given to the Corporation of Calcutta to preserve the public health by destruction of diseased animals or of unwholesome food, by removal of congestion or causes thereof etc., and of other things which interfere with proper health and sanitation. This is the fundamental object of the existence of a Municipality. If in cases of this nature the Crown is left free to sell or otherwise distribute injurious food or, as Mr. Basu has very rightly said, 'poison the whole of the City of Calcutta with unwholesome, unsound barley or other food" then it cannot but be said that it will be almost useless to

enact sections to prevent such act and to create a Municipal body. The entire good work of the Corporation of Calcutta can be frustrated if the Crown is guilty of such acts as have been proved in the present case before the Magistrate, to have been done by these two Government Ration shops. According to the test laid down by the Judicial Committee we are of opinion that in the present case, and in cases of this nature, the Crown is by necessary implication also to be considered as bound. The Crown cannot evade its own responsibility to obey such laws of health which are fundamental if a Municipality is to function properly and if the Crown violates the same it has to be made to observe such laws by means of Magisterial action. Under the circumstances we are of opinion that the Municipal Magistrate had full jurisdiction in the present case to order the destruction of the unwholesome barley.

[6] Mr. Banerjea has urged before us that his clients had many objections about the mode of seizure of the articles etc. but it appears from the judgment of the Municipal Magistrate that these points were not urged before him. It is possible that Mr. Banerjea's clients relying upon the supposed immunity from an action in such cases of the Crown might not have raised these points fully before the Court at the time of argument as not necessary.

[7] We, therefore, set aside the order of the Municipal Magistrate and remand the case back to him for decision on the other points except the points of unwholesomeness of the barley and of jurisdiction which have been finally decided here and then pass such orders as he may be entitled to pass in law.

V.R.B. *Case remanded.*

A. I. R. (37) 1950 Calcutta 423 *[C. N. 158.]*

ROXBURGH J.

Sarat Chandra Sidhukhan and others — Petitioners v. *Corporation of Calcutta and another — Opposite Party.*

Criminal Revn. Nos. 942, 1020 and 1021 of 1949, D/- 10-1-1950.

(a) Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 421 — Order under, for destruction — Persons affected by order, if should be heard.

A Superintendent of Police purchased from different contractors certain quantities of mustard oil for purpose of sale in a ration shop. On analysis he found it to be adulterated and, therefore, he moved the Municipal Magistrate for orders under S. 421 informing the contractors concerned of the proceedings. The contractors appeared before the Magistrate but he refused to hear them on the ground that the only person entitled to be heard under S. 421 is the person in whose possession the adulterated food is found :

***Held*, that in the peculiar circumstances of the case the Magistrate ought to have heard the contractors and allowed them to produce evidence regarding the quality of the oil before passing an order of destruction.** [Para 3]

(b) Criminal P. C. (1898), S. 439 — Order under S. 421, Calcutta Municipal Act, is revisable — Municipalities — Calcutta Municipal Act (III [3] of 1923), S. 421 : A I R. (37) 1950 Cal. 421, *Rel. on.* A.I.R. (14) 1927 Cal. 509, *Expl.* [Paras 4 and 6]

Annotation : ('49-Com.) Criminal P. C., S. 439 N. 8.

In No. 942/49 :

Debabrata Mukherjee and Sambhunath Banerjee (Sr.) — for Petitioner.

J. M Banerjee — for the Crown.

Anil Chandra Roy Choudhury and Sunil Kumar Basu — for Opposite Party.

In No. 1020/49 :

Debabrata Mukherjee and Purnendu Sekhar Basu — for Petitioner.

J. M. Banerjee — for the Crown.

Monomohan Mukherjee — for Opposite Party.

In No. 1021/49 :

Debabrata Mukherjee and Ranjit Kumar Banerjee — for Petitioner.

J. M. Banerjee — for the Crown.

Ajoy Kumar Basu — for Opposite Party.

Order. — These are three rules against orders passed by the Municipal Magistrate under S. 421, Calcutta Municipal Act. They relate to a large quantity of mustard oil which the Superintendent of Police, 24 Parganas, purchased from different contractors and had for sale to the members of police force under him in a ration shop. The only reason that there are three separate cases is that the total quantity of oil with the Superintendent was divided up according to the contractors from whom he had bought it. Nevertheless though this division has been made, the main point before me is an objection by the contractors that they were not allowed to be heard.

[2] The circumstances are certainly very peculiar. The Superintendent himself, after first having some analysis made by the Public Analyst, moved the Municipal Magistrate for the orders in question to be made. He himself informed the contractors of the proceedings and they duly appeared before the Magistrate The Magistrate has refused to hear them on the ground that the provisions of Ss. 418, 419, 420 and 421 of the Act show that the only person entitled to be heard under S. 421 is the person in whose possession the adulterated food was found. It is almost accidental that the provisions of S. 421 apply at all in the sense that it is only because the oil was with the Superintendent for sale in ration shops and not for issue as rations (without payment) to the force that the provisions have any application. But for this accident, probably the course that would have been followed would have been a prosecution on the complaint of the Superintendent of the contractors for selling him adulterated oil under the appropriate provisions of the Calcutta Munici-

pal Act. Personally I think it is unfortunate that in any case this procedure was not followed in the first place. The result has been very anomalous. The proceedings were brought at the instance of the Superintendent obviously with the intimation (intention ?) in some way, if possible, of protecting himself in the event of any question of his having to pay for the mustard oil to the contractors. Clearly there is no thing whatever to prevent a person in the position of the Superintendent who finds that he has noxious food in his possession, to destory it without any reference to the Magistrate for an order. The whole scheme of the sections shows that they are expected to be applied, as a result of vigilance of inspectors and as a means of enforcing destruction, on a person who happens to be found in possession. They never contemplate the person himself going to the Court for an order for some ulterior purpose. The result has been that the learned Magistrate by examining the provisions of the sections has come to the conclusion that at most the only person entitled to be heard before him is the person in whose possession the adulterated food was found deposited for the purpose of sale and he gives apt reasons pointing out the difficulties that would arise if it were held that it was necessary to trace back the history of the particular article to the various sellers and to give notice to all the various middlemen through whose hands the article might have passed before a destruction could be made. But in the present case the facts are, as I have pointed out, peculiar and different. The whole object of the order in fact is to bind, if possible, the contractors in some way, yet when they were present at the Court at the instance of the Superintendent, who acted very fairly in the matter, then the technical objection was taken and they were not allowed to be heard. The provisions of S. 421 and of the preceding sections are very vague on the question of what procedure is to be followed by the Magistrate and who is to be heard.

[3] As I read the sections, the assumption appears to be that from the time of seizure the person in whose possession the article seized is found is always present. Section 420 contemplates his giving or refusing consent and S. 421 seems to contemplate that when the food is taken before the Magistrate he again will be present. Section 421 (3) contemplates in fact his being awarded compensation on the spot in appropriate circumstances. There is, however, no specific provision for the procedure in the very peculiar circumstances of the present case. It seems to me that the only fair procedure for the Magistrate to follow was to have heard the persons really interested in the matter, namely, the contractors. As I have pointed out, the cases were divided on the basis of the oil supplied by the several contractors,—a division which was quite pointless if there were no question of the contractors being heard in the matter. It is contended in the fact that the contractors have evidence of a responsible analyst establishing that the oil is satisfactory. It seems to me that in these very peculiar circumstanees the Magistrate ought to have allowed them to produce that evidence before he passed the order of destruction.

[4] Mr. Choudhury raised a preliminary objection that this Court had no power under S. 439, Criminal P. C., to interfere with the order of the Magistrate passed under S. 421, Calcutta Municipal Act. This question has been before this Court recently and in the case of the *Corporation of Calcutta* v. *Bhupal Chandra Sinha*, Cri. Revn. No. 723 of 1949 : (A. I R. (37) 1950 Cal. 421), Chunder and Guha JJ. have held specifically that this Court has power to revise an order passed by a Municipal Magistrate under S. 421 of the Calcutta Municipal Act. In a previous case there was a difference of opinion with regard to the very same section between Mookerjee and Das Gupta JJ. *Abdulla Hasoon & Co.* v. *Corporation of Calcutta*, Cri. Revn. No. 679 of 1948 : (A. I. R. (37) 1950 Cal. 36 : 51 Cr. L. J. 346), the former holding that the Court had power of revision and the latter holding the opposite view. But as the learned Judges were agreed that the particular case had no merits, the difference was not resolved further.

[5] The point has been argued to some extent before me and the argument before me was so clearly based on an erroneous reading of the judgment of Suhrawardy J. in the case of *Krishan Doyal* v. *Corporation of Calcutta*, 54 Cal. 532 : (A. I. R. (14) 1927 Cal. 509 : 28 Cr. L. J. 407) and I propose to point out the error. With great respect it seems to me that Das Gupta J. in referring to this judgment was influenced by an argument based on this erroneous interpretation. In the case of *Ram Gopal* v. *Corporation of Calcutta*, 52 Cal. 962 : (A. I. R. (12) 1925 Cal. 1251 : 26 Cr. L. J. 1533) the matter for decision was whether the Corporation was bound to hear the opposite party before applying to the Magistrate in a proceeding under S. 363, Calcutta Municipal Act. In that case the Advocate General also specifically took the point that the Court had no power in any view to interfere in revision with the order of the Magistrate. Sir Lancelot Sanderson, C. J. gave a clear decision that the order of the Magistrate was a judicial order made by him either in the exercise of a criminal or civil jurisdiction and that the Court had jurisdiction to revise the order of the Munici-

ipal Magistrate. Part of the argument in the judgment is that the Municipal Magistrate in question being a Presidency Magistrate would be a criminal Court within the meaning of S. 6, Criminal P. C. In the later case, the sole question was whether proceedings before the Magistrate were bad because the opposite party had been examined on oath. The argument was that the Code of Criminal Procedure applied to the proceedings which also related to a demolition order under S. 363 of the Act and that as the Code applied the examination of the opposite party under the provisions of S. 342 of the Code could not be on oath and therefore the proceedings were bad as the oath had been administered. The learned Judges dealt solely with this point and no question was raised before them as to the jurisdiction of this Court to interfere with the order of the Magistrate. The assumption clearly in the judgment is that the Court has such power to interfere and the final decision was refusal to interfere not on the ground that the Court had no power but on the ground that the proceedings in the lower Court were not vitiated by any illegality or irregularity. Therefore, there is nothing in this case to weaken in any way the decision of Sanderson C. J. in the earlier case. In course of his judgment, however, Suhrawardy J. said :

"If a party to a proceeding under Chap. XII, Criminal P. C. is not an accused person, it is hardly conceivable that a party to a proceeding under the Municipal Act relating to demolition of and unauthorised structure is an accused person and as such exempted from administration of oath. It has however been argued on the authority of the case of *Ram Gopal* v. *Corporation of Calcutta*, 52 Cal. 962 : A. I. R. (12) 1925 Cal. 1251 : 26 Cr. L. J. 1533) that a Municipal Magistrate in Calcutta is a Presidency Magistrate and so the Criminal Procedure Code will apply to proceedings before him in all its details. The case referred to does not lay down any such proposition. *The learned Chief Justice has made some observation which is clearly an obiter and not necessary for the decision of that case, namely, that the Municipal Magistrate being a Presidency Magistrate the High Court has jurisdiction under S. 439, Criminal P. C. to revise his order.*" (Italics are mine).

[6] The argument before me was that the decision in the earlier case had been weakened by the later decision because in the later case it had said that the earlier remark that

"the Municipal Magistrate being a Presidency Magistrate the High Court has jurisdiction under S. 439, Criminal P. C., to revise his order."

was obiter. It is patently a misreading of the passage above quoted. "Some observation" referred to is not specifically quoted in the judgment of Suhrawardy J. and the last words following the word "namely" clearly refer to the word "decision". It seems hardly necessary to labour the point, as a careful reading of the passage quoted could surely leave nobody in the slightest doubt as to the meaning of the last lines. The judgment did not and could not say that the view that this Court had power to interfere in revision with the orders of the Magistrate had been expressed merely as an obiter in the earlier case, when in fact there was a clear decision on that point in the earlier case. And in fact the decision was substantially followed in the later case by the course adopted.

[7] The result is that the Rules are made absolute, the orders of the learned Magistrate are set aside and the cases remanded for him to give the contractors an opportunity to present such evidence as they may have on the quality of the oil in question. The Corporation of Calcutta also may adduce such evidence as they desire.

K.S. *Cases remanded.*

A. I. R. (37) 1950 Calcutta 425 *(C. N. 159.)*

ROXBURGH J.

Gostha Behari Mandal—1st Party v. *Abed Ali and others — 2nd Party.*

Criminal Ref. No. 28 of 1950, D/- 5-4-1950.

Criminal P. C. (1898), S. 147 (2) — Right to use plot as burial ground — Proviso to sub-s. (2) if applies.

The right to use a bank of a tank as a burial ground is not exercisable at all times of the year but is one exercisable on certain occasions. Hence, an order under S. 147 in respect of a dispute concerning such a right is not bad merely because the right had not been exercised within the statutory period laid down in the proviso to sub-s. (2.) [Para 2]

Annotation : ('49-Com.) Cr. P. C., S. 147 N. 13.

Manmatha N. Das and Sukumar Mitter — for 1st Party.

Manishi Kr. Das — for 2nd Party (No. 5).

Order. — This reference must be rejected. It is against an order passed under S. 147, Criminal P. C., the dispute being about a bank of a tank used as a burial ground, in certain cases, by Hindus of neighbouring villages. A lease was taken by one of the opposite parties before the trial Magistrate of a tank and its bank, the latter being claimed by the villagers to be their burial ground. Proceedings were started under S. 145, Criminal P. C., as there was a danger of a communal riot. There were also proceedings under S. 147, Criminal P. C.

[2] The sole point of the reference that the last time anybody was proved to have been buried on the bank in question was more than three months before the date of the Magistrate's enquiry and therefore under S. 147 (2), as the right had not been exercised within the statutory period laid down there, the order was bad. The answer is self-evident and it is a little surprising that the learned Judge should have fallen into an error and made the reference. The logical result of his view is that the burial ground could

only be kept going provided somebody was made to die at intervals of some three months. Clearly the answer is that this is not a right exercisable at all times of the year but are exercisable on certain occasions. The evidence was that on the last occasion somebody of the community died whose death was due to such a cause that custom required his burial, he was buried in this place and I presume there was ample other evidence to show that the plot in question was otherwise used as a burial ground on such occasions. The learned Judge in fact omitted to read sub-s. (2) carefully and notice how its terms applied to the present case.

[3] The reference is accordingly rejected.

V.B.B. *Reference rejected.*

A I. R. (37) 1950 Calcutta 426 *[C. N. 160.]*

HARRIES C. J.

Sandhya Trading Co. — Plaintiff — Petitioner v. *Governor-General, Dominion of India —Defendant—Opposite Party.*

Civil Rule No. 1851 of 1949 D/- 27-3-1950, to revise decree of Sm. C. C. J., Calcutta, D/- 10-9-1949.

Civil P. C. (1908), S. 80 — Evidence Act (1872), Ss. 106, 114 — Notice addressed to Secretary, Railway Board instead of General Manager—Validity — Presumption as to receipt by General-Manager — Onus of proof.

Provisions of S. 80, Civil P. C., are imperative and must be strictly complied with A notice under the section addressed to the Secretary, Railway Board, Delhi instead of the General-Manager of the Railway concerned is not a good notice in law and it is not necessary to show that the General-Manager has received it. [Para 8]

Section 114, Evidence Act, does not apply because it cannot possibly be presumed that a wrong addressee would immediately forward the communication to the person who by statute was bound to receive it. The addressee might or might not act and there can be no presumption under S. 114. [Para 10]

Similarly S. 106, Evidence Act, is of no help as it does not shift the onus. In this case before the plaintiffs could succeed they had to prove a valid notice. Had they made out some prima facie case, then S. 106 would have applied and the General-Manager would have been called upon to show that he did not receive the notice in time. [Para 12]

Annotation : ('50-Com.) C. P. C., S. 80, N. 9 ; ('46-Man.) Evid. Act, S. 114, N. 25; S. 106, N. 9.

Bhabesh Chandra Mitter — for Petitioner.

Bhabesh Narayan Bose — for Opposite Party.

Order. — This is a petition for revision of a decree of a learned Small Cause Court Judge dismissing the petitioners' claim for damages against the Governor-General of the Dominion of India.

[2] The plaintiffs brought a suit claiming damages for the failure of the Governor-General to deliver electric switches to the value of Rs. 1300 which had been consigned for carriage by railway to Delhi. A sum of Rs. 1304 was claimed as damages. On behalf of the defendant a point was taken that no notice was served as required by S. 80, Civil P. C. The notice was not sent to the General Manager of the East Indian Railway as required by S. 80 of the Code, but was sent to the Secretary of the Railway Board at Delhi. Apparently the General Manager of the East Indian Railway received the notice at sometime or another, but there is no evidence at all as to when the notice reached him.

[3] The learned Judge of the Small Cause Court held that as notice had not been served in accordance with S. 80, the suit was bound to fail and he accordingly dismissed it.

[4] On behalf of the petitioners it has been contended that the Court should have presumed that the notice reached the General Manager eighty days before the suit as required by S. 80. The notice was apparently dated August 1948 and the Secretary of the Railway Board acknowledged receipt, but there is nothing on the record to show when the Railway Board forwarded this notice to the General Manager of the East Indian Railway.

[5] Section 80 clearly lays down that notices of this kind must be sent to the General Manager of the Railway concerned and there is no doubt that the railway concerned was the East Indian Railway as the goods were consigned to be carried by that railway from Calcutta to Delhi. Section 80, Civil P. C. is in these terms:

"No suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to or left at the office of—

* * * * *

(b) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway."

[6] It will be seen that the notice must be delivered to or left at the office of the General Manager of the railway, namely, the East Indian Railway. Admittedly that was not done. Sen J. in an earlier case *Dominion of India* v. *Sree Dedraj Bajoria*, (Civil Revn. 856 of 1949), decided on 29th November 1949, that where a notice under S. 80 is addressed not to the General Manager of a railway but to some other body it is not a good notice and it is not necessary to show that the General Manager received it within the proper time.

[7] There can be no doubt that the provisions of S. 80, Civil P. C. must be strictly complied with. In a very recent case *Govt. of the Province of Bombay* v. *Pestonji Ardeshir Wadia*, A. I. R. (36) 1949 P. C. 143 : (76 I. A. 85) their Lordships stressed the fact that the provisions of this section must be complied with strictly.

At p. 146, Madhavan Nair J. who delivered the judgment of the Board observed:

"Their Lordships fully concur with the above view. The provisions of S. 80 of the Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government."

[8] If the provisions of S. 80 have to be strictly complied with, then clearly the plaintiff-petitioners failed to show that a valid notice under S. 80 had been served.

[9] Learned advocate for the petitioners has contended that the General Manager of the East Indian Railway should have been called upon to state when he received the notice and he relied upon Ss. 114 and 106, Evidence Act.

[10] Section 114, Evidence Act, can have no application because it cannot possibly be presumed that a wrong addressee would immediately forward the communication to the person who by statute was bound to receive it. The addressee might or might not act and there can be no presumption under S. 114.

[11] Learned advocate, however, contended that S. 106, Evidence Act, clearly applied. The facts, he contended, were entirely within the knowledge of the General Manager and he only could prove when he received the letter. Their Lordships of the Privy Council in two comparatively recent cases from Ceylon have laid down that S. 106 does not shift the onus. In this case before the plaintiff petitioners could succeed they had to prove a valid notice. Had they made out some prima facie case, then, I think, S. 106, Evidence Act would have applied and the General Manager would have been called upon to show that he did not receive the notice in time. But merely proving that a notice was sent to a person not contemplated by the statute does not raise any *prima facie* case, and there was, therefore, no evidence at all before the Court that the General Manager of the East Indian Railway received this notice within time. It seems to me quite clear that the suit was bound to fail and was rightly dismissed by the learned Small Cause Court Judge.

[12] It was suggested that in a case of this kind the plaintiffs had a remedy by applying to the Full Bench of the Small Cause Court and it was suggested that until they did that they could not move this Court. I do not think it is necessary to decide this question, as I am clearly of opinion that there is no merit in the application.

[13] The petition, therefore, fails and the rule is discharged with costs.

D.R.R. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 427 *[C. N. 161.]*

DAS GUPTA AND LAHIRI JJ.

Kalipada Nandi — Accused — Petitioner v. *The State.*

Criminal Revn. No. 228 of 1950, D/- 16-5-1950.

(a) Bengal Foodgrains Control Order (1945), Ss. 2 (b), 3 (1) —Dealer—Burden of proof—Evidence Act (1872), Ss. 101 to 103.

The burden of proving that the accused is a person coming within the definition of a "dealer" is on the prosecution. That involves the further consequence, that the prosecution is bound to prove not only that he deals in the purchase or sale of food grain or storing in foodgrain for sale, but also that he is not a producer. The prosecution may succeed in showing that he is a dealer even though he is a producer by further showing that the foodgrain in which he was dealing was not the foodgrain produced by himself. [Para 6]

Annotation: ('46-Man.) Evidence Act, Ss 101 to 103 Note 3.

(b) Bengal Foodgrains Control Order (1945), S. 2 (b)—Accused found in possession of paddy — Presumption—Evidence Act (1872), S. 114.

That the accused was a person dealing in the sale of foodgrain or at least in the storing of foodgrain for sale can reasonably be inferred from the fact that he was found in boat in charge of 130 maunds of paddy when the boat was moving down stream. [Para 5]

Annotation: ('46-Man.) Evidence Act, S 114 Notes 12, 13.

Sudhansu Sekhar Mukherjee, Purnendu Sekhar Basu, Sukumar Mitra and Sachindra Chandra Das Gupta — for Petitioner.

Nirmal Kumar Sen, Deputy Legal Remembrancer —for the State.

Das Gupta J.—This rule is directed against an order of conviction and sentence, under S. 7 of Act XXIV [24] of 1946, passed by a Magistrate, at Arambagh, and confirmed in appeal by the Sessions Judge, Hoogbly.

[2] The prosecution case was that on 26th June 1949, 130 maunds of paddy and 4 maunds and 10 seers of rice were found in a boat moving down stream near the Ghat at Chak Bashia. It is said that the accused Kalipada Nandi was in that boat. Admittedly, he had no license for taking these goods away in the boat. The charge framed against this Kalipada Nandi was that he had contravened the provisions of S. 3 (1), Bengal Food Grains Control Order, 1945, by engaging in an undertaking involving storage for sale of this paddy and rice without any license, Section 3 (1) of that Order prohibits any dealer or large producer from engaging in any undertaking which involves the purchase, sale or storage for sale in wholesale quantities of any food grain.

[3] The first question for decision, therefore, is whether, the accused was a dealer or large producer. No attempt was made by the prosecution to show that the accused is a large producer within the meaning of S 2 (e) of the Order which defines a large producer as a person who cultivates land the area of which is not less

than 25 acres at any one time and grows thereon paddy by himself with or without the aid of members of his family or paid labourers or by adhiars, bargardars or bhagdars.

[4] Both the Courts below appear to have proceeded on the basis that the accused was a dealer. A dealer is defined in S. 2 (b) of the Order in these words :

" 'dealer' means a person dealing in the purchase or sale of any foodgrain or storing any foodgrain for sale and includes any person so dealing or storing on behalf of another as a commission agent or arhatia, but does not include a producer except in so far as such producer deals in the purchase or sale of any foodgrain or stores any foodgrain other than the foodgrain which is produced by himself with or without the aid of members of his family or paid labourers or by adhiars, bargadars or bhagdars ;"

[5] That the accused was a person dealing in the sale of foodgrain or at least in the storing of foodgrain for sale can reasonably be inferred from the fact that he was found in a boat in charge of 130 maunds of paddy when the boat was moving down stream.

[6] The question remains whether it has further been proved that the accused was not a producer, or if he was a producer, the foodgrain in the sale of which he was dealing was foodgrain other than the foodgrain produced by himself. Clearly, the burden of proving that the accused is a person coming within the definition of a "dealer" is on the prosecution. That involves the further consequence, in my opinion, that the prosecution is bound to prove not only that he deals in the purchase or sale of foodgrain or storing in foodgrain for sale, but also that he is not a producer. The prosecution may succeed in showing that he is a dealer even though he is a producer by further showing that the foodgrain which he was dealing was not the foodgrain produced by himself. No attempt has been made in this case to show either that the accused is not a producer, or that if he is a producer, the goods which he was dealing with were foodgrain not produced by himself.

[7] The consequence of this, in my opinion, is that the prosecution has failed to prove that the accused is a dealer within the meaning of S. 2 (b), Food Grains Control Order, 1945.

[8] Both the Courts below have relied on a confession said to have been made by the accused. It is said that the statement, EX. 1, was written out by the accused when Civil Supplies Inspector, Prosecution Witness No. 1, requested him to put in writing the statement he had already verbally made to him. While Prosecution Witness No. 1 denies the suggestion that the statement was copied out from a draft, the other prosecution witnesses have admitted the defence suggestion that the statement was copied out from a draft. Quite apart from the question whether it was copied out from a draft, it seems to me extremely unlikely that a statement of this nature would be volutarily made by the accused person within a few minutes after the paddy had been seized without any kind of inducement. In my judgment, there is very good reason for the suspicion that the confession which we find in EX. 1 had been caused by inducement having reference to the charge against the accused person proceeding from the Inspector of Civil Supplies who was clearly a person in authority. In my judgment, this confession is inadmissible in view of the provisions of S. 24, Evidence Act.

[9] My conclusion, therefore, is that the conviction and sentence passed on the petitioner cannot stand. I would, therefore, make this rule absolute, and set aside the order of conviction and sentence passed against the accused, as also the order of forfeiture.

[10] **Lahiri J.** — I agree.

D.H. *Conviction set aside.*

A. I. R. (37) 1950 Calcutta 428 *[C. N. 162.]*

HARRIES C. J. AND CHATTERJEE J.

Sm Suraj Jan Bibee — *Appellant* v. *Banku Behary Saha* — *Respondent.*

A. F. O. O. No. 104 of 1949, D/- 8-9-1949 from order of Banerjee J , D/- 28-3-1949.

Tenancy Laws — Calcutta Thika Tenancy Ordinance (West Bengal Ordinance XI [11] of 1948), Ss. 3 and 2—Surrender of existing lease with structures made by tenant—Tenant agreeing to remain as monthly tenant—Tenant, if can claim protection under Ordinance.

A lessee for a term by a deed of surrender gave up all his rights under the lease and to the structures he had made on the land in lieu of cash payment and remained on the premises as merely a thika tenant at will (monthly tenant). Subsequently the landlord obtained a consent decree for ejectment against the tenant. In execution of the decree the tenant claimed protection under the Ordinance :

Held, that the tenant seeking the protection of the Ordinance must show that his tenancy was under one of the various systems referred to in S. 2 of the Ordinance and that he had made certain erections upon the land as such tenant. Mere description as a thika tenant was not enough. Consequently the defendant having failed to adduce any evidence on these points could not claim the protection under the Ordinance as a thika tenant.

[Paras 14, 16 and 17]

G. Mitra — for Appellant.

E. Meyers and B. K. Ghosh — for Respondent.

Harries C. J. — This is an appeal from an order of Banerjee J. sitting on the Original Side dated 28th March 1949 allowing an application for execution of a decree.

[2] The respondent obtained a consent decree against the appellant on 3rd January 1946, and by that decree the defendant undertook to deliver possession within six months, execution of

the decree being stayed for that time. The defendant did not vacate at the expiry of the period of six months and on 3rd December 1948, the Court made an order directing the Sheriff to deliver possession of the premises to the respondent. The Sheriff failed to deliver possession and an application was made to the Court for an order that the Sheriff of Calcutta be directed to deliver possession of the land and premises known as No. 2, Nayan Krishna Saha lane in the mode described by O. 21, R. 35, Civil P. C.

[3] The appellant resisted the application and claimed to be a thika tenant and entitled to the protection given by the Calcutta Thika Tenancy Ordinance, 1948.

[4] The learned Judge came to the conclusion that the appellant was not a thika tenant and was not entitled to protection under the Ordinance. If no protection under the Ordinance could be claimed then it was conceded that the appellant had no answer to the application for execution.

[5] It appears that the appellant's husband had been a lessee of these premises from the respondent, but on 13th December 1944, this lease was surrendered by a document of that date. It appears from the document that there was still fourteen years of the lease to run, but the lessee owed large sums of money to the landlord. As a result of an agreement entered into between the parties the lessee the appellant gave up all claims under the lease and the landlord the respondent in turn gave up certain decrees and claims which he had against the appellant. Further the respondent paid the appellant a sum of Rs. 2,000 in cash and agreed to pay a sum of Rs. 200 for the doors, windows, beams, rafters, bricks, lime, surki etc. of a structure upon the premises. The document ends with these words:

"I sign and execute this deed of surrender by giving up in your favour all my rights etc., to the said land which I now have on the basis of the said temporary lease. I shall have no further claim or demand, right, title and interest on account of the said temporary lease. From this day, I shall be regarded as merely a ticca tenant at will (monthly tenant) in respect of the said land."

The document was of course executed by the appellant.

[6] The document is in Bengali and I have merely set out a translation and there can be no doubt that the translation is accurate. The appellant was to be regarded as "*Ichhadhin thika praja*" and immediately following these words, the words "monthly tenant" in English appear in brackets.

[7] Learned counsel on behalf of the appellant has contended that this deed of surrender clearly created a thika tenancy within the meaning of that term as used in the Calcutta Thika Tenancy Ordinance, 1948. That being so, it is said that the appellant was protected by S. 3 of that Ordinance. That section provides:

"Notwithstanding anything contained in any other law for the time being in force, no decree or order for the ejectment of a *thika* tenant shall be executed during the continuance in operation of this Ordinance."

[8] It was argued before Banerjee J. that this section afforded no protection where the decree for ejectment was a consent decree; but the learned Judge preferred not to rest his judgment on any such basis and I do not, therefore, propose to consider that matter any further.

[9] In the learned Judge's opinion the appellant had failed to prove that she was a *thika* tenant within the meaning of the term as used in the Ordinance. It is to be observed that no one but a friend gave evidence on behalf of the appellant and the evidence of that friend is to a very large extent inadmissible. However, the agreement is in writing and no evidence would be admissible to explain or add to or vary the terms of that writing.

[10] The learned Judge was of opinion that there was no force in the appellant's defence because she had failed to show that she was a person who held this tenancy under the system commonly known as "*thika*" "*thika Masik Utbandi*", "*thika Masik*" "*thika bastu*" or under any other like system.

[11] Learned counsel for the appellant has contended that it is sufficient that her tenancy is described as a thika tenancy in the agreement. But it appears to me that not all thika tenants come within this Ordinance because a thika tenant as the term is used in the Ordinance means any person, who under one of a number of systems holds land under another person, whether under a written lease or otherwise and is, or but for a special contract would be, liable to pay rent at a monthly or any other periodical rate for that land to such other person. There is no evidence in this case at all that the tenancy held by the appellant was one under any of these systems. The necessity for such evidence has been stressed in two recent cases of this Court, namely, the cases of *Murari Mohan* v. *Prokash Chandra*, 53 C.W.N. 640 : (A. I. R. (37) 1950 Cal. 230 and *Haran Chandra Dey* v. *Sm. Charu Bala Dassi*, 53 C. W. N. 553 : (84 C. L. J 92).

[12] In *Murari Mohan Mukherjee's case*, 53 C. W. N. 640 : (A. I. R. (37) 1950 Cal. 230) P. B. Mukherji J. held that a tenant holding over after the expiry of a lease cannot be treated as holding the land within the meaning of the expression "under any other like system" in S. 2 (5), Calcutta Thika Tenancy Act, 1949, or S. 2 of the Calcutta Thika Tenancy Ordinance,

1948. He further held that a tenant under the said section can only be called a thika tenant when it is one under any particular system as mentioned therein or under a similar system. It is a matter of proof and evidence in every case and it is essential for the tenant to establish it by evidence, the onus of proving this being upon him.

[13] In *Haran Chandra Dey's case* (53 C.W.N. 553 : 84 C. L. J. 92) Banerjee J. held that where any particulars of a tenancy or of any system under which the tenancy is held are not known and it is not proved that the structures or any of them standing on the land are erected by the tenant, it cannot be said that the tenant is a "thika tenant" within the meaning of the Thika Tenancy Ordinance.

[14] Both these cases make it clear that the person seeking the protection of the Ordinance must show that his tenancy is under one of these various systems. There is no evidence at all as to whether this tenancy is covered by any of these systems and therefore, I think, Banerjee J. was right in holding that the Ordinance gave no protection to the appellant.

[15] Further it is clear that the appellant had not erected any structure on the land as a thika tenant.

[16] What had occurred was that the appellant or her husband whilst lessees had erected structures. In the deed of surrender the materials of these structures were actually purchased by the landlord respondent and there is nothing to suggest that after this deed of surrender any further erections were made by the appellant in her capacity as a tenant under the agreement. As pointed out by Banerjee J. in the case to which I have just made reference in order to be a thika tenant it must be established amongst other facts that the tenant has made certain erections upon the land which he had held as a thika tenancy under one of the systems. That factor is entirely absent in this case, and I do not think that the fact that the tenant had erected a structures on the land whilst a lessee, brings the case within the Ordinance particularly when the landlord has actually agreed to purchase the materials of such structure.

[17] It appears to me that what the parties contemplated in this case was an ordinary monthly tenancy. After the Bengali words the words "monthly tenancy" were written in English presumably to make the position perfectly clear. A monthly tenant is not necessarily a thika tenant and I think that the learned Judge was right in holding that on materials before him he was compelled to hold that the appellant was a monthly tenant only and was not a thika tenant within the Ordinance. That being so, the appellant had no defence whatsoever to the respondent's application and the order of Banerjee J. cannot possibly be assailed.

[18] In the result, therefore, this appeal fails and is dismissed with costs. The stay order is vacated. The attorneys for the respondent will be entitled to appropriate the sum of Rs. 600 deposited with them under orders of the Court or such portion of that sum as is required to satisfy this decree for costs.

[19] **Chatterjee J.** — I agree.

K.S. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 430 *[C. N. 163.]*

ROXBURGH J.

Ashutosh Chakravarty — Defendant — Appellant v. *Md. Yad Hossain—Plaintiff—Respondent.*

A. F. A. D. No. 767 of 1949, D/- 10th March 1950, against decree of D. J., Murshidabad, D/- 4th July 1949.

Bengal Village Self-Government (Amendment) Act (X [10] of 1947). S. 9 (b)—Meeting of elected members to elect new President—Person to preside at such meeting—Bengal Village Self-Government Act (V [5] of 1919), S. 101, Rules under Rr. 30-32.

Section 9 (b) which provides for the holding of a meeting of elected members of the Union Board, after removal of the nominated members, for election of new President is silent as to who is to preside at such meeting. As the situation has, however, considerable affinity with the circumstances provided for in Rr. 30-32 framed under Act V [5] of 1919, the presiding over at such meeting by the Circle Officer will not be an irregularity. [Paras 4 and 5]

Bholanath Roy and Sushil Kumar Banerjee—for Appellant.

Dr. Sen Gupta and Jani Alam—for Respondent.

Judgment.—The defendant is the appellant. He was elected President of the Moregram Union Board under the provisions of S. 9 of Act X [10] of 1947 which amended the Bengal Village Self-Government Act, 1919. The plaintiff's grievance is that the meeting at which the defendant was elected was presided over by a Circle Officer and not, as he contends should have been the case, by some member of the Board who was not a candidate for election. I understand the question is almost academical now because the term of the Board has expired. The plaintiff who was the previous President obtained an injunction against the defendant and the result is that he has been acting all along as the President because according to the rules he continues until a new President is elected. However, the parties insist on fighting the matter out and I proceed to give my decision.

[2] Briefly, the effect of the amending Act of 1947 was to remove all nominated members

from Union Board and to provide that the truncated Board, as left, would be deemed to be the Board as from the original date of election and that they should meet and elect a new President. Unfortunately, S. 9 (b) of the Act which provides for the holding of a meeting to elect the President is silent on the question as to who was to preside.

[3] The Rules framed under the Act provide two procedures for two different cases, the substantial difference between the two being that under one the Circle Officer is to preside and under the other, a member of the Board who is not a candidate for election as President is to preside. The Circle Officer is to preside under the provisions of R. 31 when a new election is held and after the names of the elected candidates have been published. It is to be noted that the President of the previous Board is to continue as President until the new President is elected by the new Board. In other words, although there is an existing President, he is not to preside at meetings for election of the new President. The Circle Officer is to preside. The other procedure is to provide for the case where there is no President where there is a vacancy by the death, removal etc., of a President. There the salient fact is that there is no President at all for the Board, the Vice-President acting for him. In those circumstances, R. 37 provides that Rr. 30-32 shall be followed substantially but the person to preside at the meeting for election of the new President is to be a member of the Board who is not a candidate for election. In both procedures, the meeting for the election is convened by the Circle Officer.

[4] Then we have S. 9 of the new Act. In cl. (b) it copies to a large extent the wording of the rules, in particular, R. 37. The meeting for election of the President is to be convened by the Circle Officer, the President is to be convened by the Circle Officer, the President of the original Board is to remain President until a new President is elected. Nothing whatever is said as to who is to preside at the meeting for election of the new President. The battle between the two sides is as to what is the correct view. The correct view in the first place is that the Legislature should have specifically stated who was to preside. The circumstances do not tally strictly with either of the situations provided for in the rules and referred to above. Strictly speaking, there is not a newly elected Board though there is a sort of reconstituted Board with the nominated members removed, a re-constructed Board to elect the new President, but there is an existing President. In that sense, the situation has considerable affinity with the circumstances provided for in Rr. 30-32 for a new election which provide for the Circle Officer to preside at the meeting for election of the new President.

[5] On the other side, it is urged that it is really a case for vacancy in presidentship and therefore the provisions of S. 37 would apply. But there is to my mind, difficulty in that S. 37 clearly contemplates a state where there is no existing President. Ordinarily, the President will preside at all meetings of the Board but where the question of election of a new President is concerned, some special provision is to be expected. It seems to me that on the law and the rules as they stand, it is very difficult to say that any irregularity was committed, no matter which system was followed. There is a definite ambiguity in the provisions of the Act. Having regard to the provisions of S. 17C of the Act, it seems to me that the Court had no power whatever to interfere with the election that had taken place. In fact, it will be tragic if Courts do interfere in this almost casual way with such elections.

[6] The result is that I allow the appeal. The judgment and decree of the lower appellate Court are set aside and those of the Court of first instance are restored. The appellant in this Court will have his costs throughout.

[7] Leave to appeal under Cl. 15 of the Letters Patent has been asked for and is refused.

G.M.J. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 431 *[C. N. 164.]*

R. P. MOOKERJEE J.

Manik Lal Dutt and others—Appellants v. *Pulin Behari Pal and others—Respondents.*

A. F. A. D. No. 1527 of 1946, D/- 28-4-1950, against decree of D. J., Hooghly, D/- 12-4-1946.

(a) Partition Act (1893), Ss. 2 and 3—Application under S. 3, when can be made.

The foundation for attracting the provisions contained in S. 3, is the earlier application under S. 2 of the Act. An application under S. 2 may be preferred after the passing of the preliminary decree. It is incontestable accordingly that the procedure laid down under S. 3 may be initiated after an application is made under S. 2 of the Act. The passing of a preliminary decree will not be a bar to S. 3 being attracted. The election by the defendant afforded under S. 3 need not be exercised immediately after an application under S. 2 is made and before the order for sale.

[Paras 12 and 13]

Annotation : ('46-Man.) Partition Act, S. 2, N. 2; S. 3, N. 1.

(b) Partition Act (1893), S. 3—Interpretation.

It is not for the Court to enter into a discussion as to the reasonableness or otherwise of a clear and direct provision made, by which one particular party is given an advantage over the other. The provisions of S. 3

are to be liberally interpreted so as to apply those provisions to cases which come within the purview of those provisions : A. I. R. (19) 1932 Mad. 15, *Not approved.* [Para 13]

Annotation : ('46 Man.) Partition Act, S. 3, N. 1.

Bhutnath Chatterjee — for Appellants.

Rishindra Nath Sarkar and Satya Charan Painas — for Respondents.

Judgment. — This appeal is on behalf of the defendants and arises out of a suit for partition of a tank.

[2] The plaintiffs' case is that there were other lands near about the tank belonging to the parties, there had been a previous partition of those other lands, but the tank was left *Ejmali*. The plaintiffs claim two-third share and defendant 1 one-third share in the disputed tank.

[3] The defence was that the watery portion of the tank could not be partitioned. Some of the other contentions raised in the plaint which are not material for the present appeal were also contested.

[4] The learned Munsif held in favour of the plaintiffs and came to the conclusion that it was not possible to possess the tank in two separate portions. The only way of partitioning the tank was by selling it under the provisions of the Partition Act. The Court further directed that if the parties failed to settle the price of the tank amicably among themselves, a Commissioner would be appointed on the plaintiffs' petition for holding a bid amongst the parties after a valuation was fixed by the Court. The tank would then be sold amongst the parties to the suit and the sale proceeds would be divided amongst them according to their respective shares.

[5] After the passing of this preliminary decree, the defendants filed a petition under S. 3, Partition Act on 28th September 1945, for leave to purchase the share of the plaintiffs who had asked for the sale of the tank under S. 2, Partition Act. The learned Munsif, by his order dated 30th November 1945, allowed the defendants' prayer under S. 3 (1), Partition Act. The Commissioner was thereupon directed to ascertain the value of the two-third share belonging to the plaintiffs.

[6] The plaintiffs preferred an appeal before the Court of the District Judge and the only question agitated was whether the application under S. 3, Partition Act, as made by the defendants, was maintainable in law and also whether the direction given by the learned Munsif for the sale of the two-third share belonging to the plaintiffs was according to law. The learned District Judge came to the conclusion that the defendants' application under S. 3, Partition Act, was not maintainable after the passing of the preliminary decree. The application was accordingly rejected.

[7] The defendants have preferred the present appeal before this Court and the only question in issue is as to the scope of S. 3, Partition Act, and the point of time when the defendants must make the application under that section.

[8] There is *prima facie* a broad distinction between the provisions contained in S. 2 and S. 3 read with S. 6, Partition Act, forming practically one group and S. 4 of the same Act on the other. Section 4 applies to the case of a dwelling house, a share of which has been transferred to a stranger and there are certain conditions which must be fulfilled before S. 4 comes into operation. As explained in the case of *Kshirode Chunder* v. *Saroda Prosad*, 12 C. L. J. 525 : (7 I. C. 436), the claim must relate to a dwelling house of an undivided family; secondly, some share in it must have been transferred to a stranger; and thirdly, that stranger must have sued for partition. If reference is made to the provisions contained in Ss. 2 and 3 of the Act, it will appear that one of the parties to the dispute may or may not be a stranger to the family. Even if the subject of the dispute is a dwelling house, unless there be a stranger, S. 4 will not be attracted. Section 3 contemplates a request by a party with certain qualifications for the sale of the entire property, in suit. It is significant that this section favours the smaller share-holder at the expense of the larger and the fact of a person owning a larger share is a disability under the section, since such a person is precluded from offering to buy up the interest of the party owning the smaller share.

[9] It has been repeatedly held that the application by a party to attract the provisions contained in S. 4 of the Act may be made at any stage of the proceedings. As explained in the case of *Kshirode Chunder* v. *Saroda Prosad*, 12 C. L. J. 525 : (7 I. C. 436), the section does not provide that the application contemplated by it should be made before the passing of the preliminary decree; on the other had, it is obvious that the application cannot be made till the rights of the parties have been determined by the preliminay decree. The question whether a particular property alleged to be joint really possesses that character must be determined before the preliminary decree is made and all questions involving the title of the parties and their right to any relief within the issues are judicial in character. They must be determined by the Court and such determination is to be made ordinarily by the Court and incorporated in the preliminary decree before any partition can be made or directed. An application under S. 4 cannot therefore, be properly made before it has been declared by the preliminary decree that the plaintiff who is not a member of the family has

acquired a valid title to a share thereof and is entitled to claim partition. This view has been accepted by this Court in the case of *Hiramoni* v. *Radha Churn*, 5 C. W. N. 128, and also by other Courts, *Kadir* v. *Abdul Rahiman*, 24 Mad 639; *Abdus Samad* v. *Abdul Razzak*, 21 ALL. 403 and *Bai Hirakore* v. *Trikamdas*, 32 Bom. 103 : (10 Bom. L R. 23).

[10] An application under S. 2 of the Act can also be made after the passing of the preliminary decree. A Division Bench of this Court had held to the effect in the case of *Hiramoni* v. *Radha Churn*, 5 C. W. N. 128. It was held that the passing of a preliminary decree would not bar an application being made under S. 2 of the Act.

[11] Section 3 of the Act, in so far as it is relevant for the present appeal, is in the following terms :

"If in any case, in which the Court is requested under the last foregoing section to direct a sale, any other share-holder applies for leave to buy at a valuation the share or shares of the party or parties asking for sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sale the same to such share-holder at the price so ascertained and make all necessary and proper directions in that behalf."

[12] The foundation for attracting the provisions contained in S. 3, therefore, is the earlier application under S. 2 of the Act. As already pointed out, an application under S. 2 of the Act may be preferred after the passing of the preliminary decree. It is incontestable accordingly that the procedure laid down under S. 3 may be initiated after an application is made under S. 2 of the Act. The passing of a preliminary decree will not be a bar to S. 3 being attracted.

[13] Mr. Sarkar, appearing on behalf of the respondents, however, points out that even if this principle be accepted, the election by the defendant afforded under S. 3 of the Act must be exercised immediately after an application under S. 2 of the Act is made and before the order for sale It is contended that as the plaintiffs had, before the passing of the preliminary decree, suggested the sale of the entire property, the tank, and on such suggestion the Court had passed an order for the sale of the property, it was not competent for the defendants to make an application under S. 3 of the Act after the preliminary decree had been passed. There is no direct authority of this Court on this point. Reference may, however, be made to the case of *Subbamma* v. *Veeraiya* 61 M. L. J. 552 : (A.I.R. (19) 1932 Mad. 15), where the Madras High Court observed that as this section favoured the smaller share-holder at the expense of the larger and as under S. 3 of the Act, the plaintiff, although the owner of the larger share, is not entitled to get the property, the Court, should, wherever possible, strive to avoid this result. I do not see any expression used in S. 3, justifying the interpretation put by the Madras High Court on this section. It is not for the Court to enter into a discussion as to the reasonableness or otherwise of a clear and direct provision made, by which one particular party is given an advantage over the other. As indicated in the different cases, while interpreting S. 4 of the Act, the provisions of the Partition Act are to be liberally interpreted so as to apply those provisions to cases which come within the purview of those provisions. There is no reason why a similar interpretation should not be put on the provisions contained in S. 3 of the Act. I do not see any reason why before the sale actually takes place, it will not be open to the defendant to exercise the option which is given to him under S. 3 of the Act.

[14] In the case now before me, the plaintiffs had suggested that as they were not in a position to use beneficially the water of the tank, they would rather have the entire tank sold and such a direction was given. If after the expression of such a desire by the plaintiffs, and the preliminary decree is passed by the Court, the defendants make an application under S. 3 (1) of the Act, it is not only competent for the Court but the section makes it incumbent on the Court to issue the necessary orders, provided the conditions mentioned in that section are satisfied.

[15] Reference may in this connection be made to a decision of this Court in the case of *Atual Chandra* v. *Bhusan Chandra*, 41 C. L J. 47 : (A. I. R. (13) 1926 Cal. 1190), where it was pointed out that S. 2 provides that whenever it appears to the Court that a division cannot reasonably or conveniently be made, the Court, if it thinks fit, on the request of any such share-holder, provided such share-holder is the owner of one moiety or upwards share, may direct the sale of the property. If such a request is made under S. 2, any other co-sharer may apply for leave to buy at a valuation the share of the party asking for sale. There is no restrictive clause in S. 3 limiting the point of time when this application must be made.

[16] The difficulty of accepting the contention raised on behalf of the plaintiffs may be further explained if we take an extreme case. The plaintiff in a particular case may contest the title of the defendants or some of them. Until the question of title is decided in the preliminary decree, there can be no question of the defendant exercising the opportunity given to him under S. 3 of the Act in spite of the fact that in the plaint the plaintiff had suggested the

sale of the entire property as it was incapable of being used in separate shares by the parties.

[17] This appeal is accordingly allowed; the judgment and decree passed by the lower appellate Court are set aside and the direction given by the learned Munsif by his order dated 30th November 1945, is restored.

[18] Each party, in the circumstances of this case, will bear the costs of this Court.

[19] Leave to appeal under cl. 15, Letters Patent is granted.

V.R.B. *Appeal allowed.*

A. I. R (37) 1950 Calcutta 434 *[C. N. 165.]*

. ROXBURGH J.

Krishna Chandra Das — Appellant v. *Lakshmi Narayan Das and others — Respondents.*

F. A. Nos. 31 & 32 of 1950 and F. A. T. Nos. 1614 and 1615 of 1949, D/- 9-2-1950.

Court-fees Act (1870), S. 8 and Sch. II, Art. 17 (vi) — Applicability — Debottar land — Award of compensation to executor — Whole amount awarded to shebait in apportionment proceedings — Appeal by executor — Court-fee.

An award of compensation in respect of debottar land was made in favour of *K* as representing the deity in his capacity as executor of the person who created the debottar. In apportionment proceedings the whole compensation was awarded to one *L* in his character as shebait. *K* appealed against this decision paying a fixed court-fee:

Held, that the court-fee payable on the appeal was *ad valorem* on the amount determined under S. 8 and not a fixed fee. If the appellant *K* was purely an executor with no personal interest in the money, the difference in the amount awarded so far as he was concerned, namely, nil and the amount claimed so far as he was concerned would also appear to be nil. But if it could be shown that he had some personal interest in the matter in any way, it might be that some value should be placed on that and that he should pay court-fee accordingly. The estimated value to the executor of the order he sought to obtain, whatever that might be, could not be the full amount of the compensation awarded for the property: 39 Cal. 906, *Rel. on*; A. I. R. (22) 1935 Cal. 243, *Disting.* [Paras 2 & 4]

Annotation: ('49 Com.) Court-fees Act, S. 8, N. 3, 7 and 9.

Sudhir Kumar Acharya — for Appellant.
Jogneswar Majumdar — for the State.

Order. — This is a reference under S. 5, Court-fees Act, arising out of an appeal against an order in land acquisition proceedings. The property acquired was *debottar* property. The Collector awarded compensation of Rs. 32,175-9 in favour of the appellant Krishna Chandra Das as representing the deity in his capacity as executor to the estate of Madhusudan Das. There were three apportionment cases before the Special Land Acquisition Judge of Alipur. They were tried together and the learned Judge has directed that the entire compensation should be awarded to Lakhinarain Das representing the deity in his character as shebait. Against this Krishna Chandra Das has preferred an appeal paying the court-fee stamp of Rs. 15 on the ground that the subject-matter of the appeal cannot be possibly estimated at a money value. The stamp reporter has objected to this and has claimed *an ad valorem* court-fee of Rs. 1590 on the amount of compensation awarded by the Collector.

[2] The cases *Trinayani Dassi* v. *Krishnalal De*, 17 C. W. N. 933: (39 Cal. 903) and *Rash Behari* v. *Gosto Behari*, 33 C. W. N. 110: (A. I. R. (22) 1935 Cal. 243) deal with a somewhat similar question to that arising in the present case. Sir George Rankin in the case of *In re Ananda Lal Chakravarty*, 35 C. W. N. 1103: (A. I. R. (19) 1932 Cal. 346) has discussed the nature of the provisions of S. 8, Court-fees Act. The decision in the case appears to me to be quite simple. Krishna Chandra Das was awarded the money by the Collector as executor and in this appeal he claims the money as executor to the will of Mudhusudan Das who created the debottar. As executor he will have to deal with the property in the terms of the will. In passing I may say that I find it a little difficult to understand why in a matter under the Land Acquisition Act the question of the rights of person claiming as shebaits against the executor had to be decided, neither side disputing that the property acquired was debottar. Further, it is not easy to understand why the amount of compensation is proposed to be paid in cash either to the executor or to the persons now found to be the shebaits and why the cash was not invested under S. 32, Land Acquisition Act. However that may be, so far as the appeal here is concerned, the matter is clearly to be governed by S. 8, Court-fees Act which, as pointed out by Sir George Rankin, is not itself a charging section but assumes that the fee payable in respect of any appeal relating to an award of compensation will be *ad valorem* and lays down the method by which the valuation is to be made on which the fee is to be calculated. It is for the party, in the first place, to say, in my opinion, what that value is and the Registrar may investigate as far as he thinks necessary. If Krishna Chandra Das is purely an executor with no personal interest in the money, the difference in the amount awarded so far as he is concerned, namely, nil and the amount claimed so far as he is concerned would appear to be also nil. If it can be shown that he has some personal interest in the matter in any way, it may be that some value should be placed on that and that he should pay court-fee accordingly. This view, although it may not appear so at first sight, is, I think, entirely consistent with the view taken in the case in *Trinayani Dassi*

v. *Krishnalal De*, 17 C. W. N. 933: (39 Cal. 906) where the facts indeed are somewhat similar. The appellant there was an executrix to her husband's will. The money had been invested under S. 32, Land Acquisition Act, as a result of an objection by the grandsons of her husband who claimed to be shebaits. According to the will, the lady and Lal Gopal De, the father of the opposite parties, had been appointed to be shebaits. The lady apparently objected to the order of investment and appealed claiming that the amount should be paid wholly to her. The difficulty in appreciating the exact decision in the case, I think, arises from the fact that precisely what was the lady's case is a little obscure. The learned Judges themselves, in fact, it seems to me, really decided her appeal for her on the matter of the application as to the court-fee payable, because they pointed out that as executrix she was in no better position than as a shebait and that she would not be able to dispose of the property other than as under the will and that hence obviously the order for investment was really a proper one. I note that after the decision of the court-fee matter the court-fees were, in fact, not paid. However that may be, the learned Judge pointed out that the fee payable was governed by S. 8 and not by Sch. 2, Art. 17, cl. 6. They remarked:

"In the present case, even supposing that the exact estimate cannot be given, it is, in our opinion, certainly possible to state approximately the money value of the relief claimed..."

The learned Judges expressed no opinion as to what the value should be and the case, though relied on by the stamp reporter, is really no authority for a contention that in the present case court-fee on the full amount Rs. 32,175-9, *ad valorem* must be paid.

[3] The case of *Rash Behari* v. *Gosto Behari*, 39 C. W. N. 110: (A. I. R. (22) 1935 Cal. 243) is of no real assistance here. There the appeal was by the reversioners against an order of payment of compensation to a purchaser from a Hindu widow. In order to protect their interest they wanted an order under S. 32, Land Acquisition Act, for investment of the money. They were not claiming any amount to be paid to them. The case was held to come not under S. 8 but Sch. 2, Arts. 7 (iii), Court-fees Act.

[4] My decision therefore is that the fee payable is *ad valorem* on the amount determined under S. 8, Court-fees Act, in the manner I have indicated. The estimated amount of the value to the executor Krishna Chandra Das of the order he seeks to obtain, whatever that may be, cannot be the full amount of the compensation awarded for the property.

K.S. *Answer accordingly.*

A. I. R. (37) 1950 Calcutta 435 *[C. N. 166.]*

G. N. DAS AND DAS GUPTA JJ.

S. C. Mitter — Appellant v. *The State.*

Criminal Appeal No. 256 of 1949, D/- 3-3-1950.

(a) Evidence Act (1872), Ss. 18, 101-103—Criminal trial—Admission by counsel — Duty of prosecution.

The law makes no provision for an admission by counsel in a criminal case. No admission by counsel can relieve the prosecution of the duty of satisfying the Court by proper evidence. [Para 8]

Annotation : ('46-Man) Evidence Act, S. 18, N. 5; Ss. 101-103, N. 3, 5.

(b) Evidence Act (1872), S. 33, proviso — "Opportunity to cross-examine" — 'Opportunity to cross-examine required by the proviso is a full opportunity and not a partial one. [Para 11]

Annotation : ('46 Man) Evidence Act, S. 33, N. 11.

(c) Evidence Act (1872), S. 33—"Right to cross-examine" — Warrant case—Accused has no right to cross examine the witness before framing of charge—Criminal P. C. (1893), S. 252. [Para 12]

Annotation : ('49-Com.) Criminal P. C. S. 252, N. 10.

A. K. Basu, Bireswar Chatterji, B. K. Ghose, Dhiren Chakraverti and Gouri Prasad Mukherji—for Appellant.

Walter Dutt and Abani Chatterji—for the State.

Das Gupta J.—The appellant was convicted by the First Special Tribunal, Calcutta, of an offence under S. 120B read with S. 161, Penal Code, and for several offences under S. 161 of the Code. He was sentenced to different periods of imprisonment for each of these offences and also to fines, in default of payment of which, he was directed to undergo further periods of imprisonment.

[2] The prosecution case was that the appellant entered a conspiracy with one Sripati Mukherji to commit offences under S. 161, Penal Code by accepting illegal gratification from Sripati as a motive or reward for issuing contracts in favour of the Dalia Tailoring Company of which Sripati Mukherji was a contractor, and that in pursuance of the same, different sums of money, as mentioned in specific charges, were actually received by the appellant from Sripati Mukherji as illegal gratification. It is said that on paper, these payments were shown as having been made to one R. K. Roy as commission on profits, though in reality, these payments were for the appellant and were received by him.

[3] The defence was a denial of any agreement to receive illegal gratification and a denial that any such gratification was received.

[4] The success of the prosecution depended entirely on proving that the payments which on paper were shown to have been made to R. K. Roy were really made to the appellant. The only evidence on the record to prove this is the evidence of Sripati. It is contended on behalf of the appellant, however, that Sripati's

evidence must be excluded from consideration as he did not get an opportunity of completing the cross-examination of Sripati.

[5] It is necessary to decide first whether this contention should prevail. Sripati's examination-in-chief was concluded on 11th March 1948. There is a note on the record that on that date cross-examination was reserved. Charges were framed against him on 26th May 1948. The witness was recalled, and further examined in chief on 9th July 1948. Thereafter his cross examination commenced on 9th July 1948, but before the cross-examination could be concluded, Sripati ceased to be available for cross-examination.

[6] The only way in which the evidence already recorded could be used as evidence in this case was by the application of the provisions of S. 33, Evidence Act. The first requirement for the application of those provisions is that the prosecution must prove that Sripati was dead, or could not be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. It is not the prosecution case that Sripati was dead, or that he could not be found, or he was kept away by the accused. It is said, however that Sripati was seriously ill, and so incapable of giving evidence; that further he was not likely to recover soon, so that his presence could not be secured without undue delay.

[7] The strange thing, however, is that the prosecution did not make the slightest attempt to prove these allegations. Though the Tribunal asked two doctors to examine Sripati and a report was received from these doctors, neither of the doctors gave evidence in the case. Two medical certificates from two other doctors were also put into Court by the Public Prosecutor. Neither of these doctors were, however, examined. The Public Prosecutor from his position in the Bar made statements that the witness was seriously ill and was not likely to recover soon. He was, however, also not examined. There is, in fact, not one single line in evidence in support of the story of Sripati's illness.

[8] The Tribunal appears to have relied on the fact that the learned defence counsel in the Court below did not contest the story of Sripati's illness. The law, however, makes no provision for an admission by counsel in a criminal case. No admission by counsel can relieve the prosecution of the duty of satisfying the Court by proper evidence, that Sripati was really seriously ill. Vide the decisions in the case of *Ganeshdas Nimani* in Cri. Appeal No. 70 of 1948, D/- 21-3-1249 and in the case of the *Attorney General of New South Wales* v. *Henry Louis Bertrand*, (1867) 36 L. J. P. C. 51 : (L. R 1. P. C. 520).

[9] I find that the prosecution has not proved that Sripati was ill, and that no case has been made out for the application of S. 33, Evidence Act.

[10] I may also point out in this case that the second requirement of the proviso to the section which requires that an adverse party has had the right and opportunity to cross examine the witness has also not been fulfilled. After charge had been framed, the accused had certainly the right to cross-examine the witness. He had partial opportunity to exercise the right, but not full opportunity as the witness ceased to be available before cross-examination could be concluded.

[11] In my opinion, what this proviso requires is that the accused must have a full opportunity of cross-examining the witness.

[12] Before charge was framed, the accused had certainly the opportunity to cross-examine the witness; but at that stage, he had no right to cross-examine the witness. The reasons for the conclusion that the accused in a warrant case has no right to cross-examine the witness before charge is framed within the meaning of S. 33, Evidence Act, were fully discussed in Appeal No. 236 of 1949, and need not be repeated here.

[13] My conclusion, therefore, is that Sripati's evidence, as recorded is not admissible under S. 33, Evidence Act, and must be excluded from consideration. On such exclusion, the position is that there is no evidence on the record at all to show either that there was an agreement between the appellant and Sripati that the appellant would receive illegal gratifications, or that, in fact, any illegal gratification was ever received by the appellant. The prosecution, has, therefore, failed in my opinion, to prove the guilt of the accused of any of the offences with which he was charged.

[14] I would, therefore, allow this appeal, set aside the order of conviction and sentence passed by the Tribunal, and order that the accused be acquitted of all the charges, and discharged from his bail bond.

[15] **Das, J.**—I agree.

[16] **By the Court**—Leave to appeal to the Supreme Court under Art. 134 (1) (c) of the Constitution is refused.

G.M.J. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 437 *[C. N. 167.]*

DAS GUPTA AND LAHIRI JJ.

Superintendent and Remembrancer of Legal Affairs, West Bengal—Petitioner v. *Abani Kumar Banerjee — Accused—Opposite Party.*

Criminal Revn. No. 92 of 1950, D/-9th May 1950.

(a) Criminal P. C. (1898), S 190 (1) (a), 156 (3) and 200 — Petition of complaint filed before Magistrate — Magistrate, if bound to take cognizance.

When a petition of complaint is filed before a Magistrate the Magistrate may take cognizance under S. 190 (1) (a) and proceed to examine the complainant under S. 200, and thereafter proceed according to the subsequent sections of the Code, or in the alternative, may not take cognizance and may instead send it to the police for investigation under the provisions of S. 156 (3). [Para 5]

Annotation: ('49 Com.) Criminal P. C., S. 156 (3), N. 5, Pt. 3; S. 190, N. 17 Pts. 1 and 2.

(b) Criminal P. C. (1898), S. 190 (1) (a) —Taking cognizance — Phrase explained.

Before it can be said that any Magistrate has taken cognizance of any offence under S. 190 (1) (a), he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of the Chapter. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of the Chapter but for taking action of some other kind, e. g., ordering investigation under S. 156 (3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence. [Para 7]

Annotation: ('49-Com.), Criminal P. C., S. 190 N. 4.

Nirmal Kumar Sen, Deputy Legal Remembrancer —for Petitioner.

Sudhansu Sekhar Mukherjee and Arun Kumar Dutt No. II—for Opposite Party.

Das Gupta J. — On 2nd February 1948, a petition of complaint was filed before the Chief Presidency Magistrate of Calcutta by one Haridas Mukherjee. On that petition of complaint, the learned Magistrate passed the following order:

"To D. C. D. D., for enquiry and report. If it is found that the Bank has ceased functioning, the enquiring officer to seize the books at once on the strength of a search warrant I should issue on his application. If the Bank is functioning he should apply to me for instructions. To 13/2."

On 9th February 1948, a report was received that the Bank had ceased functioning. On 10th February 1948, the learned Chief Presidency Magistrate ordered issue of a search warrant. A report from the police was received on 23rd March 1948. On 14th June 1948, the learned Chief Presidency Magistrate passed the following order:

"Heard learned Pleader. Let D. C. D. D., take cognizance of this case at once, and seize the books of this Bank that are necessary."

Thereafter a challan was sent up by the police under S. 408, Penal Code, against Abani Kumar Banerjee. On 7th February 1949, the learned Chief Presidency Magistrate recorded the receipt of the challan under S. 408, Penal Code, and then transferred the case to Mr. C. C. Chakravartti for disposal.

[2] This learned Magistrate came to the conclusion that the learned Chief Presidency Magistrate had acted illegally and that the accused Abani Kumar Banerjee was before him on the basis of illegal arrest, and accordingly ordered him to be set at liberty; and he fixed a date for the examination of the complainant, apparently under S. 200, Criminal P. C.

[3] It is against this order of the learned Presidency Magistrate Mr. C. C. Chakravarti, that the present Rule is directed.

[4] The real question for decision is whether the learned Magistrate is right in his view that when a petition of a complaint was filed before the Chief Magistrate, he was bound to take cognizance under S. 190 (1) (a), Criminal P. C. If he was so bound, he was certainly bound also to examine the complainant under S. 200, Criminal P. C., and thereafter proceed in the ways indicated in subsequent Ss. 202, 203 and 204 of the Code. If, however, he was not so bound, the action of the learned Chief Presidency Magistrate in sending the case to the police without himself examining the complainant under S. 200, Criminal P. C., cannot be said to be illegal as he would be entitled to order investigation by the police, under S. 156 (3), Criminal P. C.

[5] Sen J. in the case of *Samaddar* v. *Sures Chandra* 53 C. W. N. 270 : (A. I. R. (36) 1949 Cal. 197) and in some other cases has taken the view that a Magistrate duly empowered to take cognizance is bound to take cognizance of the petition of complaint as soon as it is filed before him. The contrary view has been taken by several Division Benches of this Court of which mention need be made only of two recent decisions, viz., decision of Roxburgh and Chakravartti JJ. in *Robinul Hossain* v. *K. K. Ram*, 82 C. L. J. 222 and the decision of Harries C. J. and Das J. in *Pulin Behari Ghosh* v. *King*, 53 C. W. N. 653. In these cases, the view has been clearly expressed that when a petition of complaint is filed before a Magistrate the Magistrate may take cognizance under S. 190 (1) (a), Criminal P. C. and proceed to examine the complaint under S. 200, and thereafter proceed according to the subsequent sections of the Code, or in the alternative, may not take cognizance and may instead send it to the police for investigation under the provisions of S. 156 (3), Criminal P. C. I feel bound to follow these decisions.

[6] Mr. Mukherjee has, however, tried to convince us that the view taken in these decisions mentioned above is wrong, and that we should refer the matter to the Full Bench.

[7] I have for myself no hesitation in feeling that there is nothing which would justify our referring the matter to the Full Bench. As I read S. 190, Criminal P. C., and the subsequent sections, it seems to me to be clear that a Magistrate is not bound to take cognizance of an offence, merely because a petition of complaint is filed before him. Mr. Mukherji's argument is that a Magistrate cannot possibly take any action with regard to a petition of complaint, without applying his mind to it, and taking cognizance of the offence mentioned in the complaint necessarily takes place, when the Magistrate's mind is applied to the petition. Consequently, Mr. Mukherji argues, whenever a Magistrate takes the action, say, of issuing search warrant, or asking the police to enquire and to investigate, he has taken cognizance of the case. In my judgment, this is putting a wrong connotation on the words "taking cognizance". What is "taking cognizance" has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under S. 190 (1)(a), Criminal P. C., he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter,—proceeding under S. 200, and thereafter sending it for enquiry and report under S. 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e. g., ordering investigation under S. 156 (3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence. My conclusion, therefore, is that the learned Magistrate is wrong in thinking that the Chief Presidency Magistrate was bound to take cognizance of the case as soon as the petition of complaint was filed.

[8] Mr. Mukherjee wanted to draw our attention to the evidence of some of the witness examined before Mr. Chakravarti to show that really there was something suspicious about the whole complaint. In my judgment, it is not necessary or proper for us to go into the matter at this stage. The learned Magistrate has, in my opinion, clearly committed an error in law in treating the proceedings after the filing of the petition on 2nd February, 1948, up to 7th February 1949, as invalid, and in deciding to start proceedings anew.

[9] I would, therefore, make this Rule absolute, set aside the learned Magistrate's order directing the accused to be set at liberty, and direct that the Court should proceed with the trial of the case on the basis that the proceedings up to the order of the Chief Presidency Magistrate on 7th February, 1949, ordering transfer of the case to Mr. C. C. Chakravarti are valid.

[10] We understand that the Magistrate, Mr. C. C. Chakravarti, has since been transferred. This would necessitate that the case should be tried either by the Chief Presidency Magistrate or by such other Presidency Magistrate to whom he may think fit to transfer the case.

[11] **Lahiri J.**—I agree.

V.R.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 438 *[C. N. 168.]*

ROXBURGH J.

Ramesh Chandra Roy Choudhury and another—Defendants—Appellants v. *Bhupendra Bhusan Gangully—Plaintiff—Respondent.*

A. F. A. D. No. 1263 of 1946, D/- 26 4 1950, against decree of District Judge, Murshidabad, D/- 21-12-1945.

(a) Debts laws — Bengal Money-lenders Act (X [10] of 1940), S. 36 (2) (c)—Partial restoration.

The provisions of S. 36 (2) show beyond all doubt that there was the clearest intention that partial restoration could be claimed and given. [Para 4]

(b) Debt laws — Bengal Money-lenders Act (X [10] of 1940), S. 36 (2) (c) and (e)—Provisions as to partial restoration if nullified by cl. (e) — Court's duty to estimate amount for which judgment-debtor is to be credited.

It cannot be said that the whole provisions for partial restoration are nullified. The Legislature clearly has made a mistake in the provisions it has made in clause (e) in providing that the judgment-debtor is to get credit only for the value of the property restored to him and again returned to the decree-holder. It is not possible to give any other interpretation to the section than in accordance with this manifest error, but the Courts then must estimate in the best way they can what figure is to be given as the amount for which the judgment-debtor has to be credited. [Para 6]

Paresh Nath Mukherjee (Jr.) and Smriti Kumar Roy Choudhuri — for Appellants.

Samarendra Nath Mukherji (II)—for Respondent.

Judgment. — This is an appeal against a decree of the District Judge of Murshidabad decreeing a suit under S. 36 (1), Bengal Money-Lenders Act which was dismissed by the trial Court. The original decree was passed in Mortgage Suit No. 6 of 1938 of the Court of the Subordinate Judge of Murshidabad, final decree being passed on 23rd August 1938. The properties were sold on 15th March 1939, for Rs. 1000 only. The decree-holder was the purchaser and he took delivery of possession. There were three properties sold. There was a personal decree for the balance, Rs. 2832 odd, on 19th June.

[2] The lower appellate Court has reopened the decree and passed a decree for Rs. 2,478 plus all costs giving ten instalments from March 1946 to March 1955.

[3] Of the three properties purchased some portion is in the actual possession of the decree-holder and forms the subject-matter of the prayer for restoration in the suit under S. 36. As regards the rest, there were claim cases which the decree-holder lost. In one case a cosharer succeeded on an allegation that the particular property claimed fell within his allotment. As regards the other claim case the claimant was a purchaser from the mortgagor after the mortgage. The decree-holder has brought a suit to establish his rights in respect of this portion.

[4] The main point argued before me is that as the judgment-debtors' claim is for partial restoration of the property purchased and as partial restoration cannot be given, therefore the application should have been rejected. For this proposition reliance is placed on the decision in the case of *Ahammad Mea* v. *Gunu Mia*, 51 C. W. N. 922 : (A. I. R. (35) 1948 Cal. 105). That was a case relating to the provisions of S. 36A, Bengal Agricultural Debtors Act, and the decision is to the effect the whole tenor of the provisions of that section shows that the intention is that the judgment-debtor can only claim transfer to himself of the whole property sold. In my opinion, the decision is of no assistance as regards the present case. In fact, the provisions of S. 36 (2), Bengal Money-Lenders Act, show, in my opinion, beyond all doubt that there was the clearest intention that partial restoration could be claimed and given. The nature of the procedure provided in that section is quite different from that provided in the Bengal Agricultural Debtors Act. In broad outline the provision is that the judgment-debtor may have the decree against him reopened and a new decree made in accordance with the provisions of the Act and where property has been sold the Court

"shall order the restoration to the judgment-debtor of *such* property, *if any*, of the judgment-debtor acquired by the decree-holder in consequence of the execution of the reopened decree *as may be* in the possession of the decree-holder on the date on which the decree was reopened." (The italics are mine.)

The judgment-debtor is to be directed then to pay the new decretal amount in such number of instalments as the Court thinks fit and if he fails to pay any instalment, then the property restored to him is to be again returned to the decree-holder and the judgment-debtor is to be liable for the whole decretal amount less credit for the value of the property purchased by the decree-holder. Here, however, the Legislature appears to have fallen into error and made a somewhat absurd provision. It is necessary to quote the whole of sub-cl. (e):

"If in exercise of the powers conferred by sub-s. (1) the Court reopens a decree, the Court shall direct that, in default of the payment of any instalment ordered under cl. (d) the decree-holder shall be put into possession of the property *referred to in cl. (c)* and that the amount for which the decree-holder purchased such property in execution of the reopened decree shall be set off against so much of the amount of the new decree as remains unsatisfied".

Obviously, when the operations mentioned in cl. (e) are performed, then the new position is that there is a new decree for a lesser amount; the decree-holder has all the property he originally purchased in execution of the old decree (less, of course, any properties which he may have disposed of). Clearly the judgment debtor in that position ought to be given credit as against the new decree for the full value of the properties sold at the original sale, that is to say, for the full amount paid for all the properties sold at the original sale. There is no rhyme or reason or sense in providing that in that position the judgment-debtor should receive credit against the new decree for only the value of "such property" as is "referred to in cl. (c)", that is to say,

"*such* property, *if any*, of the judgment-debtor acquired by the decree holder in consequence of the execution as the reopened decree *as may be* in the possession of the decree-holder on the date on which the decree was reopened".

In other words, there is no rhyme or reason why the judgment-debtor in the final position should get credit against the new decree only for the value of the propperty which happened to be in the possession of the decree-holder at the date of the reopening of the decree and of which restoration was given to the judgment-debtor subject to his paying the instalments and which on his failure to pay the instalments has been returned to the decree-holder. In the final position the decree-holder has all the benefits of the original purchase in execution of the original decree and in that position clearly in all common sense the judgment-debtor should get credit for whatever the decree-holder paid for those properties in the original sale. However, our legislators had slipped and had used the word 'such' as underlined (here italicised) above in the quotation in cl (e) instead of the word 'the' or perhaps the words "all the".

[5] Indeed it would appear that the draftsman had his attention so focussed on the point that he was providing for partial restoration of whatever property of the judgment-debtor might still remain with the decree-holder, that when he came to the final provisions about re restoration he provided, quite wrongly, for only a partial credit to the judgment-debtor, although

the decree-holder by that stage of the proceedings had received the full benefit of his original purchase.

[6] It is then sought to argue, taking advantage of the manifest error in the provision made in cl. (e), that where only partial restoration is possible because the decree-holder has already parted with some of the properties by the time the decree is re-opened, since there is difficulty in saying what is the amount for which the decree-holder purchased any portion of the properties sold in one lot, therefore the whole provisions for partial restoration are nullified. I am not prepared to accept this argument which really is one of *redentir ad absurb*. The Legislature clearly has made a mistake in the provision it has made in cl. (e) in providing that the judgment-debtor is to get credit only for the value of the property restored to him and again returned to the decree-holder. It is not possible to give any other interpretation to the section than in accordance with the manifest error but the Courts then must estimate in the best way they can what figure is to be given as the amount for which the judgment-debtor has to be credited. The learned District Judge has given the full credit of the purchase price of Rs. 1000. In the present case I estimate the value to be given under the terms of cl. (e) as best as I can at half this amount, Rs. 500.

[7] There is no provision in the decree of the lower appellate Court for an application by the decree-holder for a personal decree under O. 34, R. 6. The decree must be amended to make provision for such an application to be made in the event that there is a failure in payment of the instalments and the property is again returned to the decree-holder.

[8] Lastly, I am asked to add as part of the conditions of the payment of instalments a condition that the judgment-debtor will pay the rents and cesses in due time and will file the chalans and *dakhilas* at least within 3 days of the last date of payment in each case, failure to comply with this condition to be a breach of justifying an order of return to the decree-holder of the property now directed to be restored to the judgment-debtor. This is a reasonable condition in the circumstances and the decree will be amended to provide such a condition.

[9] I make no order as to costs.

[10] Leave to appeal under Cl. (15), Letters Patent is asked for and is refused.

V.R.B. *Decree amended.*

A. I. R. (37) 1950 Calcutta 440 *[C. N. 169.]*

GUHA J.

Bhagabati Devi—Defendant — Petitioner v. *Bholanath Banerjee—Plaintiff—Opposite Party.*

Civil Rule No. 559 of 1949, D/- 14th November 1949, from order of Munsif, Howrah, D/- 12th March 1949.

(a) Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), S. 18— Wrong decision under—Revision—Civil P. C. (1908), S 115.

Where the lower Court decides wrongly by dismissing the tenant's application under S. 18, the mistake concerns the jurisdiction and as such the High Court has power to interfere in revision. [Para 5]

Annotation: (44 Com.) Civil P. C. S. 115 N. 10, 11.

(b) Houses and Rents – West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), Ss. 12 (1) (b), 18– Non-compliance with S. 12 (1) (b) — Maintainability of application under S. 18.

Where in a suit for ejectment and for recovery of arrears of rent the decree of the trial Court is merged in the decree of the appellate Court prior to the coming into force of the Act, interest in terms of S. 12 (1) (b) becomes payable and if no such interest is paid the tenant is not entitled to have the decree in the original suit rescinded or varied. [Para 6]

Heramba Chandra Guha—for Petitioner.

Nirmal Chandra Chakravarty and Satya Santi Mukherji—for Opposite Party.

Order.— This revision case at the instance of the tenant defendant arises out of an application under S. 18 read with S. 12 (1) (b), West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, hereinafter called the Act of 1948 rescinding a decree for ejectment and recovery of arrears of rent from July 1945 to May 1946. The decree was passed by the trial Court on 17th March 1948 and an appeal against it was dismissed on 22nd November 1948. The Act of 1948 came into force on 1st December 1948 and the application under S. 18 read with S. 12 (1) (b) was filed on 10th December 1948, the tenant being still in possession of the disputed premises. In the application it was stated that all arrears of rent up to November 1948, *i.e.* up to filing of the application had been paid by the tenant applicant and rescission of the ejectment decree was prayed for. The learned Munsif dismissed the petition holding that by payment contemplated under S. 12 (1) (b) of the Act of 1948. the benefit of S. 18 of the same Act is not available. No detailed reasons were given, but purported to rely upon a decision of Banerjea J. The decision was given in Suit No. 2020 of 47 of the Original Side of this Court and an appeal against that decision was dismissed by the Chief Justice and Sinha J. on 9th August 1949.

[2] Though the learned Munsif disposed of the matter in a somewhat summary fashion,

the case has been argued before me at length and all the facts have been placed before me, It appears that the landlord filed T. S. 163/47 in the 2nd Court of the Munsif of Howrah on 25th March 1947 alleging that the tenant defendant was in arrears from July 1945 to May 1946 and praying *inter alia* for a decree for ejectment and for recovery of arrears of rent from July 1945 to May 1946. The defence *inter alia* was that there was no default inasmuch as the defendant deposited the arrears in question as directed by the Rent Controller. At that time the Bengal Rent Control Ordinance which came into force on 1st October 1946 was in operation and there was a provision that if the defaulter paid up the arrears of rent within 30 days from 1st October 1946, he was not liable to ejectment. In the present case, however, the arrears were deposited on 6th December 1946 and accordingly, the deposit being beyond time, the learned Munsif held that it was of no assistance to the defendant. The suit was ultimately decreed on 17th March 1948 and as pointed out before, the decree was upheld on appeal on 22nd November 1948.

[3] On behalf of the tenant defendant Mr. Heramba Chandra Guha has contended before me that his client being still admittedly in possession of the disputed premises, she is now entitled to rescission of the decree in the ejectment suit under S. 18 of the Act of 1948 in view of the circumstances of this case. His contention is briefly that whatever might have been the grounds of overruling his client's contention about not being a defaulter in the ejectment suit which was decided when the Bengal Rent Control Ordinance, 1946, was in force, the fact remains that she had deposited according to the directions of the Rent Controller the arrears claimed in the suit before its institution and accordingly under the present law there is no reason why the previous decree should not be rescinded. He has also pointed out that his client has deposited in compliance with the order of the Rent Controller all subsequent rents not sued for. According to Mr. Guha these are distinguishing features in his case and in view of them it is stronger than the cases decided by Das J. in Civil Revn No. 277/49 and Civil Revn. No. 537/49 and by Banerjea J. in Suit No. 2020/47 of the Original Side of this Court.

[4] On behalf of the landlord respondent Mr. Nirmal Chandra Chakravarti has contended : (i) No interest as required by S. 12 (1) (b) of the Act of 1948 having been paid by the tenant, she is not entitled to the benefit of S. 18. (ii) Rent not having been tendered to the landlord or remitted by postal money order to the address of the landlord, deposit of rent in the Rent Controller's office was of no assistance to the tenant in view of the Explanation to S. 12 (1) of the Act of 1948. (iii) In any case, the present application in revision under S. 115, Civil P. C., does not lie.

[5] So far as the third objection is concerned my view is that it cannot be upheld. Assuming that the lower Court decided wrongly by dismissing the tenant's application under S. 18 of the Act, the mistake concerns jurisdiction in the circumstances of this case and as such this Court has power to interfere.

[6] As regards the first objection, I am of opinion that there is force in it. In the ejectment suit the decree of the trial Court is dated 17th March 1948. The appeal against that decree was decided on 22nd November 1948 and the decree of the trial Court merged in that appellate decree. Before the appellate decree was passed, the alleged arrears were already the subject-matter of the lower Court decree and as such interest thereon at 6¼ p. c. was payable in terms of S. 12 (1) (b) of the Act. No such interest was paid. I am unable to uphold Mr. Guha's contention that on the facts of this case, no interest was payable. In view of non-compliance with S. 12 (1) (b), the tenant is not entitled to have the decree in the original suit rescinded or varied.

[7] In view of the above finding, it is unnecessary for me to express my opinion regarding the second objection of Mr. Chakravarty.

[8] In the result, I decline to interfere with the order passed by the lower Court rejecting the application for rescinding or varying the decree. The Rule is discharged but in view of all the circumstances no order is made as to the costs of this Rule.

G.M.J. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 441 *[C. N. 170.]*

R. P. MOOKERJEE J.

Kshitish Chandra Mondal—Defendant 1—Appellant v. *Shiba Rani Debi and others—Respondents.*

A. F. A. D. No. 138 of 1949, D/- 10-5-1950, against decree of D. J., Zillah Nadia at Krishnagar, D/- 9-12-1948.

Contract Act (1872), S. 56—Frustration — Applicability to leases—Transfer of Property Act (1882), S. 108 (e).

A created a thatched shed on a plot and let the shed to *B* as a monthly tenant. During the tenancy the shed was burnt by fire. Thereafter *B* raised another structure on the land in spite of *A*'s protest:

Held, (1) that S. 108 (e) did not in terms apply as *B* neither elected to walk out even after total destruction

nor was willing to suspend payment of rent and give up possession; [Para 9]

(2) that the doctrine of frustration applied to leases. The contract between *A* and *B* became impossible of performance through no negligence on the part of *A* and he was entitled to claim that the lease had come to an end by destruction by fire; [Para 21]

(3) that under the tenancy *B* had no right to raise structures of his own, treating the lease as the lease of the land only. [Para 22]

Annotation: ('46-Man.) Contract Act, S. 56 N. 2.
('50-Com.) T. P. Act, S. 108 (e), N. 3, 4.

Syamacharan Mitra—for Appellant.
Sitaram Banerjee and Arun Kumar Datta
—for Respondents.

Judgment.—This appeal, on behalf of defendant 1, arises out of a suit brought by the plaintiffs for declaration of their title to the disputed land and for recovery of vacant possession after removing a temporary shed erected by the defendant thereon. Only such facts as are relevant and necessary for deciding the limited questions raised in this appeal may be shortly stated.

[2] Under the Maharaja of Cossimbazar Nirendra and his brothers held a jama in respect of C. S. plot No. 2122 within the Ranaghat municipality. Subsequently, Nirendra became the sole owner of the leasehold right. The plaintiff's case is that on C. S. plot No. 2122 they had erected certain thatched sheds. The principal defendant was inducted as a monthly tenant of those sheds for a fruit stall. A suit for ejectment had been filed against the defendant after due service of a notice under S. 106, T. P. Act. During the pendency of the suit however there was a fire in the bazar when this particular shed was completely burnt down. Thereafter, the defendant raised another structure on the land in spite of the protest of the plaintiffs. A prayer for injunction in the suit which was then pending was refused and thereupon the said suit was withdrawn with liberty to institute a fresh suit. Under these circumstances the present suit came to be filed. The plaintiffs allege that the original shed which had been let out to the defendant having been destroyed by fire the contract between the parties was rendered void and the plaintiffs are entitled to re-enter.

[3] The defence as set up was of a two-fold nature. It was pleaded that the land on which the structure stood had been let out by the plaintiffs to defendant and the shop room now destroyed had been constructed by the lessee. Alternatively it was stated that if it be held that the original structures had been erected by the lessors and that which had been let out was the room only the lease had not terminated on that shed being burnt down. The plaintiffs were not accordingly entitled to re enter.

[4] Both the Courts below have held that the shed which had been burnt down had been erected by the lessors and what had been let out was the shop room only. That the defendant was a tenant in respect of the shop room erected by the plaintiffs is a conclusion which is a finding of fact on a consideration of the evidence in the case. This question cannot be re-agitated in this appeal.

[5] The point which requires consideration is whether on the total destruction of the shed, which had been erected by the lessors by the fire, the tenancy had come to an end.

[6] Clause (e) of S. 108, T. P. Act provides that:

"If by fire, any material part of the property be wholly destroyed or rendered substantially and permanently unfit, for the purposes for which it was let, the lease shall,"

in the absence of a contract or local usage to the contrary "at the option of the lessee, be void."

[7] It is urged on behalf of the appellant that under this clause an option is given only to the lessee to determine the lease if the conditions stated therein are satisfied. If in spite of the structures being destroyed or rendered permanently unfit, the defendant-tenant elects to continue the tenancy the lessor is not entitled to compel the defendant-tenant to walk out.

[8] It is incontestable that this clause makes no reference to the rights, if any, of the lessor if the lessee, in spite of the destruction of the premises elects to pay the rent. In *Kunhxen Haji* v. *Mayen*, 17 Mad. 98 : (4 M. L. J. 21), it was held that on the destruction of the coffee-plants by fire which only had been leased out and abandoned by the tenant the lessor was not entitled to claim rent after such exercise of option by the tenant. This was a case which was covered by the provisions contained in S. 108 (e), T. P. Act.

[9] This clause does not in terms apply to the facts of the present case where the lessee neither elected to walk out even after total destruction or is willing to suspend payment of rent and to give up possession. No contract or local usage governing the case has been attempted to be proved. On behalf of the lessor, reliance is however placed on the provisions contained in S. 56, Contract Act. The relevant portion of S. 56 is in the following terms :

"A contract to do an act which after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

[10] The Contract Act is complementary to the Transfer of Property Act. There is no conflict between S. 56 of the former Act and S. 108 of the latter Act on the facts of the present case.

We have, therefore, to examine whether S. 56, Contract Act, is attracted at all.

[11] Has the performance of the contract between the parties become, after the destruction of the shed, impossible of performance? If a specific subject-matter, assumed by the parties to exist or to continue in existence, is accidentally destroyed the promise made in the contract is discharged. (*Kunjilal* v. *Durgaprosad*, 24 C. W. N. 703: (A. I. R. (7) 1920 Cal. 1021), *Taylor* v. *Cladwell*, (1863) 3 B. & S 826 : (32 L. J. Q. B. 164) and *Howell* v. *Coupland*, (1876) 1 Q. B. D. 258 : (46 L. J. Q. B. 147).

[12] This rule is not attracted where the parties had already contemplated and provided for the particular contingency. In the present case, destruction of the room was not even contemplated by the contracting parties.

[13] Whether the doctrine of frustration applies to leases has given rise to a sharp division of opinion in the English Courts. In *Cricklewood Property and Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd.*, 1945 A. C. 221 : (114 L. J. K. B. 110) the Judges were sharply divided.

[14] Asquith J. who had heard the case at the first instance *Leighton's Investment Trust Ltd.* v. *Cricklewood Property and Investment Trust Ltd.*, (1943) K. B. 493 at p. 495 : (112 L. J. K. B. 438), thought that it could not be disputed that the doctrine of frustration had no application to an ordinary lease and relied upon *Matthey* v. *Curling*, (1922) 2 A. C. 180 : (91 L. J. K. B. 593)) *London and Northern States* v. *Schlesinger*, (1916) 1 K. B. 20 : (85 L. J. K. B. 369), *Whitehall Court Ltd.* v. *Ettlinger*, (1920) 1 K. B. 680 : (89 L. J. K. B. 126) and *Swift* v. *Mactean*, (1942) 1 K. B. 375: (111 L. J. K B. 185). On appeal this view was affirmed by Mackinnon L. J. in the Court of appeal (1943) K. B. 496. On appeal before the House of Lords, the case was disposed of on a different point. As to the application of the doctrine of frustration to a lease, their Lordships expressed the view that the circumstances of that particular case did not justify such application. Lord Simon L. C. and Lord Wright opined that the doctrine of frustration could be applied to a lease and at any rate *Matthey* v. *Curling*, (1922) 2 A. C. 180: (91 L. J. K. B. 593) was no authority to the contrary. Lord Russel of Killowen and Lord Goddard took the contrary view. Lord Porter expressed no view on this point.

[15] This question came up for further consideration in *Denman* v. *Brise*, (1949) 1 K. B. 22. In view of the divergent opinion, as expressed by the House of Lords in the case above mentioned, the Court preferred to follow their own earlier decisions and left it for the House of Lords at the appropriate time to resolve this problem.

[16] In *Denman* v. *Brise*, (1949) 1 K. B. 22 *(Supra)* we have an instance where the tenant declines to withdraw but the landlord refuses the tenant's claim; the facts are to some extent, similar to those now before me but there is at the same time a difference on a very material point. A house in the occupation of the tenant was bombed out. The tenant accordingly ceased to occupy the premises but there was no evidence of abandonment or surrender of the tenancy. The landlord erected a new structure on the site and when it became fit for occupation, the tenant approached the landlord with a view to occupy it. The tenant was, however, unable to gain possession because the landlord withheld the key. The landlord thereupon purported to determine the contractual tenancy by a notice to quit. The tenant sued for possession. As there was no evidence of abandonment or surrender of the lease before the new premises had been made fit, the tenant on such completion was entitled as such to occupy it.

[17] In this state of the law in England it is a matter for consideration whether the doctrine of frustration can be applied to a lease in India.

[18] In *Inder Pershad Singh* v. *Campbell*, 7 Cal 474: (8 C. L. R. 501), a contract had been entered into between the plaintiff and the defendant under which the plaintiff agreed to cultivate indigo for the defendant for a specified number of year in certain specific lands, with respect to the portion of which the plaintiff was a subtenant only. During the continuance of the contract, the plaintiff lost possession of those lands as his immediate landlord had failed to pay the rent due from him and had in consequence been ejected by the owner. A Division Bench of this Court held that the prayer of the plaintiff to cancel the contract so far as it related to those lands which had been taken possession of by the owner be terminated (sic?) on the ground that it had become impossible of performance through no negligence on his part.

[19] Mookerjee A C. J. affirming the decision of Rankin J., in *Ezekiel Abraham* v. *Ramjusroy*: 33 C. L. J. 151: (A. I. R. (8) 1921 Cal. 305) has explained the circumstances and conditions under which the doctrine of frustration of adventure has become a gloss on the older theory of impossibility of performance, which has been greatly developed under the guise of reading "implied terms" into contract. The rigidity of the rule that an express unconditional contract is not generally dissolved by its performance being or becoming quite impossible in fact, by reason of particular circumstances, has been relaxed, an exception had been engrafted there.

on. Whether frustration occurs or not, depends on the nature of the contract in question and on the events which have occurred in a particular case. *Tentsche Overseas Trading Co. Ltd.* v. *Uganda Sugar Factory Ltd.*, A. I. R. (32) 1945 P. C. 144 : (1945) 1 M. L. J. 417.

[20] *Inder Pershad Singh* v. *Campbell*, (7 Cal. 474 : 8 C. L. R. 501) *(Supra)* is a direct bench decision of this Court in support of the proposition that the doctrine of frustration may be applied to leases.

[21] On the finding arrived at by the Courts below that it was only the room which had been let out and that the structures had been completely destroyed the subject-matter of lease is now non-existent. The contract which had been entered into between the lessor and the lessee has now become impossible of performance through no negligence on the part of the lessor. The landlord is entitled to claim that the lease of the room had come to an end by its destruction by fire.

[22] There is one other special aspect in this case. Under the lease the tenant was entitled to occupy the shed as such. On its total destruction even if it had been held that the tenant was entitled to continue to occupy the land, if he agreed to pay the rent, no right existed under the arrangement between the parties to authorise the tenant to raise a structure of his own, thus change altogether the character and nature of the tenancy. It was the use of the room only which had been permitted on payment of rent but the tenant had no right to use it as a lease of the land only on which he may have his own structures. Allowing the tenant to raise his own structures in such circumstances will lead to various complications in future. It would further lead to an anomalous position that the defendant tenant who is paying rent for the structures on the land will pay such rent for the structures which belongs to him.

[23] This appeal is accordingly dismissed with costs.

D.H. *Appeal dismissed.*

[C. N. 171.]

*A. I. R. (37) 1950 Calcutta 444

SPECIAL BENCH

HARRIES C. J., CHATTERJEE AND BANERJEE JJ.

In the matter of "Saptaha" a Bengali Bi-Weekly Newspaper and In the matter of Benoy Kumar Chattopadhyaya.

Petn. under Press (Emergency Powers) Act, 1931, D/- 30-8-1949.

†(a) **Press (Emergency Powers) Act (1931), S. 4 (1) (d)—Government established by law—Government of majority party—Section, if has application to present Government.**

Since Independence, conditions have changed and the form of Government at the Centre and in all the Provinces is now the democratic form of Government. The party commanding the majority in the Legislature is the party in power and forms the Ministry. A Government is a Government of the majority party, but that does not make it any the less a Government by law established in British India. Whilst that party maintains a majority it remains in power and whilst it is in power it is the lawful Government of the Centre or of the Provinces. Though the Government is a Government by members of the majority party, the Government as such has its existence quite apart from the party. A criticism of the Government in power in any Province is a criticism of the Government by law established in that Province, though incidentally it may be a criticism of the policy of the majority party. The fact that the form of Government at the Centre and in the Provinces has changed does not make the Press Act inapplicable. That being so it cannot be contended that S. 4 of the Press Act can have no application to Government as constituted in the present day. [Paras 12 and 13]

Annotation : ('46-Man) Press (Emergency Powers) Act, S. 4, N. 5.

(b) Press (Emergency Powers) Act (1931), S. 4 (1) —Article, how should be read.

In considering whether the matter complained of offended against S. 4 the Court should in every case consider the writing as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there, which may be qualified by the context but endeavouring to gather the general effect which the whole composition would have on the minds of the public. [Para 16]

Per *Banerjee J.*—It is impossible to lay down any hard and fast rule as to how an article should be read, but there is no doubt that it must be read by the Court carefully, liberally and not with a view to find fault with it. The Court must read the article as a whole, giving due weight to every part. The Court must make due allowance for all kinds of ornamental phrases or fine words or figure of speech which sometimes are permitted and which nobody seriously takes into consideration. And after making all due allowances, the Court must find out the true sense of the article. The first thing the Court has to do is not to take the words *in vacuo*, so to speak, and attribute to them what is called their natural or ordinary meaning. The method of construing the words is to read them as a whole and ask oneself the question : "In this context, relating to this subject-matter, what is the true meaning of the words?" If reading the article in that way, the Court thinks that it was intended to be a criticism of the policy or the administration of the Government, with a view to obtain its change or reform, the article is safe. But if, on the other hand, the Court comes to the conclusion that the article was really meant to be an attack on the Government beyond the permitted limits of criticism, the article comes within the mischief of the Act, and then no argument can be heard on the basis that the Act does not exist or what the Act should have been. [Para 73]

Annotation : ('46-Man.) Press (Emergency Powers) Act, S. 4 N. 1 Pt. 1.

†(c) **Press (Emergency Powers) Act (1931), S. 4 (1) (d) and Explanation 2 — Criticism of measures with view to obtain their alteration—Such criticism, if can come within mischief of section — Section criticised in light of changed conditions.**

Though the object of the critic may be merely to obtain the alteration of the measures criticised by lawful means, nevertheless, the matter may come within the mischief of the section if the criticism excites or attempts to excite hatred, contempt or disaffection towards the Government. It was a matter of considerable difficulty to apply this section to criticism of measures of Government before India obtained Independence. But since Independence and the adoption of a democratic form of Government it is practically impossible to place a construction on S. 4 of the Press Act which will not stifle a good deal of legitimate criticism of Government. The right to criticise is inherent in a democracy. The opposition are entitled, and indeed it is their duty in proper cases, to expose the misdeeds or acts or omission of the Government in power and this they are entitled to do with a view to winning over the electorate so that the Government in power will be thrown out and the opposition placed in power after securing a majority in an election However, if the words in S. 4 of the Press Act are strictly applied then newspapers supporting the opposition to the Government in power are muzzled and can indulge in nothing but very mild criticism. Further, opposition newspapers might find it difficult to publish facts concerning the Government which were true because the publication of such facts might well tend to bring the Government into hatred or contempt or to excite disaffection against such Government.

[Paras 20 and 21]

Annotation : ('46-Man.) Press (Emergency Powers) Act, S. 4 N. 5.

(d) Press (Emergency Powers) Act (1931), S. 4 (1) (d)—Truth of what is stated in article and purpose of writing, if material.

It is quite immaterial whether what is stated in an article is true or not provided that the tendency of the article is to excite hatred and contempt of Government or disaffection towards Government. Further, the purpose of writing the article is also immaterial.

[Paras 25 and 26]

Annotation : ('46-Man.) Press (Emergency Powers) Act, S. 4 N. 5.

(e) Press (Emergency Powers) Act (1931), S. 4 (1) (d)—Writer charging Provincial Governments with wicked, callous and inhuman conduct—Article held came within section.

A writer charged the Provincial Governments with conduct which could only be described as wicked, callous and inhuman. According to the writer they deliberately allowed detained political prisoners, who were ill, to remain without treatment and thus hastened their death and deliberately withheld medical treatment from such political prisoners if they were injured by any aggressive action on the part of the prison or police authorities. They were also charged with causing hardship and even starvation to the relatives of such prisoners:

Held, that though the article was intended as a criticism of the Provincial Government it did exceed the bounds of fair and legitimate criticism and did tend to excite hatred and contempt and disaffection towards Government. The article, therefore, fell within the provisions of S. 4 (1) (d). [Paras 32, 33 and 34]

Annotation : ('46 Man.) Press (Emergency Powers) Act, S. 4 N. 5.

(f) Press (Emergency Powers) Act (1931), S. 8 (1) —Service of notice on publisher.

Section 8 (1) requires the Provincial Government to serve notice of the intention to forfeit the deposit not on the publisher of the paper at the time when the notice is served, but on the person who was the publisher at the time the offending article was written. If this were not so it would be possible for a publisher to avoid forfeiture of a deposit by ceasing to publish immediately after writing a most scathing unjust and seditious article. [Para 38]

Annotation : ('46-Man.) Press (Emergency Powers) Act, S. 8 N. 1.

(g) Interpretation of Statutes—Act capricious or unjust—Duty of Court to give effect to language of Act.

Per *Banerjee J.* — The Court is bound to give effect to the language of the Act so long as it is in existence, even though it thinks that the Act is capricious or unjust. The capriciousness or injustice of a particular result is a matter to which the Court can pay attention in deciding what is the true construction of the words used in the Act, but too much weight must not be given to those matters. It is the right of the Legislature, if it so wishes, to be capricious, or unjust.

[Para 61]

(h) Press (Emergency Powers) Act (1931), S. 4 (1) (d)—Public sentiment and surrounding circumstances. if can be considered.

Per *Banerjee J.*—In applying the Act, to any article appearing in a newspaper, the Court will take into consideration the public sentiment and the surrounding circumstances to find out whether the words used in the article tend, directly or indirectly, to bring into hatred or contempt the Government established by law in the land or to excite disaffection towards it.

[Para 63]

Annotation : ('46-Man.) Press (Emergency Powers) Act, S. 4 N. 5.

(i) Press (Emergency Powers) Act (1931), S. 4 (1) (d)—"Disaffection" — Term explained.

Per *Banerjee J.*—The word "disaffection" signifies political alienation or discontent, that is to say, a feeling of disloyalty to the existing Government which tends to a disposition not to obey, but to resist and subvert the Government. [Para 82]

Annotation ; ('46-Man.) Press (Emergency Powers) Act, S. 4, N. 5.

Sadhan Gupta with Krishna Prasad Basu — for the Newspaper.

A. C. Sircar with K. P. Khaitan —for the Government.

Harries C. J.—This is a petition filed by one Benoy Kumar Chattopadhyaya praying that an order of Provincial Government No. 235 Pr. dated 24th March 1949, forfeiting a sum of Rs. 1000 deposited by the petitioner under the provisions of the Indian Press (Emergency Powers) Act, 1931, (Act XXIII [23] of 1931) be set aside.

[2] The petitioner was the publisher and printer of a bi-weekly Bengali newspaper called the "Saptaha". On 23rd December 1948, the petitioner deposited Rs. 1,000 as security as required by S. 3 of the Act. On 27th January 1949 the petitioner ceased to be the publisher and printer of the newspaper which apparently became defunct. He thereupon applied to the Presidency Magistrate for refund of the deposit which he had made. The Presidency Magistrate ordered an enquiry under S 13 of the Act. On 24th March 1949, apparently before the result of the enquiry of the Presidency Magistrate had been communicated to the petitioner, the Provincial Government made an order under S. 8 forfeiting the security

and served it on the petitioner. The petitioner thereupon filed this petition praying that the sum so deposited should be refunded to him and in accordance with the provisions of the Press Act this petition has been heard by a Bench of of three Judges.

[3] In the order dated 24th March 1949 forfeiting this security the Provincial Government alleged that the petitioner had in the issue of the paper dated 6th January 1949, published matter containing words which in the opinion of the Provincial Government were of the nature described in S. 4 (1) (d), Press Act, that is, words which tended to bring into hatred and contempt the Government established by law in the different provinces of India and to excite disaffection towards the said Government.

[4] In the notice is set out the matter said to be objectionable. It will be convenient at this stage to set out the portions of the publications to which the Government took objection :

"It is reported that R. S. S. prisoners are treated as first class prisoners. While there is this indulgent treatment on the part of the Congress Government towards the R. S. S. workers there is well-planned and ruthless oppression perpetrated by the same Government on the political prisoners . . . Under the regime of the Congress Government as many as 11 political prisoners have died in the course of the last eight months in the jail in Madras, Bombay, the U. P. and Assam . . . Among these martyrs who have died as a result of the oppressions of the Congress Government the names of Bharadwaj, Kulakarni, Mayarath and Shankaran may be mentioned. It is reported that as a result of long detention in a solitary cell in the Hazaribagh jail Jalo Chowdhury former President of the Bihar Provincial Trade Union Congress and Federation of the workers of the Giridi State Railway went off his head. The plan of oppressions committed on the political prisoners within the jail is almost the same in all the provinces. It is like this classification of polititcal prisoners as Class 3 convicts, keeping them together with ordinary convicts, refusal to give them facilities of reading and writing, pushing prisoners who are ill towards death without treatment, making no arrangement for giving allowance to their families etc. Besides these, *lathi* charges were also made. The benign Government are careful to see that the wives and sons of the prisoners may not get any employment for earning their livelihood . . . . On 8th December a *lathi* charge was made on the political prisioners in Vizagapattam Jail. No arrangement was made for the medical treatment of the prisoners who were wounded. In this Jail 140 communist prisoners are detained in a place which can accommodate only 50 prisoners. One can therefore easily understand what the situation is there . . . . 400 political prisoners are suffering great hardships. They have not been given blankets in winter. They do not get articles which they are entitled to get under the Jail Code. If they want these articles, it is reported that they are threatened and even assaulted . . . . . It has been decided by the Congress Ministry in Madras that no arrangement for the treatment of men detained without trial would be made when they are ill except at their own expense.

From the time of the historic fast of Jatin Das in 1929 anti-imperialist agitation has demanded the abolition of classification of political prisoners. Now after capturing power the Congress Government are rejecting this demand . . . . strong protests are being made in the jails against these oppressions. In different jails political prisoners are on hunger-strike and are carrying on their resistance to the oppressions of the Government when Moni Mohan Burman, a tramway worker who was arrested at night on 23rd December informed the men at Tollygunge *Thana* that his wife was lying seriously ill in Calcutta Homeopathic Hospital. The *thana* officers rang up the hospital authorities and came to know that Moni Mohan's wife had died. But they told Moni Mohan that his wife was slightly better. In Patna Jail Ramavatar Sastri and Jwala Prasad resorted to hunger strike as a protest against mismanagement and persecution. Both of them were suffering from tuberculosis from a long time. It is reported that they were severely assaulted in their present state of health. This desperate attack has been made by the Government which is run in the interest of the bourgeoisie in the face of a crisis. As the crisis will thicken intensity of the attack will increase. It will not be wrong to think that this intense attack is only a manifestation of the increasing power of the masses against the bourgeoisie Government and against reactionary forces."

[5] It will be seen that in this article the writer criticises the Congress Government of the various Provinces in India for their treatment of political prisoners. The writer first points out that R. S. S. prisoners were being treated as first class prisoners and in an indulgent manner but what the writer describes as political prisoners were dealt with in a very different manner. It is then pointed out that in course of the last eight months 11 political prisoners had actually died in jails in Madras, Bombay, U. P. and Assam and four of these prisoners alleged to have died are mentioned by name. It is also pointed out that a prisoner in the Hazaribagh Jail was driven mad as a result of long detention in a solitary cell. The writer then states what he describes as the plan of oppressions is the same in all the provinces. Political prisoners are treated as Class III convicts and are not separated from ordinary convicts. They are given no facilities for reading and writing. Prisoners who are ill are left without treatment and their deaths are thereby hastened. Complaint was made that no arrangements are made for giving allowances to the families of these political prisoners who are subjected to *lathi* charges. The writer then adds that the Government deliberately takes steps to make it impossible for the wives and sons of such prisoners to obtain employment and thus to maintain themselves.

[6] It is said that on 8th December, a *lathi* charge was made on the prisoners in Vizagapattam Jail which resulted in a number being wounded. Nevertheless it is said that no arrangement whatsoever was made for the medical treatment of the prisoners so wounded. It is then complained that a large number of com-

munist prisoners are herded together in accommodation fit for only a third of them and in the cold whether they are given no blankets. If the prisoners complain it is said that they are threatened and even assaulted. It is then alleged that the Congress Government in Madras had actually decided that medical treatment should not be given to political prisoners who were ill except at their own expense.

[7] The writer then complains that from 1929 there had been an agitation for the abolition of the classification of political prisoners, but now that the Congress Government were in power they had rejected this demand for differentiating between political and other prisoners. Examples are then given of what is alleged to be callous treatment of political prisoners, namely, the treatment of Moni Mohan Burman at the Tollygunge *Thana* and the treatment of two political prisoners said to be suffering from tuberculosis at the Patna Jail.

[8] The contention of the Provincial Government was that this article was objectionable as it tended directly or indirectly to bring into hatred or contempt the Government established by law in India or to excite disaffection towards the said Government.

[9] Power is given by S. 4, Press Act, to declare a security forfeited in certain cases. That section in so far as it is material is in these terms:

"(1) Whenever it appears to the provincial Government that any printing press in respect of which any security has been ordered to be deposited under S. 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which .... tend, directly or indirectly,.....

(d) to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India or any class or section of his Majesty's subjects in British India or to excite disaffection towards His Majesty or the said Government.....

the Provincial Government may, by notice in writing to the keeper of such printing press, stating or describing the words, signs or visible representations which in its opinion are of the nature described above:

(i) where security has been deposited, declare such security or any portion thereof, to be forfeited to His Majesty ..... and may also declare all copies of such newspaper, book or other document wherever found. in British India to be forfeited to His Majesty .....

Explanation 2.— Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection shall not be deemed to be of the nature described in cl. (d) of this sub-section.....

(2) After the expiry of ten days from the date of the issue of a notice under sub-s. (1) declaring a security, or any portion thereof, to be forfeited, the declaration made in respect of such press under S. 4, Press and Registration of Books Act, 1867, shall be deemed to be annulled."

[10] On behalf of the petitioner it has been contended that there was nothing in the article complained of which tended directly or indirectly to bring into hatred or contempt the Government established by law in India or to excite disaffection towards such Government. Counsel on behalf of the petitioner urged that the article complained of was really a criticism of the Congress Party and not of the Government established by law in British India. Counsel contended that since India attained Independence the phrase "Government established by law in British India" was not appropriate to describe the Party Governments in power. He urged that criticism of a Party Government was nothing more than criticism of the Party namely, the Congress Party and we were asked to hold that the Government established by law in India was something different from the Congress Government now in power in the various provinces in India and in the Centre.

[11] There can be no doubt that when the Press Act was passed in 1931, the Government established by law in British India was not a Party Government. The form of Government was bureaucratic and the executive were not in any manner responsible to the legislature. A proposal of Government could be defeated in the legislature never theless it could be enforced. An election which might result in the defeat of the party supporting Government in the Legislature had no real effect on the Government as the executive, as I have said, were not responsible to the Legislature.

[12] Since Independence, conditions have changed and the form of the Government at the Centre and in all the provinces is now the democratic form of Government. The party commanding the majority in the Legislature is the party in power and forms the Ministry. A Government is a Government of the majority party, but that does not make it any the less a Government by law established in British India. Whilst that party maintains a majority it remains in power and whilst it is in power it is the lawful Government of the Centre or of the Provinces.

[13] Though the Government is a Government by members of the majority party, the Government as such has its existence quite apart from the party. In my view a criticism of the Government in power in any province is a criticism of the Government by law established in that province, though incidentally it may be a criticism of the policy of the majority party, It appears to me that the fact that the form of Government at the Centre and in the provinces has changed does

not make this statute inapplicable. That being so, there is in my view no force in the contention of the petitioner that S. 4, Press Act, can have no application to Government as constituted in the present day.

[14] It was then contended that in considering whether the matter complained of offended against S 4, Press Act, the article should be considered as a whole and that it should not be held to offend against that section merely because a sentence or sentences taken by themselves might offend against the provisions of that section.

[15] It appears to me that this contention is well-founded. A sentence taken out of its context might well be offensive, but when read in its context its meaning may be very different.

[16] This contention of the petitioner was considered by a Special Bench of the Lahore High Court in *Harkishan Singh* v *Emperor*, A.I.R (33) 1946 Lah. 22 : (47 Cr. L. J. 345 S.B.). At Page 24 Mahajan J. dealing with this contention observed :

"In my view if the leaflet is considered as a whole, the effect of the language used in it does not tend, directly or indirectly, to excite disaffection towards the Government established by law in British India. It is a well-recognised principle that the Court should in every case consider the writing as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there, which may be qualified by the context but endeavouring to gather the general effect which the whole composition would have on the minds of the public."

[17] With respect I entirely agree with that view and I shall examine the writing said to offend against S. 4 of the Act in the light of those observations.

[18] There can be no doubt that the writer of this article intended severely to criticise the Congress Government in the various provinces and the article does charge these Governments with callous and indeed inhuman conduct. To say of the Government that it deliberately by its acts hastened the death of prisoners by refusing to give them medical treatment when they were ill is charging the Government with conduct almost inhuman. Suggestions of this nature are made on a number of occasions in the article. It is said, for example, that no arrangements were made for the medical treatment of prisoners wounded as the result of a *lathi* charge in Vizagapatam Jail and further that it was the deliberate policy of the Congress Government in Madras that no arrangements were to be made for the treatment of political prisoners detained without trial who were ill, except at their own expense. These two allegations are made in addition to the general allegation made against all Congress Governments that political prisoners were herded with ordinary convicts and refused all facilities for reading and writing and "pushed towards death" without treatment if they were ill.

[19] It is also suggested in this article that the Provincial Governments are guilty of another form of most callous and inhuman conduct, namely, taking steps to see that the relatives of prisoners are not given employment and thus allowed to starve. It was suggested that in the original Bengali this sentence really meant that the Provincial Governments saw to it that the relatives of political prisoners could obtain no Government employment. But it is clear that the words in the original meant that the Government took steps to see that the relatives of political prisoners should not get employment anywhere. It is difficult to ascribe a more callous conduct on the part of any Government.

[20] Mr. Sadhan Gupta on behalf of the petitioner however contended that if the article was taken as a whole it amounted to nothing more than a criticism of the policy of Government and that it did not tend directly or indirectly to bring into hatred and contempt Provincial Governments or to excite disaffection towards them. He urged that the case was governed by Expln. 2 to S. 4, Press Act. This article, he said, merely amounted to comment expressing disapprobation of the measures of Government with a view to obtain their alteration by lawful means. Such comments do not bring the matter within cl. (d) of sub-s (1) of S. 4 provided that the comments do not excite or attempt to excite hatred, contempt or disaffection towards the Government. It is clear therefore that though the object of the critic may be merely to obtain the alteration of the measures criticised by lawful means, nevertheless the matter may come within the mischief of the section if the criticism excites or attempts to excite hatred, contempt or disaffection towards the Government.

[21] It was a matter of considerable difficulty to apply this section to criticism of measures of Government before India obtained Independence But it appears to me that since Independence and the adoption of a democratic form of Government it is practically impossible to place a construction on S. 4, Press Act, which will not stifle a good deal of legitimate criticism of Government. The right to criticise is inherent in a democracy. The opposition are entitled, and indeed it is their duty in proper cases, to expose the misdeeds or acts or omission of the Government in power and this they are entitled to do with a view to winning over the electorate so that the Government in power will be thrown out and the opposition placed in power after securing a majority in an election. However, if

the words in S. 4, Press Act, are strictly applied then newspapers supporting the opposition to the Government in power are muzzled and can indulge in nothing but very mild criticism. Further, opposition newspapers might find it difficult to publish facts concerning the Government which were true because the publication of such facts might well tend to bring the Government into hatred or contempt or to excite disaffection against such Government.

[22] In England the writing of defamatory words may amount to a criminal offence if the words written are not only defamatory but might lead to a breach of the peace. Of criminal libel it has been said that "the greater the truth the greater the libel" and there is much force in this old observation. Uttering the truth may very often tend to a breach of the peace. The truer a statement is the more likely it is to excite and annoy the persons affected by such statement. Hence the old phrase "the greater the truth the greater the libel." Similarly the truer the criticism of the acts of Government, the greater is the likelihood frequently of exciting hatred and contempt of Government or disaffection towards such Government. Assume a Provincial Government is guilty of some bungling or some act showing gross inefficiency in administration. Inefficiency tends to excite the contempt of efficient citizens and a criticism published in an opposition newspaper of this inefficiency of Government might well tend to excite the contempt of a very large number of citizens of that province.

[23] Assume a Provincial Government to be guilty of something worse than inefficiency, namely, nepotism or dishonesty or corruption. Such a Government would lay itself open to criticism and indeed very severe criticism would be justifiable. Nevertheless, such criticism might bring the writer within the mischief of S. 4, Press Act, because exposing Government and showing to his readers that the Government was guilty of a serious act of nepotism or an act amounting to corruption would inevitably excite the readers to hold the Government in contempt and would excite hatred and disaffection towards the Government. The truer the charge made against a Government the surer it would be to excite hatred and contempt and disaffection. If there was any doubt about the truth of a charge made against Government cautious readers might withhold their judgment, but if there was no dispute and no doubt as to the truth of the allegation made then it would inevitably excite hatred and contempt in the minds of all decent-minded and honest people.

[24] That truth is wholly immaterial in considering what effect an article may have upon the minds of its readers was considered by a Special Bench of the Bombay High Court in the case of *In re Pothan Joseph*, 56 Bom. 472 : (A.I.R. (19) 1932 Bom. 468: 33 Cr.L.J. 749 (S.B.)). In that case the Bench had to consider not only S. 4, Press Act, but certain Ordinances. At p. 486 Beaumont C. J. who delivered the judgment of the Bench observed :

"The question which we have to ask ourselves is, whether articles of that nature tend to bring Government into hatred and contempt. We have no evidence as to whether the facts asserted in the articles, on which the charges, or some of the charges, are based, are true or false, and the Advocate-General has argued the case on the basis that truth is immaterial. We think in that contention he is right. There is no exception in S. 4, Press Act as amended by the Ordinance, making truth and public good an answer to a charge under the section, as in the case of exception (1) to S. 499, Penal Code, dealing with defamation. This Court is not concerned to consider the wisdom, or lack of wisdom, of a policy of suppressing criticism upon unlawful or injudicious acts of Government. We have merely to apply the law as we find it. The effect of the Ordinance seems to us to bring within S. 4, Press Act, every charge of misconduct by Government, whether such charge is well-founded or not."

[25] These observations it appears to me apply with equal force to S. 4, Press Act, and that being so, it appears to be quite immaterial whether what is stated in an article is true or not provided that the tendency of the article is to excite hatred and contempt of Government or disaffection towards Government.

[26] Further, the purpose of writing the article is also immaterial. The article may have been written to expose an inefficient, dishonest or corrupt Government with a view to the electorate throwing out such Government at the next election. But Expl. 2 to sub-s. (1) of S. 4 of the Act makes it clear that such words may well be within the mischief of the Act, though written with a perfectly innocent and lawful intention, if they have the effect of exciting the readers to hate the Government or to hold it in contempt. That being so it is in my judgment very difficult to place any construction upon these words in S. 4, Press Act, which will permit the opposition party and the newspapers supporting the opposition party to function as they are expected to function in a democracy.

[27] Attempts have been made in the past to place a construction upon these words contained in S. 4 (1) (d), Press Act. The matter was considered at length by a Special Bench of the Madras High Court in the case of *Mrs. Annie Besant* v. *Emperor*, 39 Mad. 1085: (A.I.R. (5) 1918 Mad. 1210: 18 Cr. L. J. 157 S. B.), in which the Bench held that "hatred" and "contempt" towards "the Government" occurring in S. 4, Press Act, may be created by articles "imputing to the Government base, dishonourable, corrupt or malicious motives in the discharge of its duties,"

or by articles "unjustly accusing the Government of hostility or indifference to the welfare of the people." The Bench however held that the operative or enacting portion of S. 4 (1) (d) did make the intention or motive of the writer of the articles complained of material in considering whether the words were not of the nature described in S 4 (1). Explanation 2 thereto required that the writer must intend to excite hatred, contempt or disaffection if his writings are to be brought within cl. (d), the intention being deducible mainly from the words used.

[28] Personally, I am doubtful that the necessity of an intention to excite hatred or contempt can be inferred from Expln. 2. It seems to me that Expln. 2 makes the object of the article immaterial if the article does tend to bring the Government into hatred, contempt or disaffection. Ayling J. in his judgment in the Madras case which I have mentioned accepted the view of Strachey J. in the case of *Queen-Empress* v. *Bal Gangadhar Tilak*, 22 Bom. 112 as to the meaning of the phrases "to bring into hatred or contempt" and "to excite disaffection." In that case Strachey J. was considering S. 124A, Penal Code, which was suspectible of an interpretation much more favourable to an accused person than Expln. 2 to S. 4 (1), Press Act. Dealing with the matter Strachey J. observed:

"A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income-tax Act, the Epidemic Diseases Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers, as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people, then he is guilty under the section, and the explanation will not save him."

[29] From this observation it will appear that it was the view of Strachey J. that whilst the measures of Government may be severely criticised, nothing can be said which holds up the Government to hatred and contempt. However, in many cases, it is quite impossible to criticise the measures of Government without criticising the Government itself. As I have already stated, the Government may be guilty of acts of nepotism, dishonesty or corruption. How can such acts be criticised without criticising the Government itself and the inevitable result of the criticism would be to excite hatred or contempt towards the Government concerned.

[30] The Federal Court in the case of *Neharendu Dutt* v. *Emperor*, A. I. R. (29) 1942 F. C. 22 : (43 Cr. L. J. 504), considered S. 124A, Penal Code where words somewhat similar to S. 4 (1) (d), Press Act appear. Sir Maurice Gwyer in his judgment observed :

"Sedition is not made an offence in order to minister to the wounded vanity of Governments, but because where Government and the law ceased to be obeyed because no respect is felt any longer for them only anarchy can follow. Public disorder, or the reasonable anticipation, or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder, or must be such as to satisfy reasonable men that that is their intention or tendency."

[31] In the case of *Harkishan Singh* v. *Emperor*, A. I. R. (33) 1946 Lah. 22 : (47 Cr. L. J. 345 S. B.), the Special Bench came to the conclusion that S. 4 (1) (d), Press (Emergency Powers) Act, was substantially in the same terms as S. 124A, Penal Code, and dealt with the offence of sedition as described in S. 124A, Penal Code. That being so, public disorder or the reasonable anticipation or likelihood of public disorder was the gist of the offence and the acts or words complained of, to come within S. 4 (1) (d), must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency. This would be a workable rule now that India is a democracy. Unfortunately, however, the view expressed by Sir Maurice Gwyer as to the meaning of "sedition" in the case of *Niharendu Dutt* v. *Emperor*, A. I. R. (29) 1942 F. C. 22 : (43 Cr. L. J. 504) has been expressly dissented from by their Lordships of the Privy Council in *Emperor* v. *Sadashiv Narayan*, 49 Bom. L. R. 526 : 74 I. A. 89 : (A. I. R. (34) 1947 P. C. 82 : 48 Cr. L. J. 791). That being so, the case of *Harkishan Singh* v. *Emperor* : A. I. R. (33) 1946 Lah. 22 : (47 Cr. L. J. 345 S. B.) can no longer be regarded as good law and affords no workable rule of construing this section.

[32] In the present case, however, I do not find any great difficulty in applying S. 4 (1) (d), Press Act. Though the article complained of was intended as a criticism of the Provincial Governments it does in my view exceed the bounds of fair and legitimate criticism and does tend to excite hatred and contempt and disaffection towards Government and I have little doubt that it was written with that intention. To say of a Provincial Government that it did not afford to detained political prisoners sufficient amenities would I think be quite legitimate criticism. But far more is alleged against the Governments of the Provinces in this article. As I have pointed out previously, the writer charges them with conduct which I can only describe as wicked, callous and inhuman.

According to the writer they deliberately allow detained political prisoners, who are ill, to remain without treatment and thus hasten their death and deliberately withhold medical treatment from such political prisoners if they are injured by any aggressive action on the part of the prison or police authorities. If these allegations are true, they would disclose a most scandalous state of affairs and if they are not true then they amount to a wicked and malicious libel on the Provincial Governments. As I have said previously, it matters not whether the allegations are true or not and it appears to me that, whether true or not, they do tend to excite hatred and contempt towards the lawfully established Governments in the provinces. What can a decent-minded honest citizen think of a Government that would mete out such treatment to prisoners of any kind and particularly to prisoners who have been detained without trial and without being found guilty of any criminal offence? The effect of such an article would inevitably be contempt and hatred towards the Government.

[33] The Provincial Governments are also charged with not only ill-treating and allowing political prisoners to die, but also with causing hardship and even starvation to the relatives of such prisoners. If this allegation is true then no article would be sufficiently strong to condemn the action of such a Government. But if the allegation is untrue then it is a wicked and damnable libel. Whether the allegation be true or false I cannot imagine that it can have any other effect than to excite in the minds of decent-minded citizens contempt and hatred for the Government concerned.

[34] That being so, I am of opinion that the words complained of do fall within the provisions of S. 4 (1) (d), Press Act and therefore the order forfeiting the deposit could rightly be made.

[35] Mr. Gupta then argued that this article constituted an attack not on the Government as by law established in Bengal but upon other Provincial Governments in particular, Madras, Bihar. U, P., and Assam. He contended that the article should be considered in the light of the surrounding circumstances and that we should hold that in the particular circumstances the article was not likely to excite the Government of Bengal to the hatred and contempt of Bengalees. He relied on the case of *S. N. S. Mudaliar* v. *Secy. of State*, 10 Rang. 165: (A. I. R (19) 1932 Rang. 69 S. B.). In that case a Tamil newspaper of small circulation contained an exhortation to its Tamil readers in Rangoon to free India from an alien Raj with the "Sword of Ahimsa" and by a campaign of passive resistance. A special Bench held that in deciding whether the words complained of fall within S. 4 (1), Press (Emergency Powers) Act the Court must have regard to the surrounding circumstances: the context in which the words appear: the persons to whom the words were addressed: the political atmosphere in which the words were delivered: and the place where they were published. The Bench further held that in the circumstances obtaining in the case, although the words complained of were clearly seditious, they did not fall within S. 4 (1), Press Act. Page C. J. who delivered the leading judgment laid great stress on the fact that these words were contained in a Tamil newspaper with a very small circulation amongst Tamil readers in Rangoon. In his view the words, though seditious, were not likely in those circumstances to excite hatred and contempt towards the Government of India in the minds of the citizens of Rangoon and Burma.

[36] In the present case, however, it is clear that the article applies not only to Provincial Governments of other provinces but to Provincial Governments generally and one example of callous treatment of a detained person is said to have taken place in the Tollygunge *Thana* in Calcutta. It seems to me that this article was addressed to persons opposed not only to the Congress Government in Bengal but to Congress Governments generally, and the facts differ very materially from those in the Rangoon Case. This article would, to my mind, inevitably bring the Congress Governments generally into contempt in the minds of its Bengalee readers.

[37] Mr. Gupta then argued that no forfeiture could be made in this case as there had been no forfeiture within three months of the date of the declaration mentioned in sub s. (1) of S. 7 this being a declaration under S. 5, Press and Registration of Books Act, 1867. Mr. Gupta contended that the declaration was made on 23rd December 1948 and the order forfeiting deposit was not made until 24th March 1949, that is, one day beyond the three months. The original declaration was however produced before us which shows that this declaration was not made until 4th or 6th January 1949. It was actually signed on 4th January but the petitioner was not identified until 6th January and the declaration bears the signature of the Presidency Magistrate dated 6th January 1949. It is immaterial whether the declaration was made on 4th or 6th January because the order for forfeiture was made with-

in three months of that date and therefore the provisions of S. 7 sub-s. (2) of the Act do not apply and the publisher was not entitled to a refund.

[38] Lastly Mr. Gupta argued that no order for forfeiture could be made because at the time the order was actually made the petitioner had ceased to be the publisher and printer of the paper. He has relied upon the words of S. 8 (1) which gives the Provincial Government power to declare a security forfeited. The Provincial Government must give notice in writing of such intention to forfeit to the publisher of the newspaper. Mr. Gupta's argument was that at the date when the notice was served his client had ceased to be the publisher. In my view S. 8 (1) requires the Provincial Government to serve notice of that intention to forfeit the deposit not on the publisher of the paper at the time when the notice is served, but on the person who was the publisher at the time the offending article was written. If this were not so, it would be possible for a publisher to avoid forfeiture of a deposit by ceasing to publish immediately after writing a most scathing, unjust and seditious article. It seems to me that the publisher cannot avoid the forfeiture of his deposit by ceasing to publish after the offending article was written and before notice of the intention to forfeit the deposit was served on him. That being so, there is no force in Mr. Gupta's last contention.

[39] For these reasons I hold that the deposit in this case was rightly forfeited and the petition must therefore be dismissed. In the circumstances I would make no order as to costs.

[40] **Chatterjee J.**—It is difficult to reconcile S. 4, Indian Press (Emergency Powers) Act, with the working of responsible Government in free and democratic India. That section authorises a Provincial Government to forfeit the security of a Press when

"it appears to that Government that it is used for the purpose of printing or publishing any newspaper containing any words which tend to bring into hatred or contempt the Government established by law in India or to excite dissatisfaction towards the said Government."

[41] If we adopt the judgment of Strachey J. in *Queen Empress* v. *Bal Gangadhar Tilak*, 22 Bom. 112 at P. 135, as a guide on the interpretation of this Press Act, we have got to hold that any article or writing which excites or attempts to excite in others certain bad feelings towards the Government, comes within the mischief of the Press Act. The intention of the writer is immaterial, as also the truth of the allegations. Strachey J. said :

"The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles is absolutely immaterial. If the accused intended by the article to excite rebellion or disturbance, his act would doubtless fall within S. 124A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section."

[42] The learned Judge was there discussing the law of sedition as codified in S. 124A, Penal Code, which then stood as follows :

"Whoever by words either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites or attempts to excite feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine."

[43] Therefore, the charge of Strachey J. was confined to disaffection under the old S. 124A.

[44] In 1898 as the result of the great Tilak case the present S. 124A was substituted for the old section which was in the above terms. In the present section the words "hatred or contempt" were introduced, and the word "sedition" was inserted in the marginal note. In *Niharendu Dutt Majumdar's case*, 1942 F.C.R. 38 : (A.I.R. (29) 1942 F. C. 22 : 43 Cr. L. J. 504), the Federal Court held that the gist of the offence of sedition is the promotion of public disorder or the reasonable anticipation or likelihood that public disorder will be promoted. The acts or words complained of must either incite to disorder or must be such as to satisfy a reasonable man that that is their intention or tendency. But the Judicial Committee in *King Emperor* v. *Sadashiv Narayan Bhalerao*, 74 I. A. 89 : (A. I. R. (34) 1947 P. C. 82 : 48 Cr. L. J. 791) held that the decision in *Niharendu Dutt Majumdar's case* : (A. I. R. (29) 1942 F. C. 22 : 43 Cr. L. J. 504) by the Federal Court proceeded on a wrong construction of S. 124A, Penal Code, and of R. 34 (6) (e), Defence of India Rules and was inconsistent with the *ratio decidendi* of the Tilak case, and pointed out that there was no material distinction between R. 34 (6) (e), Defence of India Rules and S. 124A, Penal Code. The Judicial Committee has settled the law and it is not an essential ingredient of the offence that the words or acts complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their tendency or intention.

[45] If we have to put the same interpretation on S. 4 (1) (d), Press Act, then the freedom of the Press in India will be gravely imperilled, if not rendered illusory. It is not

very easy to draw the line between permissible criticism and publication which travels beyond the limits set by the law. The publication in any newspaper of any words which tend directly or indirectly to bring into hatred or contempt any of the Provincial or State Governments or to excite disaffection towards the said Government is punishable under that section.

[46] If the words of the Press Act are to be taken literally, opposition newspapers would come within the mischief of that section almost every day. The attention of the Legislature should be drawn to the incompatibility of the Press Act with the present democratic constitution in India. The Press has the right to discuss any grievances and it is the right and duty of the Opposition Press to do its best to overthrow the party in power by all constitutional means. Commenting on the doctrine that it is a crime" if a publication be calculated to alienate the affections of the people by bringing the Government into disesteem", Dr. Odgers said:

"If this is to be taken literally, all opposition newspapers commit such crime every day. Such a doctrine, if strictly enforced, would destroy all liberty of the press, and is moreover in conflict with more recent dicta : "The people have a right to discuss any grievance that they may have to complain of." It is clearly legitimate and constitutional to endeavour, by means of arguments addressed to the people to replace one set of ministers by another. And the precise object of such arguments is to bring the ministers now in office into disesteem, and to alienate from them the affection of the people." ("Libel and Slander", 6th Edn. p. 420).

[47] It is true that a particular political party commands the majority in every Legislature in the provinces as well as at the Centre and thus it formed the ministries functioning in the country. But another party may get into power and office in a particular province in the future. Supposing that Ministry formed by that party is extremely inefficient or connives at corruption, and the Press which reflects the opposition states that the Ministry is inefficient or abets corruption and wants its immediate removal, it would be publishing matters which would tend to bring into hatred or contempt the Government established by law and would excite disaffection towards that Government. To have an Act on the Statute book which penalises such publication would make the working of responsible Government or any democratic constitution in India fraught with the gravest peril. It is no use referring to Explan. 2 to S. 4, Press Act, which runs as follows:

"Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection shall not be deemed to be of the nature described in cl. (d) of this sub-section."

[48] That means the Press can criticise or comment but there must be no attempt to excite hatred or contempt or disaffection.

[49] The Indian Press Act might be made compatible with a bureaucratic or alien Government which was in existence in the old regime when the Government was not removable and was not responsible to the Legislature. But when a democratic form of Government is introduced, "Government" cannot be rigid and immutable. Responsible Government means party Government and the Government by one party may be replaced by a Government manned by another party:

" Government by free political parties is merely another name for democratic Government. Nowhere has there ever been a free Government without political parties." ("The Government of the United States," by Munro, 5th Edn. p. 113).

It is not merely the right but the duty of the opposition party to try to dislodge the party in power or the party Government in office from the affection or esteem of the people. To authorise the forfeiture of the security of a Press because its writings would excite or tend to excite hatred or contempt or disaffection towards a particular party which happens to be the dominant party in the State for the time being may tend to paralyse the Press in a democratic country and may lead to the abolition of open and public dissent and the setting up of a totalitarian regime which is inconsistent with the firmly declared objectives of India's Constitution-makers. In public opinion formed by the combined impact of universal suffrage and a free press, said Jeremy Bentham, lies the safety or representative democracy and there is good deal of pratical wisdom in Bentham's weighty utterance.

[50] The liberty of the Press connotes in England complete freedom and right of publication without censorship or restriction, unless such writing or publication tends to impair or destroy the foundations of the society. Odgers in his treatise on Libel and Slander, Edition, 6 at pages 417-18, observes as follows:

"It is sedition to speak or publish words defamatory of the Government collectively, or of their general administration, with intent to subvert the law, to produce public disorder, or to foment or promote rebellion.

"There is no sedition in censuring the servants of the Crown, or in just criticism on the administration of the law or in seeking redress of grievances, or in the fair discussion of all party questions" (per Fitz Gerald J. in *R.* v. *Sullivan.* (1868) 11 Cox C C at p. 50).

"Where corrupt or malignant motives are attributed to the Ministry as a whole, and no particular person is libelled, the jury must be satisfied that the author or publisher maliciously or designedly intended to subvert our laws and constitution, and to excite rebellion or disorder. There must be a criminal intent

But such an intent will be presumed, if the natural and necessary consequence of the words employed be "to excite a contempt of her Majesty's Government to bring the administration of its laws into disrepute, and thus impair their operation, to create disaffection or to disturb the public peace and tranquillity of the realm." (*R.* v. *Collins*, (1839) 9 C. & P. 456; *R.* v. *Lovett*, (1839) 9 C. & P. 462)".

[51] In England freedom of the press has broadened down from precedent to precedent. "The liberty of the press" said Dicey, "is in England simply one result of the universal predominance of the law of the land" ("Law of the Constitution", Edition. 7 p. 247). In the great case of *Dean of St. Asaph*, 21 St. Tr. 1043 Lord Mansfield observed that "the liberty of the press consists in printing without any previous license, subject to the consequences of the law." "The law of England" said Lord Ellenborough, "is the law of liberty". (*R.* v. *Cobbett*, 29 St. Tr. 49).

[52] It is for the Legislature or the Parliament to determine whether the law in democratic India should be brought into line with the law of seditious libel in England so as to make punishable writings maliciously and designedly intended to subvert the constitution and to excite rebellion or disorder. No writing should be penalised or brought within the mischief of any Press Act, if it seeks to overthrow by constitutional means the party in power. But words similar to those in S. 4 have received judicial interpretation of the Privy Council and that interpretation is binding upon us. We cannot follow those cases which are really based upon the observations of Gwyer C. J. in *Niharendu Dutt Majumdar's case* : (A. I. R. (29) 1942 F. C. 22 : 43 Cr. L. J. 504), as that case has been expresely overruled by the Judicial Committee. So long as S. 4 is retained by the Legislature on the Statute book, it is impossible for the Courts to ignore it, although they attempt to whittle it down when a Government attempts to take action because its vanity is wounded or it becomes intolerant of strong or bitter criticism. In view of the statute as it stands, I am constrained to hold that the impugned article falls within the scope of S. 4, Press Act. It has criticised the policy of the Congress Governments in the different provinces and has attributed breaches of faith or solemn pledges given by the Congress party while out of office. It has gone further and has charged the Congress Governments with deliberately abusing or misusing their powers in order to maltreat the political prisoner and detenus. That may be true or untrue, we have nothing to do with the truth or falsity of the charges. *In re Pothan Joseph*, 56 Bom. 472 : (A. I. R. (19) 1932 Bom. 468 : 33 Cr. L. J. 749 S. B.). In a sense the greater the truth, the greater is the offence. If the charges are true, then the publication, although it excites hatred or contempt, may be the duty of the press. But that is again a question with which the Courts are not concerned. The only question is: Does the article in question tend to bring the Government established by law in India into hatred or contempt? It attributes calculated and deliberate ill-treatment of the political prisoners as well as the members of their families. The motive or intention of the writer is immaterial. Therefore, I have got to hold that inasmuch as we are not concerned with the truth of these charges or the justification for these serious accusations, the writing tends to excite hatred or contempt and to excite disaffection towards the Congress Governments, that is, the Governments established by law in the provinces in India and the Provincial Government of West Bengal was legally competent to take action under S. 4, Press Act, as it did.

[53] **Banerjee J.**—This application must be dismissed. On behalf of the petitioner, Mr. Sadhan Gupta raised several points. They are unsound.

[54] His first point was that the article was a comment on the policy of the Congress organisation, and not of the Government. I cannot agree. There is no reference to the Congress organisation in the article. From first to last, the Government is the subject-matter of criticism.

[55] His second point was that the petitioner was not the publisher on the date the security was declared to be forfeited; therefore, the forfeiture was invalid. This contention again is wrong. Section 8, Press Act, 1931, makes it abundantly clear that if the petitioner was the publisher, as undoubtedly he was on the date when the article in question was published, the security may be forfeited, if the article offends the Press Act.

[56] His third point was based on S. 7, sub-s. (2) of the Act. He said that since three months had already elapsed from the date of the declaration mentioned in sub-s. (1), no order of forfeiture could be made. This argument was based an a misconception of facts. The declaration by the publisher was made or about 6th January 1949. Assuming for a moment that sub-s. (2) of S. 7 applies to this case, the security was declared to be forfeited on 24th March, that is to say, within three months.

[57] He next referred to S. 49, Government of India Act, 1935, and said that the Government meant the Governor and his executive, and added that the article did not offend the Act as it did not criticise the policy of the Governor or his executive. This argument I was unable to follow. Section 49 only defines the executive

authority of a Province and not the Government.

[58] He next argued that this paper was in circulation only in Bengal and the article was not written against the Bengal Government and, therefore, it did not offend the Act. This contention again is fallacious. The article refers to the Congress Government as a whole. The Bengal Government is as much a part of that Government as the Government of any other Province.

[59] His main contention was that this article was a comment expressing disapprobation of the jail administration of the Government or of its measures, with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection towards the Government.

[60] It was further suggested that today there should be a strong opposition press. If articles in question are not permitted to be published, the Government which today is the Government of the people would be deprived of one of its essential and cherished rights—namely, the right to criticise. There is no doubt that this right to freedom of discussion and "liberty of the press" are fundamental doctrines of Democracy. It is only an aspect of what is known as the "Rule of law." Yet, I do not think this is a consideration which should weigh with the Court in construing the Act.

[61] The Court is bound to give effect to the language of the Act so long as it is in existence, even though it thinks that the Act is capricious or unjust. The capriciousness or injustice of a particular result is a matter to which the Court can pay attention in deciding what is the true construction of the words used in the Act, but too much weight must not be given to those matters. It is the right of the Legislature, if it so wishes, to be capricious or unjust.

[62] Again, an argument on the hypothesis that the Act is not in existence is an argument which the Court cannot entertain. The Act is there in the Statute Book. It is incumbent on the Court to give effect to it, regardless of the consequences.

[63] But, in applying the Act, to any article appearing in a newspaper, the Court will take into consideration the public sentiment and the surrounding circumstances to find out whether the words used in the article tend, directly or indirectly, to bring into hatred or contempt the Government established by law in the land or to excite disaffection towards it.

[64] It is beyond doubt that the Congress Government today is the Government established by the law in the Dominion of India. Our duty is to consider whether the article in question has the tendency I have described above towards that Government. If it has, it is within the mischief of the Act. If it has not, the order of forfeiture must be set aside. We are not at all concerned with the truth or otherwise of the allegations in the article. We are not concerned with the purpose of writing the article. All that concerns us is to see whether the words used in the article tend to bring into hatred or contempt that Government or to excite disaffection towards it.

[65] It must be noted, however, that there is great difference between 1931 and 1949. What can be said today with impunity could not be so said in 1931. What may be comments within the meaning of the explanations of S. 4 today might not have been such comments in 1931.

[66] But, albeit, the principle of construction of the Act must be the same. Though every one has a right to publish fair and candid criticism of the policy of the Government, a critic must confine himself to criticism and not make it the veil for imputing to the Government base, corrupt or malicious motives in the discharge of its duties.

[67] The Government today is a Government of the people, by the people and for the people. The Government, if it is really to be a Government of the people, must be carried on by the people according to the wishes of the people. If any particular policy or measure of the Government does not meet the approval or the wishes of the people, the Government must change the policy or the measures.

[68] The Press today must enjoy greater liberty than it enjoyed in 1931. The liberty enjoyed by the Press differs at different times and seasons. It may vary from unrestricted license to very severe restraint, according to the condition of popular sentiment. (See Dicey, Law of the Constitution, Edn. 8, p. 242).

[69] I can think of a Government which is so efficient and so popular so firmly fixed in the affection and confidence of the people that no amount of scurrilous literature can excite or tend to excite hatred or contempt towards it. Again, I can think of a Government equally efficient and equally good but functioning at a time when public sentiment is so high and so sensitive, that slightest provocation suffices to bring or tend to bring the Government into hatred or contempt.

[70] Take a familar illustration. An article which tends to bring into hatred or contempt any class or section of the subject of the Dominion of India falls within the mischief of the Press Act. But, what can be said today without any offence to a particular community could not be said with the same result in 1946,

when the carnage in Calcutta was going on. It follows that the psychology for the time being of the people is the context in which comments which appear in the newspapers must be read.

[71] If I am correct in saying what I have said, I can fit the 1931 Act into 1949 texture. It was not possible for the Legislature in 1931 to foresee the events of 1949. It is not within human powers to do so. Therefore, so long as the Act remains in force, it is the duty of the Judge to set to work on the constructive task of finding the effect of the article, and he must do so, not only from the language of the article but also from a consideration of the prevailing public sentiment, which is the context in which the article has to be read, and then he must supplement the written words of the Act so as to give "force and life" to the intention of the Legislature. That is the principle underlying the resolutions of the Judges and the other Barons of the Exchequer, in *Heydon's case*, 3 Co. Rep. 76. This principle seems to be the safest guide today. Otherwise, there is bound to be a conflict between the words of the Act and the rights of the people.

[72] There can be no difference in the principle of construction of the words of the Act, whether construed in 1931 or in 1949. The difference must be in the manner in which the Act is to be applied. The Act undoubtedly permits the publication of statements meant only to show that the Government has committed errors, or to point out defects in the Government or the constitution with a view to their legal remedy or with a view to recommend alterations in the policy or measures of the government by legal means. The Act sanctions criticism on public affairs which is *bona fide* intended to recommend the reform of existing institutions by legal methods. Criticism is allowed that far and no further.

[73] It is impossible to lay down any hard and fast rule as to how an article should be read, but there is no doubt that it must be read by the Court carefully, liberally and not with a view to find fault with it. The Court must read the article as a whole, giving due weight to every part. The Court must make due allowance for all kinds of ornamental phrases or fine words or figure of speech which sometimes are permitted and which nobody seriously takes into consideration. And after making all due allowances, the Court must find out the true sense of the article. The first thing the Court has to do is not to take the words *in vacuo*, so to speak, and attribute to them what is called their natural or ordinary meaning. The method of construing the words is to read them as a whole and ask oneself the question: "In this context, relating to this subject-matter, what is the true meaning of the words?" If reading the article in that way, the Court thinks that it was intended to be a criticism of the policy or the administration of the Government, with a view to obtain its change or reform the article is safe. But if, on the other hand, the Court comes to the conclusion that the article was really meant to be an attack on the Government beyond the permitted limits of criticism, the article comes within the mischief of the Act, and then no argument can be heard on the basis that the Act does not exist or what the Act should have been.

[74] In the light of these principles, I have read the article. Reading the article as a whole, I ask myself the question, what is the true meaning of the article?

[75] I have no doubt in my own mind that the article was never intended to obtain by lawful means any change in the policy or measure of the Government or its jail administration. In my view, the words used, have the tendency to impute base, corrupt and malicious motives to the Government in discharge of its duties.

[76] We repeatedly asked Mr. Gupta to tell us how any or what reform was expected by the words, (Portion in Begali omitted). I have translated the words myself. The translation is as literal as I could make it, consistent with the spirit of the article:

"The pattern of oppression of the political prisoners within the jail is almost the same in all the provinces: that is that the political prisoners are regarded as Class III convicts, e.g., forcing them to live with ordinary convicts, refusing to give them any facility for reading, driving the ailing prisoners to death without treatment, making no arrangement for giving allowance to their wives, children and family; besides, there is of course the *lathi* charge etc. Added to this, the generous hearted Government has an eye in the direction (to see) that their wives and children etc., do not get any work or job in any way even to earn their daily bread."

[77] We asked Mr. Gupta to tell us what reform or change of policy or administration was intended by the words that the Government sees that the wives and children of the political prisoners do not get any opportunity to earn their livelihood. He was unable to give any answer. I have not been able to see by what manner or means it was possible to obtain any alteration of any measure or policy of the Government or its jail administration by these remarks.

[78] The meaning of the words I have quoted above in their setting is clear. That the Government not only ill-treats the political prisoners lodged by them in jail, not only it does not provide for their treatment but it is so vindictive that it does its level best to see that

the wives and children of the political prisoners do not even get the chance of earning their livelihood. Nothing can be more inhuman, more corrupt and more malicious for a Government than to adopt a policy like this towards its political prisoners.

[79] The charge is very serious against the present Government. Yet, no particulars have been given in the petition. There is not a shred of evidence to support the statement. Mr. Gupta, to our repeated questions, could not furnish any particulars. He said generally, that this statement in the newspaper had been made on information received from reliable sources. But he was unable to disclose what the reliable sources were. He further said that a newspaper is entitled to make such a statement on information. I decline to assent to such a proposition so broadly stated. Be it an individual or a corporation or a newspaper, whosoever publishes a malicious statement which is not true, does so at his risk, and must take the consequences.

[80] On the law as it is today, I am bound to hold that this statement is not a comment expressing disapprobation of the measures or policy of jail administration of the Government with a view to obtain their alteration by lawful means, but it is an imputation which excites or tends to excite hatred or contempt towards the Government established by law in the Dominion of India.

[81] Then again, there is the last sentence of the article which, from its translation as given in the paper book is this:

"This desperate attack has been made by the Government which is run in the interest of the bourgeoisie in the face of a crisis; As the crisis will thicken, intensity of the attack will increase. It will not be wrong to think that this intense attack is only a manifestation of the increasing power of the masses against the bourgeoisie Government and against reactionary forces."

These words seem to me to tend indirectly to excite disaffection towards the Government.

[82] The word 'disaffection' has been construed in *Queen-Empress* v. *Ramchandra Narayan*, 22 Bom. 152 (F.B.). It signifies political alienation or discontent, that is to say, a feeling of disloyalty to the existing Government, which tends to a disposition not to obey, but to resist and subvert the Government. The words "as the crisis will thicken, intensity of the attack will increase" suggest, (1) that there is a crisis, (2) that it will thicken, and (3) therefore the attack on the Government will also increase.

[83] Perhaps these words taken out of the article by themselves may not have that significance. But, the article has to be read as a whole as I have said before and reading in that way, I think the words have the meaning I have attributed to them.

[84] For these reasons, I hold that the Government was right in declaring the security to be forfeited.

V.R.B. *Petition dismissed.*

***A. I. R. (37) 1950 Calcutta 457** *[C. N. 172.]*

HARRIES C. J. AND BANERJEE J.

Municipal Commissioner of the Budge Budge Municipality —*Applicant* v. *P. R. Mukherjee and another*—*Opposite Party.*

Civil Rule No 563 of 1950, D/- 1-6-1950.

✠(a) Industrial Disputes Act (1947), S. 2 (k) and (s) — Dispute between Municipality and its employees.

The modern municipality carries on a huge business or undertaking and its employees are workmen and any dispute arising between the employees and the Municipality is an industrial dispute as defined in the Act. [Para. 26]

(b) Industrial Disputes Act (1947), S. 7 (1)— Dispute between Municipality and its employees — Government of India Act (1935), Sch. VII, List III, Item 29.

Even if a dispute between the employees of a Municipality and the Municipality could not be regarded as an industrial dispute as that phrase is used in item 29 of List III, it would be clearly a labour dispute which ordinarily means a dispute between employers and employees and the Central Government could legislate concerning such a dispute, which can therefore be governed by the Industrial Disputes Act. [Para 36]

✠(c) Industrial Disputes Act (1947)—Act, if *ultra vires* so far as it applies to disputes between Municipality and its employees—Government of India Act (1935), Sch. VII, List II, Item 13.

The Industrial Disputes Act is clearly a legislation on labour and industrial disputes. The pith and substance of the enactment is therefore industrial and labour disputes and the trespass or invasion on item 13 in List II so far as it applies to disputes between a Municipality and its employees is merely incidental. The legislation can in no way be regarded as legislation on the powers of a municipality and therefore it must be held that the Industrial Disputes Act is *intra vires*, though it does invade to a slight extent upon item 13 in List No. II. [Para 47]

(d) Constitution of India, Art, 227 — Industrial Tribunal is such tribunal as is contemplated in Art. 227. [Para 49]

Dr. N. C. Sen Gupta with Sushil Chandra Dutt and Purnendu Sekhar Basu—for Petitioners.

Sir S. M. Bose with A. C Sircar—for the State of West Bengal and the Tribunal.

Amiya Kumar Basu—for the Union.

Harries C. J.—These are two Rules which have been issued in connection with an award made by an Industrial Tribunal. An application was made for the issue of a writ of *certiorari* or prohibition on the adjudicator concerning an award which he had made. In the application it was prayed that a writ of *certiorari* should issue for removing the proceedings to this Court and quashing the same. In the alterna-

tive it was prayed that an order, restraining the adjudicator from giving effect to the said award or from taking any steps in pursuance thereof, should be made.

[2] Another application was made for a Rule to issue under Art. 227 of the Constitution of India and in that application similar prayers were made.

[3] The application for a writ of *certiorari* was heard by Bachawat J. sitting on the original side. He had jurisdiction to deal with that matter, but he had no jurisdiction to deal with the application made under Art 227 of the Constitution. He therefore referred both the matters to me and I directed that both the matters should be heard by this Bench. They have accordingly been heard together.

[4] The matters arise out of a dispute between the employees of the Budge Budge Municipality and the Commissioners of the Municipality. It appears that on 12th May 1948, a so-called charter of demands was submitted by the Trades Union representing the employees of the municipality. An increase of pay was demanded and on 23rd September 1948 certain increments of pay were sanctioned by the Municipality with effect from the month of August, 1948.

[5] It seems that there were two Unions representing the interests of the employees and the Chairman of the municipality was the President of one of these Unions. The two Unions amalgamated and it is said that this displeased the Chairman of the Municipality and he severed all connection with the Union with which he was concerned.

[6] On 1st July 1949, the conservancy menials employed by the Municipality went on strike. But on the intervention of the Subdivisional Officer that strike was settled on 7th July 1949.

[7] Two employees, P. C. Mitter, Head Clerk, and Phanindra Nath Ghose were actively concerned in the affairs of the Union which had been formed by the amalgamation of the two previous Unions and it is suggested that these two employees incurred the displeasure of the authorities controlling the Municipality. On 13th July 1949, both these employees were suspended and a charge sheet was drawn up against them. On 30th July 1949 the Labour Commissioner intervened and called a conference for 5th August 1949. Apparently this conference could not be held and was adjourned until 12th August 1949. In the meantime the Commissioners of the Municipality met and on 6th August 1949 the two employees, P. C. Mitter and Phanindra Nath Ghose were dismissed. On 8th August 1949, the Labour Commissioner again wrote to the Municipality suggesting a conference on 12th August and asked that the *status quo* should be maintained. However, as I have said, the two employees had been dismissed by that time. It seems that representations were made to Government concerning these dismissals, but no action was taken. Eventually the Trades Union representing the workmen applied for the setting up of an Industrial Tribunal to enquire into the dispute and in due course an adjudicator was appointed to consider the matter under the Industrial Disputes Act. On 13th February 1950, he made an award and in that award he directed the municipality to reinstate the two dismissed employees Mitter and Ghose. On 9th March 1950, the Government made an order under S. 15 (2) of the Act declaring the award to be binding and that order was published in the Gazette of that date.

[8] Dr. Naresh Sen Gupta who has appeared on behalf of the petitioners, the Municipality of Budge Budge, has contended in the first place that the Industrial Disputes Act could have no application to any dispute between the Municipality and its employees and therefore the Tribunal appointed under the Act had no jurisdiction to make an award and that the award made is void and wholly ineffectual. That being so, it is said that this Court should quash the proceedings or set aside the award under Art. 227 of the Constitution.

[9] There can be no doubt that the dispute in this case was between the employees of a Municipality and the Municipality. The argument is that such a dispute is not an industrial dispute and therefore not within the purview of the Act.

[10] Industrial Tribunals are appointed by the appropriate Government under S. 7, Industrial Disputes Act, 1947. That section provides:

(1) The appropriate Government may constitute one or more Industrial Tribunals for the adjudication of industrial disputes in accordance with the provisions of the Act.

(2) A Tribunal shall consist of such number of members as the appropriate Government thinks fit. Where the Tribunal consists of two or more members, one of them shall be appointed as the chairman.

[11] It will be seen therefore that there must exist an industrial dispute before an industrial tribunal can be appointed to adjudicate thereon.

[12] The phrase 'industrial dispute' is defined by S. 2 (k), Industrial Disputes Act, and the definition is as follows:

" 'Industrial dispute' means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

[13] It will be seen that in this definition no reference whatsoever is made to the nature of the employment of the workman or the nature of the business carried on by the employers. The term 'employer' is not defined in the Act except where the term is used in relation to an industry carried on by a department of Government or by some local authority. The term 'employer' therefore must be given its ordinary grammatical meaning, namely, a person who employs someone to work or to do something for him.

[14] The term 'workman' however is defined in S. 2 (s) of the Act in these terms :

" 'Workman' means any person employed (including an apprentice) in any industry to do any skilled or unskilled, manual or clerical work for hire or reward and includes, for the purposes of any proceedings under this Act, in relation to an industrial dispute, a workman discharged during that dispute, but does not include any person employed in the naval, military or air service of the Crown."

[15] Here it is clearly stated that to be a workman the person must be employed in any 'industry' and this latter word is defined in S. 2 (j) of the Act. The definition is as follows :

" 'Industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."

[16] It is somewhat unfortunate that the term 'workman' is defined in terms of industry and in the definition of 'industry' reference is made to the term 'workman'. However, the definition of 'industry' is in the widest possible terms. But Dr. Sen Gupta has contended that the words 'business, trade, undertaking or calling of employers' must be qualified by the adjective 'industrial', and that the words 'any calling, service, employment of workmen' should also be qualified by the same adjective 'industrial'. It will be noticed that in the definition of the word 'industry' the word 'industrial' is used to qualify the words 'occupation or avocation of workmen'. But it is not used to qualify the words "any calling, service, employment or handicraft of workmen" and it is not used to qualify the terms "business, trade, undertaking, manufacture or calling of employers". The omission appears to be intentional and therefore any undertaking is an industry and so is any service or employment of workmen in such an undertaking. Anybody employed in an industry is a workman and it appears to me that anyone employed in an undertaking, though it is not of an industrial nature, would be a workman and that undertaking would be an industry.

[17] There are indications in the Act itself which suggest that persons employed in a public utility service are workmen, though the public utility service may be carried on not for gain. The term 'public utility service' is defined in S. 2 (n) of the Act and includes any system of public conservancy or sanitation. There can be no doubt that a municipality carries out such a utility service.

[18] Section 22 (2) makes it clear that in a public utility service workmen can be rare (?) employed. That sub-section provides:

"No employer carrying on any public utility service shall lock out any of his workmen ....."

[19] The term 'workmen' there must mean the term as defined in the Act and the definition means persons employed in any 'industry' as that latter term is defined in the Act. If workmen can be employed in a public utility service then it appears to me that an industrial dispute could arise between such workmen and the authority carrying out such public utility service.

[20] Again the word 'strike' is defined in the Act in S. 2 (q) as meaning a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal or a refusal under a common understanding of any number of persons who are or have been so employed to continue to work or to accept employment.

[21] From this definition, it is clear that the term 'strike' is used as something which occurs in an industry.

[22] It is quite clear from S. 22 that a strike can occur in a public utility service and therefore that service must amount to an industry because the term 'strike' only covers what occurs in an industry by reason of its definition.

[23] There are therefore clear indications in the Act that anybody carrying on a public utility service is an employer within the meaning of the Act and the employees would be workmen within the meaning of that term.

[24] Further in the proviso to S. 10 (1) of the Act it is expressly provided :

"Provided that where the dispute relates to a public utility service and a notice under S. 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced."

[25] In this proviso it is expressly recognised that a dispute covered by the Act may arise in a public utility service and can be adjudicated upon under the provisions of the Act.

[26] It appears to me that a municipality carries on an undertaking or a series of undertakings and carries on a public utility service. The municipality exists for the purpose of administering the municipal area and for providing amenities for the citizens who of course have to provide the income for the municipality. These municipalities, for instance, have to main-

tain the roads and repair the same. They have to maintain sanitation and conservancy. They are responsible for lighting and for a hundred and one amenities. They can be regarded as either carrying out a huge undertaking or a series of undertakings. Reference was made to S. 108, Bengal Municipal Act, which deals with the powers of the municipalities in Bengal. A perusal of that section makes it clear that the modern municipality carries on a huge business or undertaking and it seems to me that its employees are workmen and that any dispute arising between the employees and the municipality is an industrial dispute as defined in the Act.

[27] Dr. Sen Gupta suggested that there could be no industrial dispute unless there was some undertaking carried on for profit. Some of the undertakings of a municipality may well be carried on for profit such as the running of trams or buses or such like. But it appears to me that where the draftsmen of a statute wish to make it clear that only industrial undertakings are referred to the word 'industrial' is usually added.

[28] In S. 299 (2), Government of India Act, which deals with the power to make laws authorising the compulsory acquisition of land for certain purposes the word 'undertaking' is used, but it is qualified by the words 'commercial' or 'industrial'. It was realised that the word 'undertaking' by itself does not necessarily involve the conception of industry or commerce as those terms are ordinarily understood and the draftsmen qualified the word 'undertaking' by the words 'commercial or industrial' to make it clear that what was contemplated was an undertaking of a commercial or industrial nature and not any other kind of undertaking. It may be that a municipality does not carry on a commercial or industrial undertaking in the ordinary sense of the word, but it certainly carries on an undertaking and it appears to me that where a municipality provides light or water for payment it carries on a commercial undertaking and may actually carry it on at a profit. In any event it seems to me quite clear that a Municipality carries on an undertaking or undertakings and, therefore, its employees must be regarded as being employed in industry and, therefore, the Industrial Disputes Act can apply to disputes between such employees and the municipality.

[29] Reference was made to an English decision in the case of *National Association of Local Government officers* v. *Bolton Corporation*, (1943) A. C. 166 : (111 L. J. K. B. 674), in which the House of Lords expressly held that employees of the Bolton Corporation which would be similar to an Indian municipality, could have a trade dispute with the Corporation. The definition of 'trade dispute' was similar to the definition in the Indian Act of 'industrial dispute,' but the definition of 'workmen' was somewhat different. Viscount Simon dealing with the meaning of the phrase "trade dispute" observed at p. 176 as follows :

"First, as to the meaning of 'trade dispute' in this connection. Having regard to its definition for present purposes, and to the wide definition of 'workman' which has to be read into it in order to ascertain its ambit, I think that the phrase can cover a dispute as to conditions of service of officers of a municipal corporation. Mr. Turner strenuously argued that such an interpretation gives no effect to the limiting word 'trade.' The answer is that the definition of 'trade dispute' introduces no such limitation. It does not speak of disputes or differences connected with the employment or non-employment of persons 'in trade' or 'in trade or industry,' but deliberately omits such limitation, though the limitation is to be found in the definition of 'workman' in the Trade Disputes Act, 1906. If there can be a 'trade' union to which the higher grades of officers of a municipal corporation can belong, it does not seem an impossible use of language to say that a dispute concerning their conditions of service may be a 'trade' dispute."

[30] As I have already pointed out in the definition of "industrial dispute" no reference is made to industry or trade though reference is made to industry in the definition of 'workman.' The position under the Indian Act is very much the same as that stated by Lord Simon to exist under the English law and it appears to me that by the same reasoning as that adopted by Lord Simon it can be held in this country that the employees of a municipality are workmen and may have an industrial dispute with their employers.

[31] For these reasons, I am bound to hold that there is no force in the first contention put forward on behalf of the petitioners that the Industrial Disputes Act could have no application to the dispute existing in this case.

[32] It was then argued that even if the workmen of a municipality could have an industrial dispute with their employers such could not be governed by the Industrial Disputes Act. It was urged that the Industrial Disputes Act must be construed as having no application to municipalities.

[33] The Industrial Disputes Act of 1947 is a Central Act and the Central Government were empowered to legislate upon such a topic by reason of item 29 of List III of Sch. 7, Government of India Act. That item is as follows :

"Trade unions; industrial and labour disputes."

[34] There can be no doubt whatsoever that the Central Government could enact a piece of legislation like the Industrial Disputes Act.

[35] Dr. Sen Gupta, however, contended that the word 'industrial' as used in Item 29 of List III of Sch. 7 of the Act must be given its ordinary grammatical meaning and, therefore, 'industrial disputes' mentioned in the item must

be disputes arising in 'industry' as the latter term is ordinarily understood. He contended that even if the definition given to 'industrial disputes' in the Industrial Disputes Act was wide enough to cover disputes between a municipality and its employees, nevertheless the Central Government had no right to legislate in respect of such disputes when their power was given under item 29 of List III to legislate only on 'industrial disputes' as that term is ordinarily understood.

[36] It appears to me that there is no force whatsoever in this argument, because the Central Government are competent to legislate not only on industrial but labour disputes. The item reads: "Trade unions, industrial and labour disputes". Even if a dispute between the employees of a municipality and the municipality could not be regarded as an industrial dispute as that phrase is used in item 29 of list III, it would be clearly a labour dispute which ordinarily means a dispute between employers and employees and the Central Government could legislate concerning such a dispute. It seems to me that the Central Government were competent to legislate on disputes arising between employers and employees though the employers were not conducting an industry in the usual sense of that word. They could legislate in respect of all labour disputes, that is, in respect of disputes between employers and employees which are ordinarily regarded as labour disputes.

[37] Dr. Sen Gupta however contended that the Industrial Disputes Act in so far as it applies to disputes between a municipality and its employees is *ultra vires*. He relies on item 18 of List II of Sch. 7, Government of India Act. That item reads as follows:

"Local Government, that is to say, the constitution and powers of Municipal Corporations, Improvement Trusts, District Boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration."

[38] List II deals with the subjects which fall exclusively in the province of the Provincial and now the State Legislature. Dr. Sen Gupta's argument is that the Central Government could not legislate on the powers of a municipal corporation. He has argued that the provisions of the Industrial Disputes Act interfere with the powers of a Municipal Corporation and such interference is only warranted if it is the result of Provincial or State legislation and not Central Legislation.

[39] Learned advocate relied upon S. 66 (2), Bengal Municipal Act which provides as follows:

"Subject to the scale of establishment approved by the Commissioners under sub-s. (1) the Chairman shall have power to appoint such persons as he may think fit and from time to time to remove such persons and appoint others in their place."

[40] Then follow provisos limiting the power to some extent.

[41] The argument is that by a Provincial Act the Chairman has been empowered to appoint and dismiss employees and by reason of item 18 of List II of the Sch. 7, Government of India Act there can be no interference with those powers except by the Provincial or State Legislature. The powers of a municipality, it is contended, is not a matter upon which the Central Government can legislate at all. If the Act applies, as we have held it does on its true construction, to disputes between municipalities and its employees then the Act in so far as it applies to such disputes is said to be *ultra vires*.

[42] What could be enacted by the Central and Provincial Legislatures in the year 1947 is dealt with by S. 100, Government of India Act and it is clear from sub-s. (3) that the Central Government could not make laws for a Province or any part thereof with respect to any of the matters enumerated in List II. There can be no doubt I think that if the Industrial Disputes Act applies to disputes between a municipality and its employees the Act does to some extent trespass on a Provincial subject, namely, the powers of a municipality. It is a trespass upon the rights of the Chairman of the municipality to appoint whomsoever he likes and to dismiss his employees in proper cases.

[43] It has been held by the Federal Court that an adjudicator under the Industrial Disputes Act has jurisdiction to order the reinstatement of workmen lawfully dismissed. In the present case the award directs the municipality to reinstate the two employees, Mitter and Ghose who were dismissed by the Chairman apparently in accordance with the rules. There is therefore a clear interference with the powers of the Chairman and of the municipality and Dr. Sen Gupta contends that the Central Legislature had no power to pass any legislation affecting the powers of a municipality.

[44] There can be no doubt that the Industrial Disputes Act, 1947, is an Act dealing with the settlement of Industrial Disputes and it does not purport to be an Act dealing with the powers of a municipality. In dealing with Industrial Disputes the Act does trespass to some extent upon a Provincial subject, namely, the powers of a municipality. But such trespass would not in my view make the Central Act *ultra vires*. The effect of a trespass such as the one which has occurred in this case was considered by their Lordships of the Privy Council in the recent case of *Prafulla Kumar* v. *Bank of Commerce Ltd., Khulna*, 74 I. A. 23: (A. I. R. (34) 1947 P. C. 60). In that case their Lordships laid down that in distinguishing

between the powers of the divided jurisdictions under Lists I, II and III of Sch. 7 to the Government of India Act, 1935, it is not possible to make a clean cut between the powers of the various Legislatures. They are bound to overlap from time to time and the rule which has been evolved by the Judicial Committee whereby an impugned statute is examined to ascertain its pith and substance or its true nature and character for the purpose of determining in which particular list the legislation falls, applies to Indian as well as to Dominion legislation. The extent of the invasion by the Provincial Legislature into subjects enumerated in the Federal List is material for the purpose of determining what is the pith and substance of the impugned Act.

[45] In that case the Bengal Money Lenders Act, 1940, was impugned and S. 30 of that Act provided that

"notwithstanding anything contained in any law for the time being in force, or in any agreement, (1) no borrower shall be liable to pay after the commencement of this Act"

more than a limited sum in respect of principal and interest or more than a certain percentage of the sum advanced by way of interest; it was held that the Act was in whole *intra vires* the Provincial Legislature as in pith and substance it dealt with "moneylending and moneylenders", a subject-matter within the legislative competence of the Provincial Legislature under entry 27 of List II, and whether it trenched incidentally on "promissory notes" and "banking", subject-matters reserved for the Federal Legislature under entries 28 and 38 respectively of List I was not fatal to the enactment as neither of those matters was its substance.

[46] Lord Porter who delivered the judgment of the Board summed up the matter at page 43 in these words:

"Thirdly, the extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not moneylending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content. This view places the precedence accorded to the three lists in its proper perspective."

[47] I think there can be no doubt whatsoever that the pith and substance of the Industrial Disputes Act is industrial and labour disputes. There is a slight invasion respecting a matter in List II. But is this legislation, legislation on industrial or labour disputes, or is it legislation on the powers of a municipality? That is the question which Lord Porter has directed the Court to ask itself. When I asked myself—is the Industrial Disputes Act a piece of legislation on industrial and labour disputes or a piece of legislation on municipal powers, there is only one answer that can be given. It is clearly legislation on labour and industrial disputes. The pith and substance of the enactment is therefore industrial and labour disputes and the trespass or invasion on an item in List II is merely incidental. The legislation can in no way be regarded as legislation on the powers of a municipality and therefore following the case of *Prafulla Kumar Mukherjee* v. *Bank of Commerce Limited, Khulna*, (74 I. A. 23 : A. I. R. (34) 1947 P. C. 60) it must be held that the Industrial Disputes Act is *intra vires*, though as I have said it does invade to a slight extent upon an item in List No. II. In my judgment there is no substance in the contention that the Act in so far as it applies to municipalities must be held to be *ultra vires*. In the *Bank of Commerce case** the Federal Court had held that the Bengal Money-Lenders Act in so far as it applied to promissory notes was *ultra vires* as promissory notes were a Central subject and would not be the subject of legislation by a Province. The Privy Council nevertheless held that the statute was *intra vires* and its provisions could be applied to promissory notes, though the latter were a Central Subject. In the same way it must be held that this Act is *intra vires* and does apply to disputes between municipalities and its employees.

[48] Lastly, Dr. Sen Gupta contended that this award was bad on the merits.

[49] It seems clear that an Industrial Tribunal is such a tribunal as is contemplated in Art. 227 of the Constitution. As the Supreme Court very recently held that an Industrial Tribunal is a tribunal within the meaning of that term as used in Art. 136. of the Constitution it must be held that an application can be made to this Court under Art. 227. Once it is held that the Industrial Tribunal had jurisdiction, then no relief by way of *certiorari* or prohibition can be granted.

[50] Dr. Sen Gupta has contended that we ought to interfere under Art. 227 of the Constitution upon the merits. But it is extremely difficult for this Court to interfere upon the merits in a matter such as this. The Industrial Tribunal is constituted to settle an industrial dispute when the parties cannot do so by conciliation and direct agreement. The Industrial Tribunal

*See A. I. R. (32) 1945 F. C. 2.

does not settle a dispute in accordance with any rules of law. It must of necessity settle the dispute in the best way to secure future peace in the industry concerned. For example, an employer is legally entitled to dismiss an employee if he gives him the proper notice or wages in lieu of notice. But this Court and the Federal Court have held that an adjudicator can well order the employers to reinstate such a man if in the view of the adjudicator such would be a fair settlement of the industrial dispute.

[51] Dr. Sen Gupta contends that there was no material upon which the adjudicator in this case would order reinstatement. I am very doubtful whether we can sit in judgment upon the views of the adjudicator. Possibly if he had conducted himself contrary to all the rules of natural justice we, might have a right to interfere. But there can be no question that in this case the adjudicator did hear the parties and has considered the relevant materials. The adjudicator in his award makes it quite clear that in his view these men have been victimised and much can be said for that view. However, it is not for us to say whether that be the right or the wrong view. It is certainly a possible view and may well be the right view. If that be so, then it appears to me that the adjudicator was fully entitled to make this award ordering reinstatement. In any event, if the adjudicator was of opinion that the only way to bring this dispute to a peaceful end would be to order reinstatement, he was in my view fully entitled to do so. On the merits I do not think we could interefere. But even if we have power to interfere I can see no ground why we should interfere.

[52] In the result, therefore, both the petitions fail. The petition for a writ of *certiorari* is dismissed with costs, and so is the petition filed under Art. 227 of the Constitution. The interim injunction is dissolved. The petitioners must pay the costs of the State as well as of the Union. We assess a hearing fee of ten gold mohurs to each of the contesting opposite parties. There will be one set of costs for the two applications.

[53] We grant a certificate under Art. 132 (1) of the Constitution.

[54] **Banerjee J.** — I agree.

V.R.B. *Petitions dismissed.*

A. I. R. (37) 1950 Calcutta 463 *[C. N. 173.]*

SEN AND K. C. CHUNDER JJ.

Iswar Madan Gopal Jiu and others—Petitioners v. *Province of West Bengal — Opposite Party.*

Civil Rules Nos. 2027 to 2030 of 1949, D/-4th May 1950 to set aside the Orders of D. J., Burdwan, D/-21st November 1949.

(a) Indian Independence (Rights, Property and Liabilities) Order (1947), Para. 9—Other financial obligations—Word 'financial' must be construed in restricted sense.

The word 'financial' in 'other financial obligations' in Para. 9 has got to be given its technical meaning which it has in connection with matters of revenue and it cannot be given the wide meaning as equivalent to any kind of pecuniary liability. It must therefore be given a restricted meaning and construed *ejusdem generis* with the words 'loan and guarantees' used in that paragraph. [Paras 1, 3]

(b) Indian Independence (Rights, Property and Liabilities) Order (1947), Para 12—'Legal proceedings with respect to property' — Meaning — Proceedings for compensation for acquired land pending at the time of partition of Bengal — Liability to pay is on successor province.

The word 'property' in the expression 'legal proceeding with respect to property' in Para 12 must be taken to include land and other kinds of properties mentioned in the previous paras. The question of compensation for acquisition of land is a question with respect to the value of land and therefore it is a legal proceeding with respect to land or with respect to property. "Legal proceeding" and "with respect to land" must be given a wide interpretation, and therefore, under Para. 12 the liability is of the successor Government which has obtained that property on partition. Where, therefore, at the time of the partition of Bengal certain proceedings for compensation for land acquired in the district of Burdwan were pending before the District Judge at Burdwan and the land has fallen within the Province of West Bengal in the partition, the liability to pay compensation is on that Province and as the State of West Bengal represents that Province under the Constitution the proceedings must continue against that State. [Para 4]

Purusottam Chatterjee — for Petitioners.

Chandra Sekhar Sen, Sr. Govt. Pleader and Jajneswar Majumdar, Asstt. Govt. Pleader—for Opposite Party.

K. C. Chunder J.—These four revision cases arise out of the Land Acquisition proceedings in Mouza Hirapur within the sub-division of Asansol in the district of Burdwan. Notification for acquisition of land was issued on 29th April 1940. The Land Acquisition Collector gave his award on 10th February 1945 and on 1st April 1945, the Province of Bengal took possession. Then on the application of the petitioners before us the Collector made a reference under S. 18 to the District Judge of Burdwan on the question of valuation of the land, and this gave rise to Land Acquisition Case No. 9 of 1946. On 15th August 1947, the Indian Independence Act came into force and from that day the Province of Bengal was divided into two provinces of West and East Bengal. On 13th August 1949 the province of West Bengal now represented by the State of West Bengal objected before the District Judge of Burdwan that in view of the Indian Independence Order Rights of Properties, etc., of 1947 the liability now was that of the province of East Bengal or the Eastern Pakistan and the Province of West Bengal was no longer liable to pay the compensation which may be de-

termined for the land. By his order dated 21st November 1949 the District Judge gave effect to this contention and held that the liability was that of the province of East Bengal and not of West Bengal. The present Rules were issued on 22nd December 1949 and the new Constitution of the Republic of India came into force from 26th January 1950. The only question which arises in all these Rules is whether the liability to pay any additional compensation for the value of the land which may be determined by the District Judge was that of the West or of the East Bengal Government. Ordinarily as the land is within West Bengal and the acquisition has been wholly for the purpose of West Bengal the liability would be of that Government to pay adequate compensation as determined by the District Judge to the parties whose lands were acquired. Mr. Chandra Sekhar Sen appearing on behalf of the State of Bengal has contended first that in view of S. 9, Indian Independence Order of 1947 these cases come within "other financial obligations" mentioned in this section and therefore the liability is that of the Province of East Bengal and not of West Bengal. On this point there is a decision of a Divisional Bench of this Court in the case of the *Province of West Bengal* v. *Midnapore Zemindari Co. Ltd*, (A.I.R. (37) 1950 Cal. 159), that the expression "and other financial obligations" as used in Article or Para. 9, Indian Independence Order, 1947, must be given a restricted meaning and construed *ejusdem generis* with the words 'loan and guarantees' used in that article. It appears that no reasons were given for this construction and it also further has been contended that this is merely an obiter dictum as it was not necessary to decide this point in that case. It was in connection with a legal proceeding respecting rent payable and the Divisional Bench pointed out that rent arose out of a contractual obligation and contractual obligation was dealt with in Article or Para. 8 and therefore under that Article the liability was that of the West Bengal Government. In view of that decision it was unnecessary really to decide about "other financial obligations".

[2] Mr. Sen's second contention is that even if it be held that Art. 9 did not apply and the liability was not of East Bengal under this Article, as no provision has been made as to which of the two successor Governments namely the East Bengal or West Bengal is to be substituted in place of the now non-existent province of Bengal, the province of West Bengal cannot be substituted in place of the previous province of Bengal and cannot be made liable. There is no question that under S. 4 of the Legal Proceedings Order the District Judge's Court at Asansol is the proper Court in which the present proceedings are to continue. Mr. Sen's contention is that Article or Para. 12 of the Indian Independence Order 1947 does not apply to the present proceedings before the District Judge and therefore there is no other provision for substitution and the petitioners before us who have obtained these Rules are not entitled to proceed against the State of West Bengal even if they cannot also proceed against East Bengal. It is to be pointed out that by the Constitution Act of 1950 the State of West Bengal is the successor to the province of West Bengal. It is also to be pointed out that in view of S. 6, General Clauses Act accrued rights and liabilities and proceedings in that connection are not affected by the repeal of Independence Act, 1947.

[3] As regards the first contention relating to the interpretation of Art. 9 of the Indian Independence Order 1947, it is clear that that Article has some reference to S. 178, Government of India Act, 1935, where the same words "loans, guarantees and other financial obligations" are also used. It would appear from the Government of India Act in the subsequent sections that obligations considered in that connection are obligations which are charged upon the revenue or which are in the nature of grants etc. The word 'financial' in 'financial obligation' has got to be given its technical meaning which it has in connection with matters of revenue and it cannot be given the wide meaning as equivalent to any kind of pecuniary liability. Further, it would appear that pecuniary liabilities arising out of different kinds of transactions have already been provided in the Act and if 'financial obligations' were not taken in a restricted technical sense, it would have been more appropriate to mention pecuniary liabilities except those already provided for in the other sections. We are therefore of opinion that *ejusdem generis* meaning is to be preferred in the present case and the interpretation put upon the Article previously by the Divisional Bench was the correct interpretation.

[4] The Indian Independence Order, 1947, proceeds to assign rights and liabilities between the different provinces created as a result of partition of Bengal and the Punjab and between the other Governments and in that connection it deals first with property in which connection it makes provisions for land, bank notes, coins etc. and then as regards other properties. It next goes on to deal with contractual rights and liabilities. Then it deals with liabilities which are connected with revenue matters, namely, loans, guarantees and other financial obligations and finally it deals with

liabilities arising out of Tort or Wrongs done. After making these broad divisions and assigning rights and liabilities under different heads, in Art. 12 it provides for substitution in pending proceedings in connection with different kinds of rights and liabilities and again mentions all the broad heads we have pointed out. The broad head under which, it is contended by Mr. Chatterjee appearing on behalf of the petitioners, we should consider the present case is legal proceeding with respect to property." We have already pointed out that property has been taken to include land and other kinds of properties mentioned in the previous Articles. The question of compensation for acquisition of land is a question with respect to the value of land and therefore it is a legal proceeding with respect to land or with respect to property. "Legal Proceeding" and "with respect to land" must be given a wide interpretation, and therefore under Art. 12 of the Indian Independence Order of 1947 the liability was of the successor Government which has obtained that property on partition. There can be no doubt that the lands in West Bengal in the sub-division of Asansol in the District of Burdwan have fallen within the Province of West Bengal and therefore in the present case the Province of West Bengal now represented by the State of West Bengal was to be substituted in place of the previous Province of Bengal and the District Judge was therefore not right in holding that the Land Acquisition proceedings could not continue against the Province of West Bengal.

[5] The Rules are made absolute. The Province of West Bengal in all these proceedings is to be substituted in place of the previous Province of Bengal.

[6] The petitioners will get their costs of these Rules. Leave to appeal is refused.

[7] **Sen J.**—I agree.

D.R.R. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 465 *[C. N. 174.]*

DAS GUPTA AND LAHIRI JJ.

Sm. Purnasashi Devi—1st Party v. *Nagendra Nath Bhattacharjyee — 2nd Party.*

Criminal Ref. No. 34 of 1950, D/- 16-5-1950, made by Sessions Judge, Burdwan.

(a) Criminal P. C. (1898), S. 488 (1) — "Neglects or refuses to maintain"—Inadequate maintenance.

When the law says "neglects or refuses to maintain", it cannot but mean "neglects or refuses to maintain properly". Where, therefore, a Magistrate finds that the maintenance which had been given by the husband is inadequate he has jurisdiction to pass proper order under S. 488 (1). [Para 2]

Annotation : ('49 Com.) Cr. P. C., S. 488, N. 11.

(b) Criminal P. C. (1898), S. 488 (1)—Maintenance —Cost of ordinary education.

It is not correct to say that in no case can maintenance be thought to include anything more than food, clothing and lodging. Thus the cost of ordinary education can in the case of a middle class family be considered to form part of maintenance. [Para 3]

Annotation : ('49-Com.) Cr. P. C., S. 488, N. 13.

(c) Criminal P. C. (1898), S. 488 (1)—Payment of annual allowance.

There is no provision in S. 488 (1) for an order of payment of annual allowance, or any kind of annual payment. [Para 5]

Annotation : ('49-Com.) Cr. P. C., S. 488, N. 13.

(d) Criminal P. C. (1898), S. 488 (1)—Son 17 to 19 years old—Allowance, if can be granted.

The word "child" has been deliberately used to leave the Courts free to order maintenance for such sons and daughters as are unable to earn livelihood for themselves, having due regard to the class of society to which they belong and other surrounding circumstances. The fact, therefore, that the son is 17, 18 or 19 is no ground for refusing maintenance on his account. [Para 6]

Annotation : ('49-Com.) Cr. P. C., S. 488, N. 9.

S. S. Mukherjee and Nalin Chandra Banerjee — for 1st Party

Arun Kumar Dutta No. 2 — for 2nd Party.

Das Gupta J. — This reference was made by the Sessions Judge of Burdwan recommending that an order passed by the learned Magistrate, Asansol, directing payment of Rs. 60 8.0 per month and 11 *Sali Bhati* rice and 2 *Sali* of other variety of rice or its money equivalent per year to his wife Sm. Purnasashi Devi for her maintenance and the maintenance of his legitimate child by her should be set aside.

[2] Three grounds have been put forward by the learned Judge for his recommendation. The first is that as the learned Magistrate was of the view that the maintenance had been paid but the rate was inadequate, it could not in law be said that the husband had neglected or refused to maintain his wife. In my judgment, this ground cannot prevail. When the law says "neglects or refuses to maintain", it cannot but mean "neglects or refuses to maintain properly." Suppose one rupee was paid for the maintenance of a wife for a month, that would be paying some amount of maintenance, but it would be ridiculous to suggest that that in such maintenance which would stand in the way of the operation of S. 488, Criminal P. C. In this case, the learned Magistrate found that the maintenance which had been given by the husband was inadequate. He had jurisdiction to pass proper order under S. 488 (1), Criminal P. C.

[3] The second ground is that "maintenance" includes food, clothing and lodging and it does not include cost of education. Even if the costs

of education were left out, it does not seem to me that the amount ordered by the learned Magistrate in this case could be considered to be too high. But I do not see why the cost of ordinary education should not in the case of a middle class family be considered to form part of maintenance. It may be that when the case of a person of the cultivator class is being considered, any education more than primary education should not be considered to form part of maintenance, but the case of middle class families is different. I am unable to agree with the learned Judge that in no case can maintenance be thought to include anything more than food, clothing and lodging.

[4] The third ground is that while S. 488, Criminal P. C. empowers the Magistrate to fix a monthly allowance for the maintenance, the learned Magistrate had acted illegally in directing annual payment of the paddy. In my opinion, the learned Judge was right in this criticism of the learned Magistrate's order. The operative portion of S. 488, Criminal P. C. is in these words :

" . . . . order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding one hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs."

[5] There is no provision for an order of payment of annual allowance, or any kind of annual payment.

[6] It was contended by Mr. Dutt on behalf of the husband that as the son on whose behalf maintenance has been asked for is aged 17 or 18 or 19, he does not come within the meaning of "child" under S. 488, Criminal P. C. If it was intended to limit the maintenance to sons or daughters upto a certain age, there seems no reason why the Legislature did not make use of explicit words to give effect to that intention. It seems to me that the word "child" has been deliberately used to leave the Courts free to order maintenance for such sons and daughters as are unable to earn livelihood for themselves, having due regard to their class of society to which they belong and other surrounding circumstances. The fact, therefore, that the son is 17 or 18 or 19 is, in my opinion, no ground for refusing maintenance on his account.

[7] In this view of the matter, I would maintain the order passed by the learned Magistrate with this modification only that I would order payment of a lump sum money per month instead of Rs. 60-8 0 per month and 11 *Sali Bhati* rice and 2 *Sali* of other variety of rice or its money equivalent per year as ordered by him. On consideration of all the circumstances, it seems to me that the proper order to make is that the petitioner must pay Rs. 90 per month on account of the maintenance of his wife and child to his wife Sm. Purna Sashi Devi and I would order accordingly. This order will take effect from the date of the petition under S. 488, Criminal P. C.

[8] The reference is disposed of in these terms.

[9] **Lahiri J.**—I agree.

V.R.B. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 466 *[C. N. 175.]*

ROXBURGH J.

Abinash @ Ambarish Chandra Roy — Defendant — Petitioner v. *S. C. Sreemani — Plaintiff — Opposite Party.*

Civil Rule No. 1053 of 1949, D/- 15-11-1949.

Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948), S. 16—Pending proceedings—Applicability—S. 16 (1) is not intended to apply to pending proceedings — Consequently there is no right of appeal under S. 16 (2) in pending cases. [Para 2]

Siddheswar Chakravarty—for Petitioner.

Abani Kanta Roy—for Opposite Party.

Order. — This is a Rule against an order passed in appeal purporting to be made under S. 16, West Bengal Rent Control Act, 1948. The landlord brought a suit for rent on 5th May 1948. The Act in question came into force on 1st December 1948. The decision of the trial Court was made on 14th February 1948.

[2] The short point taken before me is that as the suit began before the new Act came into force the suit itself is not one under S. 16 (1) of the Act and therefore there was no appeal under S. 16 (2). The point does not appear to have been taken in the lower appellate Court. It could only be said that the suit was one covered by S. 16 (1) of the Act if it be held that the words "or tried by" in that section which says "that no suit or proceeding by a landlord against a tenant for the recovery of rent or possession of any premises which the Court of Small Causes of Calcutta is competent to try, shall be instituted or tried by any Court other than the said Court of Small Causes of Calcutta" are applicable to pending proceedings. The point was considered in the case of *Amulya Ratan* v. *Megh Mala*, 53 C. W. N. 474 but it was not necessary for it to be decided then. That case related to a proceeding which was pending in the High Court and it was pointed out by the Hon'ble the Chief Justice that if the section applied to pending proceedings one would have expected provision in that Act as to what was to happen to pending proceedings in the High Court which by the provision of S 16 (1), if so interpreted, were put an end to. I have been referred to the case of *Sadar Ali* v. *Dalimuddin*, 56

Cal. 512 : (A. I. R (15) 1928 Cal. 6:0 F.B.) but that dealt with the effect of the amendment of the Letters Patent by which the right of appeal previously existing was taken away. I am of opinion that it cannot be said that S 16 (1) of the Act in question was intended to apply to pending proceedings. Consequently S. 16 (2) does not apply. No right of appeal was given in pending cases, that is to say, in the present case.

[3] The result is that the Bench of three Judges of the Small Cause Court had no jurisdiction to hear the present appeal The plaintiff had some right under S. 38, Presidency Small Cause Courts Act, and this appeal should be treated as an application thereunder and dealt with accordingly.

[4] The order of the Bench is accordingly set aside and the case is remanded to the Small Cause Court to be treated as one under S 38, Presidency Small Cause Courts Act. There will be no order as to costs.

V.B.B. *Case remanded.*

A. I. R. (37) 1950 Calcutta 467 *[C. N. 176.]*

SEN AND K. C. CHUNDER JJ.

Satya Kishore Banerjee and others — Appellants v. *Province of Bengal and others — Respondents.*

A. F. A. D. No. 1274 of 1945, D/- 1-6-1950, against decree of Dist. Judge, Nadia at Krishnagar, D/- 22-2-1945.

(a) Bengal Public Demands Recovery Act (III [3] of 1913), Ss. 34 to 37— Applicability — Suit for declaration that certificate is nullity — Limitation Act (1908), Art. 120.

Sections 34 to 37 relate to a certificate which has been duly made but which is defective for some of the reasons mentioned in those sections. They have no application to a case when it is alleged that the certificate is a nullity. A suit for a declaration that the certificate was a nullity and not binding on the plaintiffs would be governed by the provisions of Art. 120, Limitation Act and not by S. 34 and would also be not barred by reason of any of the Ss. 35 to 37. [Para 6]

Annotation : ('42-Com) Lim. Act, Art. 120 N. 7.

(b) Civil P. C. (1908), Ss. 100, 101 — Finding of fact—Service of notice — Whether notice was served on persons required to be served is question of fact—Reasons for finding given by lower Court —No interference in second appeal—Bengal Land Revenue Settlement Regulation (VII [7] of 1822), S. 10 (4). [Para 7]

Annotation : ('50 Com.) C. P. C., Ss. 100-101 N. 51.

(c) Civil P. C. (1908), Ss. 100, 101—New point—Question of fact.

Point which is a pure question of fact, not taken in the pleadings, nor argued in the trial Court, nor taken in the grounds of appeal before the first appellate Court, nor argued there, nor even taken specifically in the grounds of the second appeal, cannot be allowed to be argued in second appeal. [Para 8]

Annotation :('50-Com.) C. P. C., Ss. 100, 101 N. 55.

(d) Civil P. C. (1908), Ss 100, 101 — Question of fact—Making of proclamation — Whether proclamation was made, is question of fact—Bengal Land Revenue Settlement Regulation (VII [7] of 1822), S. 10 (4). [Para 8]

Annotation : ('50-Com.) C. P. C., Ss. 100-101 N. 55.

(e) Evidence Act (1872), S. 114 —Official Acts — Question whether proclamation under S. 10 (4), Bengal Land Revenue Settlement Regulation was made—Nothing alleged denying such proclamation —That proclamation was duly made can be presumed —Bengal Land Revenue Settlement Regulation (VII [7] of 1822), S. 10 (4). [Para 8]

Annotation : ('46 Man.) Evidence Act, S. 114 N. 29.

(f) Bengal Land Revenue Settlement Regulation (VII [7] of 1822), S. 10 (5) —Majority includes unanimity —Only one person appearing and accepting jama—Decision is binding on others not appearing though served with notice.

The word majority in S. 10 (5) includes unanimity. Thus where only one co-sharer appears and the rest do not, even though served with a notice, and the person appearing is willing to take the settlement, the persons not, appearing are bound by his decision. In such a case the conduct in abstaining from appearing would indicate their willingness to abide by the decision of the majority, in this case unanimity of one person: 47 C. W. N. 730, *Rel. on.* [Para 9]

(g) Bengal Land Revenue Settlement Regulation (VII [7] of 1822), S. 10 (5) —Arrears of Revenue —Personal liability for—Liability whether extends only to the interest of defaulter in estate — Bengal Public Demands Recovery Act (III [3] of 1913), S. 3 (6) and Sch. 1.

Sub-section (5) to S. 10 imposes a liability on the 'interest and estate' for the revenue but it does not say that this is the only liability. Further, the arrears due constitute Government revenue and they constitute 'a public demand' as defined in S. 3 (6), Bengal Public Demands Recovery Act, 1913, read with Sch. 1 of the Act. A certificate under the last mentioned Act may be issued by the Collector for the recovery of such arrears and it may be executed in any of the ways mentioned in S. 14, i. e. by attachment or sale of any property of the certificate debtor, by his arrest or by the other methods mentioned therein. It cannot therefore be argued that the certificate debtor is not personally liable for the arrears of the revenue under S. 10 (5). [Para 10]

(h) Bengal Land Revenue Settlement Regulation (VII [7] of 1822), Ss. 10, 3 — Accreted land— Proprietors refusing settlement—Government farming out land for certain period—Malikana paid to proprietors—Fresh Settlement, if can be offered after expiration of lease, to the proprietors — Payment of malikana, effect.

The fact that the accreted land is, under S. 3, Bengal Land Revenue Settlement Regulation, 1822 let out in farm or the fact that the land is taken in khas possession by the Government on the ground of the refusal of the proprietors to accept the jama fixed by Government under S. 6, Bengal Alluvian and Diluvian Act, does not take away the proprietary interest of the owners of the Asli land in the accreted land. That interest remains and all that the letting out in farm or the taking of the khas possession by the Government amounts to is that the land is managed by Government on behalf of the proprietors. The fact that Malikana is paid to proprietors on such farming out or taking of khas possession by the Government would make it quite clear that the proprietors of the Asli land have a proprietary interest in the accreted land

which would render them liable to be called upon to accept or refuse a fresh settlement under S. 10 of the Regulation at the termination of the period during which the land is held either in farm or in khas. They cannot say that by their refusal to accept the settlement in the beginning they have ceased to have any interest in the accreted land. A person to whom Malikana is paid in accordance with the provisions of Regn. VII [7] of 1822 is a proprietor. (The term "malikana" explained); 9 W. R. 102; 17 All. 1 (PC) and A.I.R. (19) 1932 Cal. 49, *Rel. on.*; A. I. R. (11) 1924 Cal. 197, *Disting.* [Para 11]

Chandra Sekhar Sen and Satya Prosad Banerjee — for Appellants.

Jajneswar Mazumdar, A.G. Pleader; Urukramdas Chakravarty and Benoy Krishna Ghose — for Repondents (1, 3 and 2 respectively.)

Sen J. — This is an appeal by the plaintiffs whose suit has been dismissed by both the Courts below.

[2] It will be necessary to state a few facts for the proper understanding of the matter which is before us for decision. Touzi No. 399 of Mahal Nawapara of the Nadia Collectorate is owned by the plaintiffs and defendants 2-11. Defendant 1 is the State of West Bengal. It is unnecesary to state the different shares held by the plaintiffs and defendants 2 to 11 in this Touzi. There was an accretion to this Touzi and that became Touzi No. 2645 Char Nawapara which was settled temporarily, that is, for a period of 15 years with the plaintiffs and defendants 2 to 11 in accordance with the provisions of Bengal Alluvion and Diluvian Act (Act IX [9] of 1847). Just before the term was coming to an end, the Collector of Nadia addressed the proprietors of the accreted Touzi asking them to take a fresh settlement. The plaintiffs refused to take fresh settlement. Thereupon the Collector farmed out the Touzi in favour of the Chetlangia Court of Werds which is defendant 3 for a period of one year pending the Revisional Settlement. On the expiry of that year, a fresh settlement had to be made with the former owners and according to the State of West Bengal such fresh settlement was made under S. 10 (5) of the Bengal Land Revenue Settlement Regulation 1822 with the original owners. I may mention at this stage that a great deal of controversy has been raised by the plaintiffs as to whether the fresh settlement was legal, or whether it was at all binding on the plaintiffs. I shall deal with this controversy later. After this alleged fresh settlement, the accreted Touzi, namely, Touzi No. 2645 of Char Nawapara, fell into arrears of revenue and it was put up for sale and purchased by the State of West Bengal. The amount realised by the sale was not sufficient to meet the arrears. Thereupon, in accordance with the provisions of the Public Demands Recovery Act (Bengal Act III [3] of 1913) a certificate was issued for the arrears against the alleged defaulting proprietors. The plaintiffs then instituted the present suit.

[3] The plaintiffs' case was that the certificate is null and void and unenforceable against them for various reasons. I shall state only those reasons which were pressed before this Court. They are as follows :

(i) In accordance with the provisions of S. 10 (4) of the aforesaid Regulation of 1822 it was incumbent upon the Collector to issue a notice as well as to promulgate a proclamation requiring the parties to whom the fresh settlement was being offered to attend and declare their agreement or non-agreement to the jama proposed to be assessed on the land. It is argued on behalf of the plaintiffs that no notice was issued, nor was there any proclamation made.

(ii) According to the provisions of S. 10 (5) of the aforesaid Regulation, when a fresh settlement is offered if any person or persons, summoned to appear and to express his or their agreement or disagreement, omit to attend, he or they shall be bound by the decision of the majority of those who may attend and agree or disagree to the jama. In this case, the plaintiffs point out that one person only attended, namely, defendant 3 and that there could, therefore, be no majority. In these circumstances, it is argued, the plaintiffs would not be bound by the acceptance of the settlement by defendant 3.

As a subsidiary point, it was argued that, even if the plaintiffs were bound by the decision of defendant 3, if the revenue fell into arrears, the plaintiffs' interest in the Touzi only would be liable for the arrears and the plaintiffs would not be personally liable.

(iii) The third point argued was this: After the expiration of the period of 15 years when the time came for making a fresh settlement, the plaintiffs refused to take a fresh settlement and the Collector farmed out the Touzi to defendant 3, the plaintiffs getting merely a Malikana in respect of the Touzi. By reason of this act of the Collector, the plaintiffs ceased to have any rights or liabilities as proprietors of the Touzi, and not having any joint property in the Touzi they were not liable to be asked to take fresh settlement, nor were they liable to be bound by a fresh settlement being taken by the majority of persons attending pursuant to a notice issued under S. 10 (4) of the aforesaid Regulation of 1822.

[4] These are points which have been argued before us.

[5] As stated before both the Courts below dismissed the suit. The suit was dismissed not only on the merits but also on the ground that it was barred by limitation by reason of the provisions of S. 34, Public Demands Recovery Act,

and also barred by the provisions of Ss. 35, 36 and 37 of the last mentioned Act.

[6] I shall deal first with the question whether the suit is barred by limitation or otherwise by reason of the provisions of Ss. 34 to 37, Public Demands Recovery Act. In my opinion, none of the sections relied upon by the Courts below have any application. The plaintiffs' suit was for a declaration that the certificate was a nullity. The sections relied upon by the Court below relate to a certificate which has been duly made but which is defective for some of the reasons mentioned in those sections. They have no application to a case when it is alleged that the certificate is a nullity as in the present case. The suit, in my opinion, would be governed by the provisions of Art. 120, Limitation Act and is, therefore, well within time. It is also not barred by reason of any of the other provisions of the sections above mentioned for the reasons just stated.

[7] As regards the first point, I find that the Courts below have found as a matter of fact that notice was served upon the plaintiffs and all the other defendants who were required to be served with notice. The learned Judge has given his reasons for coming to this conclusion and on second appeal I can find no justification for interfering with such a finding of fact. I hold, therefore, that the notice was duly served upon the plaintiffs and the others to whom re-settlement was being offered.

[8] As regards the making of the proclamation, I find that this point was not taken in the pleadings, nor was it argued in the trial Court. It was not taken in the grounds of appeal before the first appellate Court, nor was it argued there. In this Court in the grounds of appeal no such specific point has been taken. This is a pure question of fact and on second appeal I do not see why I should entertain such a question when it was never argued in the Cour's below. I must presume that official acts were duly performed when nothing is alleged denying such performance. The first ground, therefore, fails.

[9] As regards the second ground, I am of opinion, that it is not tenable. The defendant 3 did appear and agree to the settlement. The plaintiffs and the other defendants did not trouble to attend. Their conduct, having regard to the provisions of S. 10 (5) of the aforesaid Regulation of 1822 indicated that they would be willing to be bound by the decision of the majority of the persons who did appear. Mr. Sen argued that when one person appeared there could be no majority. The same argument would hold good if two persons appeared, then also there could be no majority. Carried to its logical conclusion, if all of several persons who appeared agreed or disagreed to take a settlement, then also there would be no majority, because there would be a unanimity. This illustrates the unsoundness of the argument propounded on behalf of the plaintiffs. The word 'majority' would include unanimity. If one person appears, the decision is unanimous and therefore it would bind the others. Mr. Sen very fairly drew our attention to the decision in the case of *Naresh Chandra* v. *Sm. Snehalata Guha*, 47 C. W. N. 730, where Rau J. held that one person appearing and accepting the jama offered by the Collector bound the others by reason of the provisions of S. 10 (5) of the aforesaid Regulation. The second point, therefore, fails.

[10] The subsidiary point raised by Mr. Sen on behalf of the appellants that although their interest in the estate may be liable for the arrears of revenue they cannot be held personally liable is based on the latter part of subs. (5) of S. 10, Bengal Land Revenue Settlement Regulation, 1822. The passage he relies on is in these terms :

"And his or their interests and estate shall, unless otherwise specially allowed, be held responsible for the Government revenue and be liable to sale in the event of any arrear accruing on account of the settlement."

Mr. Sen suggests that this passage indicates that the method therein mentioned is the only method open to Government to realise its dues. In my opinion there is nothing in the sub-section to justify such a view. The sub-section imposes a liability on the 'interest and estate' for the revenue but it does not say that this is the only liability. Further the arrears due constitute Government revenue and they constitute 'a public demand' as defined in S. 3 (6), Bengal Public Demands Recovery Act, 1913, read with Sch. 1 of the Act. A certificate under the last mentioned Act may be issued by the Collector for the recovery of such arrears and it may be executed in any of the ways mentioned in S. 14, i.e, by attachment or sale of any property of the certificate debtor by his arrest or by the other methods mentioned therein. There is therefore no substance in this subsidiary point raised on behalf of the plaintiff.

[11] There remains the last point. The view of Mr Sen seems to be that when the plaintiffs refused to take a fresh settlement on the expiry of 15 years, they ceased to have any further interest in the accreted touzi and therefore they were not liable to be called on to take a fresh settlement under the provisions of S. 10 of the aforesaid Regulation He argued that all their interest ceased to exist in the accreted touzi and they could in no sense be held to have any proprietary right therein. In my opinion, this argument must also fail. When land is gained by

gradual accession, it shall be considered to be part of the estate to which it is annexed. This is clear from the provisions of S. 4, Bengal Alluvion and Diluvian Regulation XI [11] of 1825. Thus this accreted touzi became part of the zemindary which was Touzi No. 399 of Mahal Nawapara of the Nadia Collectorate and the proprietors of the zemindary which may be called the Asli zemindary became proprietors of the accreted tauzi, subject to their paying such revenue as Government was entitled to fix for the accreted touzi. The right of Government to fix the revenue for such alluvial land is to be found in the Bengal Alluvion and Diluvian Act, 1847 (Central Act IX [9] of 1847). Section 6 provides for it. Now if the proprietors of the Asli touzi do not agree to pay the revenue fixed, then the Government is entitled either to settle the land in farm or to take khas possession of the land and manage it. In either of these cases, the Government is bound to pay the proprietors "Malikana". This is provided for in S. 3, Bengal Land Revenue Settlement Regulation, 1822, and in S. 5 of the same Regulation. The Government however, cannot let out the land in farm, or take khas possession of it for any term exceeding 12 years. It is quite clear from these provisions that after the expiry of the farming lease, if the land is let in farm, or after the expiry of the period for which the Government had decided to take khas possession, the Government is again bound to offer the accreted touzi to the proprietors for taking a fresh settlement on such jama as the Government fixes. If again the proprietors refuse to take settlement, the land would be let out in farm, or taken in khas possession for such period as the Government thought fit not exceeding 12 years. On the expiry of such period, there would again have to be an offer for a fresh settlement and so on. It is quite clear from the provisions of these sections that the fact that the land is let out in farm or the fact that the land is taken in khas possession by the Government on the ground of the refusal of the proprietors to accept the jama fixed by Government does not take away the proprietary interest of the owners of the Asli land in the accreted land. That interest remains and all that the letting out in farm or the taking of khas possession by the Government amounts to is that the land is managed by Government on behalf of the proprietors. The fact that Malikana is paid to proprietors would make it quite clear that the proprietors of the Asli land have a proprietary interest in the accreted land which would render them liable to be called upon to accept or refuse a fresh settlement at the termination of the period during which the land is held either in farm or in khas. The term 'Malikana' has been defined in Wilson's Glossary edited by Mr. A. C. Ganguli and Mr. N. D. Basu (*vide* pp. 511 to 513). In one passage Malikana has been defined as 'Pertaining or relating to the Malik or proprietor, as his right or due." It is also defined as "an allowance assigned to a zemindar or to a proprietary cultivator, who from some cause, as failure in paying his revenue, or declining to accede to the rate at which his lands are assessed, is set aside from the management of the estate, and the collection and payment of the revenue to Government, which offices are either transferred to another person, or taken under the management of the Government Collector." This definition clearly shows that a person to whom Malikana is paid in accordance with the provisions of Regulation VII of 1822 is a proprietor. Malikana has also been defined as an inalienable right of proprietorship.

[12] In this connection I would refer to the decision of this Court in the case of *Herranund Shoo* v. *Ozeerun*, 9 W. R. 102, where it was held in a special appeal that the right to Malikana is a proprietary right constituting an interest in the land and that it is not the same as rent.

[13] I would also refer to the case of *Deo Kuar* v. *Man Kuar*, 21 I. A. 148 at p. 161 : (17 ALL. 1 P. C.) where Malikana is defined as an allowance made to proprietors who have been dispossessed by Government for the reasons stated in that case. It is thus clear that Malikana is a sum which is received by a proprietor. It is true that the proprietors may not be in possession, but they are proprietors nevertheless.

[14] I would also refer to the case of *Mahendra Narayan* v. *Abdul Gafur*, 35 C. W. N. 1233 at p. 1235 : (A. I. R. (19) 1932 Cal. 49). This case was relied upon by the plaintiffs as supporting their contention. I am of opinion that it does not do so. It was observed by Suhrawardy J. at p. 1235 that Malikana is a grant of a portion of the revenue in view of the pre-existing proprietary rights. It was argued that the words 'pre-existing proprietary rights' meant that those rights did not exist when Malikana was granted. That is a wrong interpretation. What was meant was that Malikana is an amount which is payable because of the already existing proprietary right in the person to whom Malikana is granted. The passage does not mean that the proprietary right which had existed from before ceased to exist upon the grant of Malikana.

[15] Mr. Sen depended upon a passage appearing in the judgment of this Court in the case of *Soudamini Dassya* v. *The Secy. of State*, 50 Cal. 822 : (A I. R. (11) 1924 Cal. 197). The passage appears at p. 838. We have read the passage and we do not think that it has any

reference to the facts of the present case. The facts there were entirely different In that case there had been an accretion to a zemindary and it was assessed to revenue, but the proprietor of the zemindary refused to take settlement with the result that the accreted lands were constituted into a new estate which was permanently settled with the holder of another zemindary. That person became proprietor of the new estate which had become a separate estate independent of the old estate in all respects. In these circumstances, it was held that the Malikana paid to the original zemindars did not indicate that he had a proprietary right in the accreted lands. The settlement of the accreted lands was made under S. 1 of Act XXI [21] of 1858. The present case is quite different. The plaintiff's received Malikana in respect of the accreted land while it was let out in farm for a period of one year to defendant 3 on the plaintiffs refusing to take re-settlement. The accreted land was not constituted into a separate estate and permanently settled with any one. No new proprietor was given the land. Thus the plaintiffs' proprietary right in the accreted land remained in them and because they had such proprietary right Malikana was paid to them. Malikana was paid to the plaintiffs under quite a different law from that under which Malikana was paid in the case of *Soudamini Dassya* v. *The Secy. of State*, 50 Cal. 822 : (A I. R. (11) 1924 Cal. 197) where the accreted land was created into a new permanent estate and settled with a person other than the original zemindar as proprietor.

[16] If the matter is looked at from another point of view, I think that it would be evident that the plaintiffs had a proprietary interest in the accreted Touzi. A Touzi cannot exist without a proprietor. Somebody must therefore fulfil the position of a proprietor. Obviously the holder of the farming lease is not the proprietor. If Government takes khas possession for purposes of management it cannot be the proprietor. The proprietor must necessarily be the person on whose behalf khas possession is taken or on whose behalf rent is farmed. In other words, the plaintiffs and his co-sharers must be the proprietors.

[17] I hold, therefore, that the plaintiffs held a joint interest in the accreted Touzi and that the Government was bound to offer settlement to them and the other co-sharers in accordance with the procedure laid down in S. 10 of the Bengal Land Revenue Settlement Regulation VII [7] of 1822. The plaintiffs, therefore, are bound by the acceptance of the settlement by defendant 3 and consequently they are liable to pay the revenue for the land. That revenue not having been paid, the land was rightly put up for sale and as the sale proceeds were not sufficient, the Collector was justified in issuing a certificate against the plaintiffs.

[18] In my opinion, the Courts below were right in dismissing the suit. The appeal is accordingly dismissed with costs in favour of defendant respondent 1.

[19] **K C. Chunder J.** — I agree.

R G.D. *Appeal dismissed.*

A I R. (37) 1950 Calcutta 471 *[C. N. 177.]*

DAS GUPTA AND LAHIRI JJ.

Surajmal Sharma and others — Accused — Petitioners v. *The State — Opposite Party.*

Criminal Revn. No. 131 of 1950, D/- 17-4-1950.

Criminal P. C. (1898), Ss. 227, 228, 255, 256 — Alteration in original charge — Alteration not only read and explained but accused asked whether he pleaded guilty — Effect.

Where the Magistrate not merely reads and explains to the accused the alteration in the original charge but asks them whether they are guilty and the plea of guilty or not is taken under S. 255, the Magistrate ought, after this to follow the procedure laid down in S. 256 and the subsequent sections in spite of the fact that the alteration in the charge was not material.

[Paras 11, 12]

Annotation : ('49-Com.) Criminal P. C., S. 227, N. 10 ; S. 223, N. 1 ; S. 256, N. 2.

Suresh Chandra Talukdar and Nikhil Chandra Talukdar — for Petitioners.

N. K. Sen — for the State.

Das Gupta J. — This Rule was obtained by these petitioners against an order of Mr. G. Kumar, Presidency Magistrate, Calcutta, convicting the petitioners under S 116/161, Penal Code, and sentencing them to rigorous imprisonment for six months, each.

[2] A preliminary point has been taken by Mr. Talukdar on behalf of the petitioners that the trial has been vitiated by the fact that the charge on which the petitioners were originally tried was altered after arguments of both sides had been heard and immediately before judgment was delivered, on 13th February 1950. The charge originally framed was in these words:

"That you, on or about the 21st day of April 1949, at Calcutta abetted the commission by one Sri Kedar Nath Sett, Civil Supply Officer, a public servant in the department of Civil Supplies, of an offence under S. 161, Penal Code, punishable with imprisonment for accepting Rs. 100, a gratification other than legal remuneration, as a motive for forbearing to do an official act, viz., to mend the adverse note Ex. I made by the aforesaid officer in his inspection book which said offence was not committed in consequence of the abetment, and thereby committed an offence punishable under S. 161/116, Penal Code., and within my cognizance ....."

[3] From Order No. 15, dated 13th February 1950, it appears that at the time of writing judgment, it appeared to the learned Magistrate that the charge framed was not happily worded

and so he altered the charge. The order continues in these words :

"As the alteration is purely a technical one, it is not likely to prejudice the accused if the case be proceeded with immediately. So, judgment will be delivered today at 3.30 p. m."

[4] The charge as altered reads thus :

"That you, on the 21st day of April 1949, at Keventer's Milk Shop, New Market, Calcutta, abetted the commission by Sri Kedar Nath Sett, an Inspector of the Civil Supply Department, of an offence under S. 161, Penal Code, by offering him Ex. 1, a 100 rupee C/N, as illegal gratification, so that he might be induced to change his inspection report dated 24th April 1949 (Ex. 2), and thereby committed . . . . . "

[5] It appears that this amended charge was read over and explained to both the accused and that they pleaded not guilty. After this plea of not guilty of the accused, it appears, without any further examination of any witness or any further argument, the learned Magistrate delivered his judgment convicting and sentencing the petitioners as stated above.

[6] In his explanation to the Rule, the learned Magistrate has said that the original charge was not at all materially altered by the newly framed charge, that only the wording of the charge was changed and as in his opinion, the accused were not likely to be prejudiced in their defence, he proceeded immediately and delivered the judgment.

[7] Section 227, Criminal P. C., authorises any Court to alter or add to any charge at any time before judgment is pronounced and provides that every such alteration or addition shall be read and explained to the accused.

[8] Section 228, Criminal P. C., provides that if the alteration or addition is such that proceeding immediately with the trial is not likely to prejudice the accused in his defence, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered charge had been the original charge.

[9] Section 229, Criminal P. C., provides that if the altered charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor, the Court may direct a new trial.

[10] Section 231, Criminal P. C., provides that whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to re-call or re-summon and examine with reference to such alteration or addition any witness who may have been examined and also to call any further witness whom the Court may think to be material.

[11] It has to be noticed that while S. 227, Criminal P. C., by itself only requires that every such alteration shall be read and explained to the accused, the learned Magistrate did not merely read and explain to the accused but apparently asked them whether they were guilty and the accused said that they were not guilty of the charge as altered. This plea of guilty or not is taken under S. 255, Criminal P. C., and after this has been done, the procedure which has to be followed is laid down in S. 256 and in the subsequent sections of the Code of Criminal Procedure.

[12] I am prepared to agree with the learned Magistrate that no material alteration was made in the charge by the change which he did effect, but the fact remains that he did take a new plea of the accused and so in spite of the fact that he might have proceeded under S. 228, Criminal P. C., as if the altered charge was the original charge, he did not so proceed. As soon as he took a new plea of the accused to the charge, he ought to have followed the procedure as laid down in S. 256 and the subsequent sections of the Code of Criminal Procedure. In my opinion, the preliminary point taken should prevail.

[13] I would, therefore, set aside the order of convictions and sentences passed upon the accused and remand the case to the learned Magistrate for re-trial from the stage where the accused's plea was taken. The trial should be by some Magistrate other than Mr. G. Kumar.

[14] Let the petitioners continue on the same bail.

[15] **Lahiri J.** — I agree.

V.B.B. *Case remanded.*

A. I. R. (37) 1950 Calcutta 472 *[C. N. 178.]*

SEN J.

Akhil Ranjan Das Gupta — Defendant 1 — Petitioner v. *B. N. Biswas — Plaintiff — Opposite Party.*

Civil Rule No. 1226 of 1949, D/- 16-12-1949, against order of Munsiff 3rd Court, Alipur, D/- 19 5-1949.

Civil P. C. (1908), O. 6, R. 17 — Amendment by adding new ground of relief.

The general rule is that amendment should be generously allowed unless such amendments would cause prejudice to the defendant by reason of surprise or by reason of the fact that the amended claim had become barred by limitation or similar other reasons.

[Para 3]

Where the plaintiff sues in ejectment on the ground of the termination of the tenancy by notice to quit, an additional ground of relief, namely, the non-payment of rent for three consecutive months under the West Bengal Premises Rent Control (Temporary Provisions) Act, does not alter the character of the suit and can be allowed. **[Para 3]**

Annotation : ('44 Com.) C. P. C., O. 6, R. 17, N. 10.

Sudhir Chandra Majumdar — for Petitioner.
Panchanan Ghose ahd Ranajit Ghose — for Opposite Party.

Order — This rule has been obtained by the defendant against an order allowing the plaintiff to amend his plaint.

[2] The facts are these. The plaintiff instituted a suit in ejectment against the defendant when the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, was not in force. His suit was based on a notice to quit and the bar to the recovery of possession which had been laid down in the Calcutta Rent Ordinance, 1946, then in force was sought to be removed by the plea that the plaintiff required the premises *bona fide* for his own use and occupation. While the suit was pending, the present Act (The West Bengal Premises Rent Control (Temporary Provisions) Act, 1948) came into force. Section 12 (3) of the present Act lays down that if a tenant fails for three consecutive months to pay or deposit in accordance with the provisions of this Act any rent payable by him in respect of any premises which has accrued due after the commencement of this Act, the interest of the tenant in such premises shall on such failure be *ipso facto* determined and he shall no longer be deemed to be a tenant. The plaintiff applied to amend his plaint by an averment to the effect that the defendant had failed to pay rent for three consecutive months and that by reason of the provisions of S. 12 (3) of the aforesaid Act the tenancy had terminated *ipso facto*. This prayer for amendment was resisted, but the Court below had allowed it.

[3] Learned advocate appearing on behalf of the petitioner contends that this amendment should not be allowed as it changes the nature of the suit and that it introduces a new cause of action and he has cited certain cases before me in support of this view. In my opinion each case must be decided upon its own particular facts. The general rule is that amendments should be generously allowed unless such amendments would cause prejudice to the defendant by reason of surprise or by reason of the fact that the amended claim had become barred by limitation or similar other reasons. I do not wish to lay down any general principle or state any exhaustive list of conditions under which an amendment may be allowed or disallowed. I would say that in the present case the amendment does not alter the plaintiff's case at all. The plaintiff has sued in ejectment and the suit still remains a suit in ejectment. The cause of action has also not been altered. The plaintiff's cause of action in the original suit was the termination of the tenancy. The plaintiff is relying upon the same cause of action. He is only adding an additional ground in support of his case that the tenancy has ceased. In the original plaint his case was that the tenancy had been terminated by a notice to quit. In the present case by an amendment he wishes to add another ground upon which the tenancy has been terminated namely the ground of non-payment of rent for three consecutive months. Whether this ground can be allowed to prevail or not is a matter which will be decided in suit. I express no opinion on that point. I can, however, see no reason why the plaintiff should be prevented from stating this ground in his plaint by way of amendment. It is suggested by learned advocate for the petitioner that the suit should be fought out upon the original ground alleged in the plaint and that if the plaintiff fails, he may be entitled to file a fresh suit on the additional ground now sought to be taken by way of amendment. I think that to accede to this prayer would be to encourage multiplicity of suits. This should be avoided wherever possible.

[4] In these circumstances I uphold the decision of the Court below and discharge this rule with costs.

V.B.B. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 473 *[C. N. 179.]*

G. N. DAS AND GUHA JJ.

Sm. Charu Bala Dasi — Defendant — Appellant v. *Province of West Bengal — Plaintiff — Respondent.*

A. F. O. D. No. 256 of 1949 (Probate), D/- 12-6-1950, against decree of Sub-Judge, 2nd Court, 24 Parganas at Alipore, D/- 12-11 1949.

(a) Hindu law — Succession — Hindu dying without any heirs — Government takes the property by escheat — Constitution of India, Art. 296 : 8 M. I. A. 500 (P. C.), *Rel. on.* [Para 9]

(b) Precedents — Authority of — Decision merely based on concession of a pleader — Decision is not binding : 2 Beng. L. R. 28 (F. B.), *Rel. on.* [Para 13]

Annotation : ('50-Com.) Civil P. C., Pre N. 15.

(c) Hindu law — Succession — Dayabhaga — Stridhan of prostitute.

The mere fact that a Hindu woman has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood, and consequently, the stridhan property of a Hindu woman who has adopted the life of prostitute passes upon her death to her heirs under the Bengal School of Hindu law. [Para 17]

(d) Hindu law — Succession — Dayabhaga — Degraded woman — Succession to stridhan of prostitute sister.

Under the Bengal school of Hindu law a degraded woman does not succeed to the stridhan property of her degraded sister : 25 Cal. 254, *Approved.* [Para 44]

Hiralal Chakravarty and Syamadas Bhattacharya — for Appellant.

Jajneswar Majumdar — for Respondent.

G. N. Das J. — This appeal is directed against a decision of Mr. B. C. Nandy Majumdar, Sub-

ordinate Judge, 2nd Court, Alipore, dated 12th November 1949, revoking the grant of letters of administration to the appellant.

[2] The facts are not in controversy and are as follows : The appellant Charubala and Santamani were sisters. They belonged to the Kaibarta caste. They were widows and subsequently lapsed into prostitution. The said Santamani died on 15th January 1946. At the time of her death she owned and possessed premises NO. 6A Nabu Roy Lane, Calcutta. On 6th April 1946 the appellant made an application for the grant of letters of administration to the estate of Santamani. This was registered as Letters of Administration Case NO. 51 of 1946.

[3] Thereafter Butto Krishna Saha and Atul Krishna Saha, set up a Will alleged to have been executed by Santamani. This was registered as Letters of Administration Case NO. 54 of 1946. Charu Bala filed an objection. The application was dismissed on 2nd June 1947 on the finding that the Will was a forgery. But Krishna and Atul filed an appeal to this Court, being F. A. 296 of 1947. In the meantime Letters of Administration Case NO. 51 of 1946 had been stayed. This was prcceeded with, as a result of the dismissal of Letters of Administration Case NO. 54 of 1946 and an order for the grant of letters of administration was made on 18th June 1947 and the letters of administration were issued to the appellant.

[4] The aforesaid First Appeal NO. 296 of 1947 was dismissed on 21st January 1949. In the course of the hearing (Ex. C.3) this Court directed the issue of a notice on the Senior Government Pleader so that he might appear and take note of the proceedings in view of the fact that Charubala could not be the heir of her sister and the estate may go to the Crown by escheat. Accordingly the respondent Province of Bengal claiming title to the estate of Santamani, initiated proceedings under S. 263, Succession Act, for revocation of the grant of letters of administration to the appellant on the ground that the grant had been obtained by a false suggestion that Charubala was an heir of Santamani, suppressing the fact that Santamani was a prostitute and on the further ground that the proceedings to obtain the grant were defective in substance because no citation was issued to the respondent, the latter being entitled to the estate of Santamani by way of escheat.

[5] The appellant filed an objection on the ground that the respondent, the applicant for revocation of the grant, had no *locus standi* to make the application inasmuch as the appellant was an heir to the estate of Santamani, and the respondent could not take by way of escheat.

[6] The principal issue which arose was whether the appellant succeeded to her sister Santamani.

[7] The Court below held that the appellant was not an heir to her degraded sister Santamani and on this finding, revoked the grant. The present appeal is directed against the order revoking the grant.

[8] Mr. Hiralal Chakravarty appearing for the appellant ultimately limited his contention to the sole ground that under the Dayabhaga law a degraded sister inherits the stridhan of her degraded sister, the parties not belonging to the twice-born class and that accordingly the Crown could not take by way of escheat and had no *locus standi* to apply for revocation of the grant of letters of administration, to the appellant.

[9] The right of the Crown to take by escheat the property of a Hindu subject, though a Brahmin, dying without heirs was firmly established in the case of the *Collector of Masulipatam* v. *Cavely Venkata Narrainapah*, 8 M. I. A. 500 at pp. 526-527 : (2 W. R. 59 (P. C.)). An attempt to curtail the right of the Crown by limiting its application only to cases of entire absence of blood relations was put down by this Court in *Satish Chandra* v. *Haridas Mitra*, 38 C. W. N. 98 at p. 100 : (A I.R. (21) 1934 Cal. 399).

[10] The question, therefore, remains whether the appellant is an heir to her degraded sister Santamani under the Dayabhaga School of Hindu law.

[11] The Assistant Government Pleader who appeared for the Province of Bengal, submitted that the point was covered by the decision in *Sarnamoyee Bewa* v. *Secy. of State*, 25 Cal. 254 : (2 C. W. N. 97).

[12] Mr. Chakravarty fairly admitted that the point now raised was directly decided in that case. He however, submitted that the decision in that case proceeded on a concession made by Mr. Golap Chandra Sarkar, learned vakil appearing for the appellant.

[13] It may be conceded that the decision, if it had been based merely on the concession of the learned vakil, would not have been binding on us: *Omrit Koomaree* v. *Luckhee Narain*, 10 W .R. 76 at p. 80 : (2 Beng. L. R. 28 (F.B.)).

[14] Turning however, to the decision itself, it appears that it did not proceed merely on concession of the learned vakil. Reference may be made to the following passages in the judgment:

"It is conceded, *as it must be*, that if the Hindu Law governs this case, it must be the Hindu Law of

the Bengal School; and that according to the law of that school the sister is no heir" (p. 255).

* * * * * *

"Moreover it would be a strange anomaly, that though the sister is no heir to a female proprietor under the Bengal School of Hindu Law, if they remain undegraded, yet if they both lapse into prostitution, the one becomes an heir to the other, quite apart from custom" (p. 256).

[15] We are, therefore, bound by the decision and this appeal must be dismissed unless we hold that the view taken in that case is wrong and that the matter should be referred to a Full Bench.

[16] We have, therefore, to consider whether the view taken by Macleon C. J. and Banerji J. in *Sarnamoyee's case*, (25 Cal. 254 : 2 C. W. N. 97) was wrong.

[17] The parties in the present case are admittedly governed by the Bengal School of Hindu Law. It is now settled that the mere fact that a Hindu woman has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood, and that consequently, the stridhan property of a Hindu woman who has adopted the life of a prostitute passes upon her death to her heirs under the Bengal School of Hindu Law. *Harilal* v. *Tripura Charan*, 40 Cal. 650 at p. 677 : (19 I. C. 129).

[18] The question, therefore, is whether under the Bengal School of Hindu Law a sister is an heir to the stridhan property of her sister.

[19] I shall begin my discussion of the question by a reference to the texts of the Bengal School.

[20] Dayabhaga, Chap. IV, deals with succession to woman's property. Section 2 deals with succession of a woman's children. Section 3 then deals with the succession to the separate property of a *childless* woman.

[21] The author then deals with the claims of certain specified relations, and concludes as follows:

"Again, on failure of these six, it must be understood, that the succession devolves on the father-in-law, the husband's elder brother and the rest, according to their nearness of kin (the nearest sapinda being the heir)" S. 39 (Colebrooke's translation).

[22] Paragraph 42 then says: "Thus has succession to the separate property of a childless woman been explained." The enumeration of heirs in Jimutvahan's Dayabhaga thus stops with the *sapindas* of the woman.

[23] The same is the case with Raghunandan's Dayotottwa, Ch. X, S. 38.

[24] Srikrishna Tarkalankar in his Dayakrama Sangraha Ch. II, section VI §. 11 to 13 carries the line a little forward. I may quote the translation of the said paragraphs by F. M. Wynch except in regard to an omission made in paragraph (II) which is added in italics.

Paragraph (II)

In default of all sapindas, those allied by common oblation of water, and those descended from the same patriarch in the male line, succeed *in the same order as in the case of the property of males.*

Paragraph (12)

Failing all these, in the case of the property of a Brahmin woman, Brahmanas, inhabitants of the same village, exceedingly learned in the vedas, are entitled to the succession.

Paragraph (13).

But in the case of the property of a woman of the Chatriya and other tribes, the king is exclusively entitled to the inheritance.

[25] It may be noted in passing that para. (12) must now be held to be inapplicable in view of the decision of the Lords of the Judicial Committee in the *Collector of Masulipatam* v. *Cavely Venkata Narrainapah*, 8 M. I. A. 500 : (2 W. R. 59 P. C).

[26] Srikrishna, therefore, extends the line to sakuloyas, samanodakas, and samanoprobaras of the woman's husband. How far the paragraphs quoted above extended the line also to sapindas, sakulyas, samanodakas and samanoprabaras of the father of the woman is doubtful.

[27] Texts of Brihaspati and of Katyayana, both quoted in Raghunandan's Institutes (Udbawatattam) Vol. II, p. 72 take opposite views, the former text negatives the right while the latter recognises the same. In Jagannath Tarcapanchanan's Digest translated by H. T. Colebrooke (1874 Ed.) Vol. II, S 513 at p. 624, after setting forth the line of succession upto the fourteen persons ascending and descending from her husband (samanodaka) it is stated as follows:

"After these, her kindred on her father's side, as far as the tenth person ; after them the family of her mother ; and lastly, the King takes the estate, except the property of a Brahmani woman. This brief exposition may suffice."

[28] The above are all the texts bearing on the point. I shall now deal with the opinions of the text-book writers. Commenting on Jagannath's Digest, Sir Gooroodas Banerji in Hindu law of Marriage and Stridhan (Tagore Law Lectures 1878) 5th Edn., Lecture XI, p 500 observes :

"Considering how anxiously the Hindu law tries to prevent escheat to the Crown, and bearing in mind the other reasons stated in the last lecture, I think it may be safely affirmed, on the authority of Jagannath, that on failure of other heirs, a woman's kinsmen on the father's and mother's side succeed to her stridhan according to the Bengal School."

[29] Shyama Charan Sarkar in Vyavastha Darpan Vol. I (3rd Edn) 255, Ss. 306-309 limits the line to husband's samanodakas and does not extend the same to the woman's sapindas.

[30] In Cowell's Hindu law (Tagore Law Lectures 1871) Lecture X the line of succession to stridhana has not been traced beyond the children.

[31] In Mayne's Hindu law, 10th Ed. S. 639 p. 761 the line of inheritance to stridhana according to Dayabhaga school is thus carried forward:

"Failing them, her husband's sokulyas and samanodakas. Lastly according to Jagannatha, the father's Kinsmen come in as heirs, and after them, the mother's kinsmen."

[32] In West, Buhler and Majid's Hindu law of Inheritance etc. 4th Ed. Book I Ch IV B. Section 7 pp. 507-508 the inclination of the authors seems to be in favour of conceding the right to the woman's own kinsmen.

[33] In Mulla's Hindu law 9th Ed. S. 155, and S. 157 p. 149, p. 151 succession to Stridhana according to Dayabhaga has bean extended to (11) Husband's Sapindas, Sakulyas, Samanodakas (12) Father's kinsmen.

[34] Travelyan's Hindu law, 2nd Ed., P. 461 takes the same view.

[35] In Golap Chandra Sarkar's Hindu law 8th Ed. Ch. XIII S 6, p. 616, succession to both classes of Stridhana, according to Dayabhaga, goes upto (7) Husband's Sapindas (8) Father's kinsmen.

[36] The text writers who have conceded the right to a woman's blood relations (kinsmen) as regards her own stridhan property base their opinion entirely on Jagannath's Digest. The authority of Jagannath's Digest (also spoken of as Colebrook's Digest), on questions of Hindu law is well established. It ranks only next to Jimutavahana, Raghunandan and Srikrishna, *Katki* v. *Lakpati Pujan*, 20 C. W. N. 19 at p. 23 : (A. I. R. (2) 1915 Cal 214), *Kerry Kolitari* v. *Moniram Kolita*, 19 W. R. 367 : 13 Beng L. R. 1 F.B.).

[37] The Judicial decisions in this Court have however taken a view different from that of Jagannatha. In *Sarnamoyee's case*, 25 Cal. 254 : (2 C. W. N. 97) a Division Bench, of which Sir Gooroodas Banerji J. was a member a view contrary to that of Jagannath was taken.

[38] The view so taken was followed in other cases in this Court. Thus in *Sundari Dossee* v. *Nemye Charan*, 6 C. L J. 372 the claim of a sister's daughter to inherit the stridhana of her maternal aunt was negatived. Again in *Satish Chandra* v. *Haridas Mitra*, 38 C. W. N. 98 : (A. I. R. (21) 1934 Cal 399) the right of a sister's son's son to inherit the stridhana of a woman was negatived. Thus all the decisions in this Court take a view of the law which is contrary to the opinion expressed in Jagannath's Digest and do not recognise the right of inheritance of the father's relations of a woman in respect of her stridhana.

[39] Mr. Chakravarty referred us to the case of *Narayan Pundalik* v. *Lakshman Daji*, 51 Bom. 784 : (A. I. R. (14) 1927 Bom. 456) where a sister was held to be an heir to the stridhana property of a prostitute. The reasoning of Patkar J. who delivered the judgment of the Court was that the prostitute might be regarded as a lower class than the Sudras, and that as the order of succession to the estate of a deceased prostitute was not laid down in the texts, the Courts ought to act according to rules of justice, equity and good conscience. Such rules for purposes of succession might be found in Manusanhita Chap. IX verse 187 i.e. "To the nearest sapinda the inheritance shall belong" and that as the particles of the mother's body abound in the daughters, applying the principle of analogy the sisters should be regarded as sapinda of each other and of the mother.

[40] The above line of reasoning is inapplicable to cases governed by the Dayabhaga school of law for the following reasons : (1) In determining the succession to the stridhana property of a woman, the more accepted view is that it is regulated by the doctrines of spiritual efficacy except in certain specified cases, covered by express texts, Banerjee's Hindu Law of Marriage and Stridhan (Tagore Law Lecture 1878 Edn. 5 pp. 476 477, the claim of the sister cannot be supported on this principle. (2) The texts of the Dayabhaga which deal at length with succession to the stridhana property of a woman use the word *Stri* which, according to the Sabdakal, adruma applies equally to undegraded and degraded relations As such the texts of the Dayabhaga would be applicable. The result would then, be that a sister would not be entitled to succeed to her sister. (3) Sir Gooroodas Banerjee in Hindu Law Marriage and Stridhana (Tagore Law Lectures 1878) Edn. 5 pp. 458 459 opined that the texts of Dayabhaga would not apply to degraded woman. This is contrary to the observations of Mookerjee J., in *Hiralal's case*, 40 Cal 650 at p. 677 : (19 I. C. 129 F.B.). Even if we adopt the view of Sir Gooroodas Banerjee, the position would be that the case of succession to the stridhana property of a degraded woman would be unprovided for in the texts. In such a contingency, the Court would be justified in applying the analogous provisions of Hindu law. Mayne on Hindu Law Edn. 10 S 634 p. 763. In this view also the sister would not be heir to her sister.

[41] It is unprofitable to discuss cases governed by other schools of Hindu law, on the ground that they are founded on theories wholly divergent from those which underlie the Bengal School of Hindu Law.

[42] Even if we assume that Jagannath's view would apply, it is problematical whether the expressions 'father's or mother's kindred include

a widowed and degraded sister under the Dayabhaga School.

[43] The foregoing discussion does not induce us to dissent from the view taken in *Swarnamoyee Bewa's case*, 25 Cal. 254 : (2 C. W. N. 97) which has been consistently followed in Bengal for about half a century.

[44] In my opinion, a degraded woman does not inherit the stridhana property of her degraded sister, under the Bengal School of Hindu Law.

[45] The appellant was, therefore, not an heir to her sister Santamoni. Accordingly the Province of Bengal had locus standi to apply for revocation of the grant of letters of administration to the appellant. The sole contention of the appellant must accordingly be overruled.

[46] The result, therefore, is that the appeal fails and must be dismissed with costs. Hearing fee 5 gold mohurs.

[47] **Guha J.**—I agree.

K.S. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 477 *[C. N. 180.]*

MITTER J.

Kalicharan Ganguly—Plaintiff v. *Rameswarlal Agarwalla—Defendant.*

Ordinary Original Suit No. 4044 of 1949, D/- 5-4-1950.

Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act, (XVII [17] of 1950), Ss. 16 and 18 (1) — High Court in Original Side, if has seisin of pending suits.

An elementary rule of construction of statutes is to reconcile, if possible, the apparent conflict between the two sections. Applying that rule and in order to bring S. 16 into harmony with S. 18 one has to read the word "or" in S. 16 as meaning "and." Unless this is so read, S. 18 will not mean what it says; and further, the section will be entirely robbed of its content, because there is no provision in this cumbrous statute for transfer of pending suits to Courts set out in Sch. B. The High Court in its Original Side has, therefore, seisin of suits which were filed under the West Bengal Premises Rent Control (Temporary Provisions) Act, (XXXVIII [38] of 1948) and were pending when the Rent Control Act of 1950 came into force. [Para 14]

Sridhar Chatterjee — for Plaintiff.

T. P. Das — for Defendant.

Judgment.—This is a suit for ejectment on the ground of the tenancy having been determined *ipso facto* by reason of default in paying rent for three successive months. The suit was filed in September 1949 when the West Bengal Premises Rent Control Act of 1948 was in force.

[2] The plaintiff let out the premises concerned to the defendant as a monthly tenant with effect from 1st November 1948 at a rent of Rs. 200 per month. The terms of the tenancy were incorporated in a document which was executed on 17th October 1948.

[3] The plaintiff's case is that the defendant was very often in arrears with his rent and that he failed to pay any rent for June, July and August 1949. It was a term of the tenancy that rent should be paid in advance on or before the 15th of the current month. The defendant having thus defaulted in paying rent for three consecutive months, the plaintiff filed the present suit on 21st September 1949.

[4] The defendant's case as pleaded is that at the time of the agreement setting out the terms of the tenancy he paid to the plaintiff Rs. 1000 as *salami* and Rs. 100 as pleader's fees in connection with the agreement. According to him, he was subsequently advised that the payment of a *salami* was illegal and that the said sum of Rs. 1000 was refundable. His case further is that when in June 1949 he threatened the plaintiff with legal proceedings to recover the said amount, the parties, agreed that the said *salami* and the advance deposit of Rs. 200 which the defendant had paid to the plaintiff would be set off against rent for the months of July to December 1949. Thus according to the defendant, no rent was due to the plaintiff at the date of the institution of the suit. This case is set out both in para 8 of the defendant's affidavit sworn on 4th January 1950 and in para. 4 of his written statement. The said affidavit was used in opposition to the plaintiff's application for summary judgment under Chap. 13A, Original Side Rules.

[5] By the time the suit came up for hearing, the West Bengal Premises Rent Control (Temporary Provisions) Act XVII [17] of 1950 had become law. In view of this legislation I have allowed an issue to be raised as to jurisdiction.

[6] The following are the issues :

(1) Has the Court jurisdiction to try this suit ?

(2) Is the suit maintainable ?

(3) Is the defendant in arrears in respect of rent since June 1949 or at all ?

(4) To what relief, if any, is the plaintiff entitled ?

(His Lordship after discussing the evidence disposed of issue 3 in favour of the plaintiff and proceeded :)

[7-12] As to issue 2, namely, whether or not the suit is maintainable, Mr. T. P. Das's contention was that the deposit of Rs. 200 had been agreed to be held as rent for the last month of the tenancy and that therefore there was no default in paying rent for three consecutive months. On that footing, according to Mr. Das, there was default for two successive months at the date of the institution of the suit. The answer to this contention is to be found in the agreement itself which by para. 12 provides :

"This amount will be regarded as being the rent for the final month when the tenant vacates the premises as aforesaid."

That being so, the defendant cannot take advantage of the said deposit in order to avoid

default for three successive months. The deposit having been held as rent for the last month of occupation, the tenancy had been *ipso facto* determined before the institution of the suit. Issue 2 is therefore answered in the affirmative.

[13] Mr. Sridhar Chatterjee appearing on behalf of the plaintiff argued that in view of the definition of the word "tenant" in S. 2 (11) of the new Act S. 16 has no application to a suit such as this. Section 2 (11) is as follows :

"'Tenant' means any person by whom rent is, or but for a special contract would be, payable for any premises, and includes any person who is liable to be sued by the landlord for rent."

This definition is materially different to that under the old Act, by S. 2 (11) of which the word 'tenant' was defined as follows :

"'tenant' means any person by whom, or on whose account, rent is, or but for a special contract would be, payable for any premises and includes a legal representative, as defined in the Code of Civil Procedure, 1908 of the tenant and a person continuing in possession after the termination of a tenancy in his favour."

As under the new Act a tenant does not include a person continuing in possession after the termination of a tenancy in his favour, the defendant, whose tenancy had been validly determined under the old act by reason of default is not a tenant within the meaning of S. 2 (11) of the new Act. Section 16 speaks of a suit by a landlord against a *tenant* in which recovery of possession is claimed. According to the new definition of the word 'tenant,' this suit can no longer be treated as a suit against a tenant, but must be regarded as a suit against a trespasser; although under the old Act, having regard to the definition of a 'tenant' the suit was a suit by a landlord against a tenant As Mr. Chatterjee does not press for eviction, it is not necessary, in my view, to decide this point.

[14] I now turn to the consideration of the issue as to the jurisdiction of this Court to try this suit. The question for determination is what is the position of pending suits in view of the West Bengal Premises Rent Control (Temporary Provisions) Act XVII [17] of 1950? Sections 16 and 18 are the two relevant sections for the purpose. The words 'no other Court shall be competent to entertain or try such suit" in S. 16, except those Courts set out in Sch. 'B,' seem to nullify the effect of the words "the tenant may apply to the trial Court within 60 days ....." occurring in sub s. (1) of S. 18. An elementary rule of construction of statutes is to reconcile, if possible, the apparent conflict between the two sections. Applying that rule and in order to bring S. 16 into harmony with S. 18, one has to read the word 'or" in S 16 as meaning 'and.' The word 'or' is not always disjunctive. Here the word 'or' seems to me to be interpretative or expository of the former word 'and.' Unless this is so read, S. 18 will not mean what it says; and further, the section will be entirely robbed of its content, because there is no provision in this cumbrous statute for transfer of pending suits to Courts set out in Sch. B. This is an obvious lacuna in this statute of dark prolixity. That being so, unless effect is given to the plain words of S. 18, there will be a complete deadlock in the practical working of the Act For these reasons, I am clearly of opinion that the High Court in its Original Side has seisin of all pending suits and the new Act does not take away its jurisdiction to try these suits. A pending suit such as this, is however to be disposed of in the manner expressly provided for in S 18. Sub-section (5) of S. 18 is as follows :

"(5) If at the date when this Act comes into force, a suit for ejectment of a tenant is pending whether in trial Court, or in Court of first or second appeal in which no decree for ejectment would be passed except on the ground of default in payment of arrears of rent under the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act (XXXVIII [38] of 1948) the Court shall exercise the powers of granting relief against ejectment given by S. 14 of this Act following the provisions and procedure of that section as far as may be necessary, and for the said purpose shall make such order for amendment of pleadings, production of evidence, remand, payment of costs as may be necessary or just."

Section 14 provides for protection against eviction in certain circumstances A reference to Ss. 12, 14 and 18, which must be read together shows that the relief of absolute ejectment open to a landlord under the old Act has now been amended to one of conditional ejectment, the condition being that if within the time expressly mentioned in the statute, namely, a fortnight, the tenant pays up all arrears of rent together with interest, then he should be allowed to continue to occupy the premises as a tenant. This position is accepted by both parties. That being so, the plaintiff is entitled to a decree for Rs. 2000 being arrears of rent upto the end of last month Accordingly, I order that the defendant should pay to the plaintiff the said sum of Rs. 2000 together with interest at the statutory rate on the fifteenth day from the date of this order excluding the date of the order. The defendant must pay the costs of the suit.

[15] My attention has been drawn to the concluding portion of S. 14 which requires that the Court

"shall make an order on the tenant for paying the aggregate of the amounts (specifying in the order such aggregate sum) on or before a date fixed in the order."

On the Original Side, it is not possible for any Judge to arrive at an aggregate sum which will include the costs of the suit. Any figure that I may mention as costs can only be an arbitrary figure and must work to the prejudice of one of the parties. The absence of such an order as to

costs is an advantage to the defendant who is concerned to retain his tenancy with least payment. The order as to costs must be separated from the order as to payment of arrears of rent together with interest. The defendant must, therefore, pay the costs of this suit when taxed. In default of the payment of Rs. 2000 together with interest at the statutory rate within the time mentioned, there will be a decree for possession.

V.R.B. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 479 *[C. N. 181.]*

SEN AND K. C. CHUNDER JJ.

Shew Narayan Singh — Defendant — Petitioner v. *Brahmanand Singh and others — Plaintiffs — Opposite Party.*

Civil Revn. Case No 1832 of 1949, D/ 2-6-1950.

Civil P. C. (1908), O. 1, R. 3 and O. 2, R. 3— Different causes of action against different parties —Joinder of, in one suit —When allowed —*A* suing *B* on breach of contract and *C*, *D* and *E* for damages for tort of conspiracy with *B* to bring about the breach in one suit—Suit not bad for multifariousness.

A sued *B* for damages for breach of contract to supply certain number of bricks. Later on, *A* came to know that *C*, *D* and *E* conspired with *B* to bring about the breach of the contract. He therefore obtained leave to join them as defendants in the suit along with *B* and alleging the conspiracy, claimed the same amount of damages jointly and severally against them also. It was contended that the suit was bad for multifariousness as two entirely different causes of action which were not common to all the defendants were joined together in one suit :

Held that the suit was properly framed and there was no misjoinder of parties or causes of action; [Para 7]

That the suit clearly fell within the provisions of O. 1, R. 3 as the relief arose out of the act of causing breach of contract, right to relief was available against all the defendants jointly, severally or in the alternative and the same question namely breach of contract would be common to all the suits if they were separately filed; [Para 9]

That O. 1, R. 3 is not confined to joinder of parties only but that it also embraces joinder of causes of action against different parties, and that O. 2, R. 3 must not be interpreted so as to override or render nugatory the provisions of O. 1, R. 3. It is, therefore, permissible to join different causes of action against different defendants in one suit so long as the stipulations set out in O. 1, R. 3 are complied with; [Para 12]

That the breach of contract was the question of fact which affected all the defendants. It was therefore a common question of fact which had to be proved against all the defendants in the suit. Though it was true that even if this common question of fact was proved, an additional fact, viz., conspiracy was required to be proved if the added defendants were to be made liable, it did not matter as O. 1, R. 3 did not stipulate that all the questions of fact arising in the suit must be common. It was sufficient if one common question of fact arose : A. I. R. (5) 1918 Cal. 858, *Rel. on.* [Para 15]

That though the claim against *B* was based on the breach of a contractual right while the claim against the other defendants was based on the breach of a common law right, the right to relief was available in respect of both sets of defendants because the contractual right has been infringed. If it had not been infringed no question of tort would arise. In such a case one suit against all was permissible : A. I. R. (25) 1938 Rang. 185, *Rel. on; Case law discussed.* [Para 18]

Annotation: ('44 Com) Civil P. C , O. 1, R. 3, N. 2, Pts. 10, 11 ; O. 2, R. 3, N. 9,

Chandra Sekhar Sen and N. C. Talukdar — for Petitioner.

Dwijendra Nath Das — for Opposite Party.

Sen J. — The facts giving rise to this rule briefly are as follows : The present plaintiffs are the heirs and legal representatives of the original plaintiff Bishwanath Singh. For the sake of brevity and convenience I shall deal with this rule as if Bishwanath Singh is still alive and shall describe him as the plaintiff.

[2] The plaintiff instituted a suit in the Court of the Second Subordinate Judge, Hooghly against Ram Narain Singh for damages for breach of contract, alleging that Ram Narain Singh had entered into a contract with him agreeing to supply him with 10 lakhs of manufactured bricks in return for 250 tons of coal which the plaintiff would supply to him. The plaintiff carried out his part of the contract but Ram Narain Singh in collusion with one Bindeswari Singh removed a large number of bricks which were manufactured by Ram Narain Singh for the purposes of the contract. In spite of repeated demands Ram Narain Singh refused to perform his part of the contract and the plaintiff claimed damages to the extent of Rs. 20,000 for breach of contract. This was the suit as originally framed. Thereafter the plaintiff applied for attachment before judgment of the bricks and at this stage he came to know that the defendant Ram Narain Singh Bindeswari Prosad Singh, Hazari Singh, Rajen Singh and Thakur Shew Narayan son of Bindeswari Prosad had conspired together and pursuant to that conspiracy, Ram Narayan Singh broke the aforesaid contract. Having obtained this knowledge the plaintiff applied to amend his plaint by alleging this conspiracy and by adding Bindeswari Singh Hazari Singh, Rajen Singh and Thakur Shew Narayan as defendants. He amended his claim by claiming Rs. 20,000 as damages against all the five defendants. The application was rejected by the Subordinate Judge. The plaintiff then moved this Court but did not make the defendants proposed to be added parties to this rule. The rule was heard ex parte and made absolute, the amendments were allowed and the proposed defendants were made defendants 2-5. These defendants then applied to this Court for expunging their names from the record. This Court held that they had no *locus standi* in the rule as they were not parties at

the time when the rule was disposed of and rejected the application. This Court stated that these added defendants were not bound by the order and it was open to them to agitate the matter before the trial Court. This last order was passed by my brother Chunder. The added defendant 2 then applied before the Subordinate Judge for striking out the names of the added defendants. The learned Judge has refused the application stating that no good ground has been made out for striking out the added defendants' names. Against this order the present rule has been obtained by the defendant Thakur Shew Narayan praying that his name and those of the other added defendants be struck out.

[3] The only question which falls for decision in this rule is whether the plaintiff should be allowed to amend his plaint in the manner stated above and add the petitioner and the other three persons viz., Bindeswari, Hazari Singh and Rajen Singh as defendants in the Suit.

[4] The contention on behalf of the petitioner is that the amendment to the plaint and the aforesaid addition of parties makes the suit bad for multifariousness and that this course is not sanctioned by the provision of the Code of Civil Procedure In developing this argument learned advocate points out that the plaintiff's claim against the defendant 1 Ram Narayan Singh is one for breach of contract whereas his claim against the others is for damages for the tort of conspiracy. These claims, he argues, are based on different causes of action which are not common as against all the defendants and therefore they cannot be united in the same suit. He refers to O. 2, R. 3 (1), Civil P. C., which is in the following terms

"Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit."

[5] On behalf of the plaintiff opposite party learned advocate argues that the plaintiff bases his case on one material fact viz., the breach of the contract made between him and the defendant 1 Ram Narayan Singh. This breach was brought about by all the defendants in conspiracy and therefore it was permissible to sue all the defendants for relief in one suit. He relies for this contention on the provisions of O. 1, R. 3 which is in the following terms :

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise."

[6] I must say at the outset that the judgment of the Court below is not of much assistance to us. The points raised have not been discussed and the application has been disposed of by saying that no reason had been shown why the amendment or addition of the defendants should not be allowed.

[7] In my opinion the suit is properly framed and there is no misjoinder of parties or causes of action. Before dealing with the case law on the subject I propose to consider the matter by reference to the words of the relevant provisions of the Code of Civil Procedure. I have already quoted O. 1 R. 3. In my opinion this suit clearly falls within its provisions. The first point to be determined is whether the 'right to relief' claimed by the plaintiff is 'in respect of or arising out of the same act or transaction or series of acts or transactions.' The relief claimed by the plaintiff is damages. The damages claimed is in respect of the breach of the contract between him and Ram Narayan Singh. So far as Ram Narain Singh is concerned, the breach alone is sufficient to afford relief. As regards the other defendants in addition to the breach the plaintiff must prove that there was a conspiracy between them and Ram Narain Singh to cause the aforesaid breach. But there can be no claim for damages against any of the defendants unless there has been a breach of contract and the plaintiff claims one sum and one sum only against all the defendants, viz., compensation for this loss occasioned by the breach. Separate sums are not claimed for breach of contract and for tort. Thus the relief or damages arises out of the act of causing the breach of contract. To me it seems clear that the relief is undoubtedly "in respect of or arising out of the same act or transaction" or at any rate out of "the same series of acts or transactions." The act or transaction or the series of acts or transactions is the breach of contract and its attendant circumstances, viz., the conspiracy to commit the breach. Thus one part of O. 1, R. 3 is satisfied.

[8] Next it must be established that the right to the relief must exist against all the defendants "jointly severally or in the alternative." Now the plaintiff, if he succeeds, is entitled to get damages against all the defendants jointly and severally or in the alternative. All and each of the defendants would be liable to pay damages if it is proved that the contract was broken as a result of the conspiracy alleged. If the conspiracy is not proved but the breach of contract only is proved the plaintiff would have the right to get damages in the alternative against defendant 1 Ram Narayan Singh only. Thus the right to relief is available against all the defendants jointly, severally or in the alternative.

[9] The last essential required by O. 1, R. 3 is contained in the words "where if separate suits were brought against such persons, any common question of law or facts would arise". Let us assume separate suits being brought against each of the defendants; would then a common question of fact arise? In my opinion, it certainly would. The vital question, viz., the breach of the contract would have to be proved in each and every case, O. 1, R. 3 does not stipulate that all the questions of law or fact must be common to the defendants. It is sufficient if one common question arises. I realise that the common question must be a substantial one affecting the subject-matter of the suit. In the present case the breach of contract is the very foundation of the suit. If it is not proved the whole suit would fail. This question, viz., the breach of the contract would be common to all the suits if separate suits were instituted against each of the defendants. I am of opinion, therefore, that all the requisites mentioned in O. 1, R 3 are present in this case and that a suit like the present one is sanctioned by the provisions of O. 1, R. 3.

[10] It is argued on behalf of the petitioner that O. 1, R. 3, is merely permissive and that a suit, even if it complied technically with the provisions of the rule should not be permitted if it causes embarrassment or injustice to the parties. This is perfectly correct. The Court may in such case direct that the plaintiff should confine his suit to particular parties on grounds of convenience or it may make suitable orders in order to protect any of the defendants from incurring unnecessary costs by directing them to appear at certain stages only of the suit where their presence was necessary, e. g., the Court may try certain issues preliminarily in the presence of only defendants who are immediately concerned in the determination of those issues. In the present case, however, these considerations do not arise. It is of utmost importance to all the defendants to show that there was no breach. If they succeed in this all of them would be exempt from the plaintiff's claim. Once the breach is proved all the defendants would be involved in the issue regarding conspiracy. I realise that even if the breach of contract is proved that the added defendants would not be liable unless conspiracy is proved. In the investigation regarding whether there was a conspiracy or not all the defendants, however, would be interested. Thus it would be proper and convenient, if not necessary, for all the defendants to be present throughout the suit. In this connection I would refer to O. 1, R. 5 which says that

"It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him."

This rule indicates the extent to which the law of procedure has gone to prevent multiplicity of suits. It shows that defendants may be joined even if the claims against them are different in extent or in nature so long as the provisions of O 1, R. 3 are complied with.

[11] I shall now take up for consideration the argument that O. 2, R. 3, Civil P. C. prohibits a suit of this description. It was argued that whereas O. 1, Rr. 1 and 3 deal with joinder of parties, O. 2, R. 3 deals with joinder of different causes of action and that as the present case was one of a joinder of different causes of action O. 2, R. 3 and not O. 1, R. 3 would apply and that by reason of the provisions of O. 2, R. 3, the suit as framed was not maintainable.

[12] I shall assume for the moment that the plaintiff's cause of action against defendant 1 Ram Narain Singh is different from his cause of action against the other defendants. Read in isolation O. 2, R. 3 does not permit a suit of this description. The rule permits the joining of several causes of action in one suit against one defendant or one group of defendants jointly. It does not sanction a single suit when the cause of action against one defendant is different from the cause of action against another. But it has been held in numerous cases that O. 1, R. 3 is not confined to joinder of parties only but that it also embraces joinder of causes of action against different parties. It has been further held that O. 2, R. 3 must not be interpreted so as to override or render nugatory the provisions of O 1, R. 3. This view was taken in the case of *Ramendra Nath* v. *Brojendra Nath*, 45 Cal. 111 : (A. I. R (5) 1918 Cal. 853). I am relying on this case at present for no other purpose than that of showing that although a suit as framed may not be in accordance with the provisions of O. 2, R. 3, nevertheless, it would be maintainable if it complied with the provisions of O. 1, R. 3 and for the purpose of showing that O. 1, R. 3 deals not only with joinder of parties but also with joinder of causes of action. In other words, I rely upon this case for the proposition that it is permissible to join different causes of action against different defendants in one suit so long as the stipulations set out in O. 1, R. 3 are complied with. The English cases which interpret a similar rule contained in O. 16 of the R. S. C. rules are dealt with in this case and it is, therefore, unnecessary for me to deal with the English cases on this point separately. I can do no better than reproduce the remarks of Woodroffe J. at pages 122-124:

"On the merits the question is this. The frame of the suit is admittedly not supported by O. 2, R. 3. It is then said that it is justified by O. 1, R. 3. To this it is replied firstly, that this last rule deals with parties and not joinder of causes of action, and in the alter-

native and on the supposition that it does deal with joinder of causes of action, the present case does not on the facts fall within the rule. Order 1 is headed 'parties' and O. 2 'frame of suit.' The question of parties involves that of cause of action and *vice versa* A person is made a party because there is a cause of action against him; and where causes of action are joined, parties are joined. In a perfectly framed Code which dealt in separate chapters with parties and causes of action, the provisions should be exactly parallel, looking at the same matter from its different aspects in a way according to which the provisions of one Order would be in conformity with the provisions of the other. So much may be conceded, and if the solution of the question were doubtful, one might have hesitated on this ground to hold that a suit might be framed under O. 1 in a manner not provided for by O. 2, which, according to its heading, specifically deals with the frame of a suit. But in the present case we have to deal with the wording of a rule, the meaning of which has been construed. There are decisions of the English Courts on rules from which our own are taken. These decisions are subsequent to the year 1896, when O. 16, R. 1 was amended. It has been held that that order deals not only with joinder of parties but also joinder of causes of action, notwithstanding that O. 16 like O. 1 is headed parties only (*Compania Sansinena DeCarnes Congeladas* v. *Houlder Bros. & Co. Ltd.*, (1910) 2 K. B. 354 : (79 L. J. K. B. 1094). *Bullock* v. *London General Omnibus Co.*, (1907) 1 K.B. 264 at pages 271, 272 : (76 L. J. K. B. 127), *Markt & Co., Ltd.* v. *Knight Steamship Co., Ltd.*, (1910) 2 K.B. 1021 at p. 1036 : (79 L. J. K. B. 939) and *Times Cold Storage Co.* v. *Lowther and Blankley*, (1911) 2 K. B. 100 at p. 107 : (80 L, J. K. B. 901).

This, notwithstanding incidental observations to a contrary effect in *Thompson* v. *London County Council*, (1899) 1 Q. B. 840 at p. 842 : (68 L. J. Q. B. 625), is not disputed before us. The decisions in the Bombay High Court given in 1908 and referred to in *Mt. Jankibai* v. *Shrinivas Ganesh*, 38 Bom. 120 : (A. I. R. (1) 1914 Bom. 193) do not refer to the latest English decisions. It is conceded before us that it cannot be now contended that O. 16 from which O. 1 is taken does not refer to joinder of causes of action. These decisions were on O. 16, R. 1 corresponding to O. 1, R. 1 but are equally applicable to O. 1, R. 3 which is in exactly the same terms as O. 1, R. 1 substituting the word "defendant" for "plaintiff." Indeed, in England where the rule relating to the joinder of defendants is in differing terms from that relating to joinder of plaintiffs it has been held that they should be interpreted on similar principles. It must be held then that O. 1, R. 3 does refer to joinder of causes of action . . . ."

[13] After discussing the English cases in respect of O. 16 of the R. S. C., Mookerjee J. at p. 134 observes as follows :

"The matter is one essentially of substance and not of form, as Romer L. J. observed in *Frankenburg* v. *Great Horseless Carriage Co.*, (1900) 1 Q. B. 504 : (69 L. J. Q. B. 147) and I am not prepared to put a narrow construction upon the provisions of Order 1. On the one hand, we have the fundamental principle that needless multiplicity of suits should be avoided; on the other hand, we have the equally essential principle that the trial of the suit should not be embarrassed by the simultaneous investigation of totally unconnected controversies. The legislature has effected a compromise of these two principles by means of the rules embodied in Orders I and II which may possibly overlap to some extent in their application to concrete cases. It is not the function of the Court, however, to determine how far the rules are appropiate we are bound to interpret them in their natural sense and apply them to the circumstances of each case. I hold, accordingly, that O. 1, R. 1 and O. 1, R. 3 apply to questions of joinder of parties as also of causes of action, and I respectfully dissent from the contrary view adopted by Davar J. in *Umabai* v. *Bhau Balwant*, 34 Bom. 358 : (3 I. C, 165) and *Mt. Jankibai* v. *Shrinivas Ganesh*, 38 Bom. 120: (A.I R. (1) 1914 Bom. 193) without examination of or reference to the later decisions in England as to the scope and meaning of the corresponding rules in that system."

[14] We are bound to follow this principle which, I would say with respect, is the correct one, there is no decision of this Court, so far as I am aware, where a contrary view has been taken of this rule as it emerged after amendments in 1908.

[15] Next it was argued on behalf of the petitioner by Mr. Sen that there is no common question of law or fact affecting all the defendants in this suit. He contends that a common question of fact means a question of fact of such a kind that if it is decided in favour of the plaintiffs it would make all the defendants liable. He points out that if the plaintiff succeeds in proving only a breach of contract, he would not get damages against the added defendants. He would get relief against the original defendant alone. To succeed against the other defendants he would have to prove conspiracy as well. Thus he argues there is no single fact or group of facts which if proved would entitle him to relief against all the defendants and, that being so, it cannot be said that there is a common question of fact. In my opinion this argument is fallacious. I would test its validity in this way. Suppose the plaintiff failed to prove a breach of contract would not the suit fail against all the defendants ? It surely would. Thus the breach of contract is a question of fact which affects all the defendants; it is therefore a common question of fact which must be proved against all the defendants in the suit. It is true that even if this common question of fact is proved an additional fact viz., conspiracy must be proved if the added defendants are to be made liable but this does not matter. Order 1, R. 3 does not stipulate that all the questions of fact arising in the suit must be common. It is sufficient if one common question of fact arises. I realise that this common question must be one which is not an inessential or trivial question upon which nothing turns. It must involve an important fact which forms the basis of the suit. The alleged breach of contract is certainly such a basic fact. The wording of the rule is quite clear on the point and any reference to case law is hardly necessary. There are however cases in which this question has been considered and decided which support my view. I would refer again

to the case of *Ramendra Nath* v. *Brajendra Nath*, 45 Cal. 111: (A I.R. (5) 1918 Cal. 858) where Mookerjee J. at pp. 135 and 136 makes the following observations:

"As regards the second test, it is clear that if different suits were instituted, at least one common question of fact would arise, namely, the exact nature of the act imputed to Brajendra Nath Dass, which would have to be investigated, presumably on the same evidence separately adduced in several suits. Here, again, it is important to observe that the Code does not require that all the questions of law or fact which arise should be common to all the parties. The contention of the respondents was, in fact, based upon two fallacious assumptions, namely, first, that the rules require that each of the defendants should have been concerned in all the transactions, and, secondly, that, if different suits were brought, no question would arise in which all the defendants were not interested. There is clearly no foundation whatever for either of these assumptions."

[16] I would also refer to the observations of Woodroffe J. in the same case at pp. 124-125:

"The next question then is whether the joinder in the present case is justified by that rule. It is contended that it is not, it being argued that there are different sets of transactions and no common question of law or fact. The foundation of the case, on which the rest of it depends, is the alleged fraud of B. N. Dass. If such fraud is proved the question is, did the defendants who all claim under B. N. Dass obtain any title? *If the plaintiff fails to prove fraud on the part of B.N. Dass, the case fails against all the defendants. If he proves fraud, it may be that the defendant may have a different answer by way of defence; but that does not make the case any the less one of a common question of law and fact.* The same act or transaction which concerns all parties is the alleged fraud of B. N. Dass, and this involves a common question of law or fact. All defendants have derived title from a person who is alleged to have obtained the goods by means of fraud. By reason of this, the possession of all is alleged to be wrongful. Whether a common question arises may be tested by seeing what the evidence will be. In the shorthand notes Chitty J., expressed the opinion that the evidence will be common and that if there were separate suits, they might be heard together with consent. In the judgment the learned Judge qualified this statement by saying that this was true up to a point. It is true so far as the plaintiff's cause of action, as based on the fraud of B.N. Dass, is concerned though there may be some facts which are particular to particular parties being offered in proof of the plaintiff's case (e. g. present possession of the goods as a result of such fraud) or by the defendants as part of their defence. The rule does not say that all questions must be common."

[17] The same view was taken by this Court in the case of *Harendra Nath* v. *Purna Chandra* 55 Cal. 164: (A.I.R. (15) 1928 Cal. 199). I would refer particularly to the passage appearing at p. 171 where Mukherjee J. quotes certain observations of the Court of appeal in *Payne* v. *British Time Record Co. Ltd.*, (1921) 2 K.B. 1: (90 L. J. K. B. 445) to the following effect:

"Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried."

[18] The last argument on behalf of the petitioner may be stated thus. The cause of action against the original defendant is based on contract while the cause of action against the other defendants is based on tort. Causes of action so differently based cannot be joined. I am not prepared to accept this view. There is nothing in the provisions of the Code of Civil Procedure which supports it. As pointed out above the Code permits a joinder of different causes of action against different defendants. The fact that so far as the different defendants are concerned, their liability arises out of their different legal relationsbips with the plaintiff would not, in my opinion, bar this suit and drive the plaintiff to institute separate suits. Order 1, R. 3 and O. 2, R. 4 are directed towards avoiding multiplicity of litigation. What would be the result of giving effect to the view propounded? The plaintiff would first have to institute a suit, against defendant 1 alone and establish a breach of contract. If he succeeded in so doing, he would then have to institute another suit against defendant 1 and the added defendants and again establish, first, the breach of the contract because the other defendants not being parties to first suit would not be bound by any decision arrived at therein; he would also have to establish conspiracy. It may be that in the second suit the added defendants may succeed in showing that there was no breach of contract. This would lead to conflicting decision on the same issue. It is to avoid such anomalies and inconsistencies that the Code has provided that one suit is permissible. It is true that the claim against defendant 1 is based on the breach of a contractual right while the claim against the other defendants is based on the breach of a common law right, but the right to relief is available in respect of both sets of defendants because the contractual right has been infringed. If it had not been infringed no question of tort would arise. In such a case one suit against all is in my opinion permissible. This view has been taken by a Special Bench of the High Court at Rangoon in the case of *P. B. Bose* v. *M. R. N. Chettyar Firm*, A. I. R. (25) 1938 Rang. 185 at p. 188: (1938 Rang L. R. 303 S. B.) Dunkley J. observes:

"The learned Judge appears to have thought that there was a misjoinder of defendants in the original suit, and that a decree based on a breach of contract against one defendant and a decree for damages in tort against another defendant cannot be made in the same suit. With the greatest respect, this is a misconception of the law. There was no misjoinder of defendants in this case; the provisions of O. 1, R. 3, Civil P. C., cover the joinder of the three defendants in the suit

in the Towship Court. There is no reason why a decree for damages for breach of contract against one defendant and a decree for damages in tort against another defendant should not be passed in the same action; in *R. T Grant v. Australian Knitting Mills Ltd.*, (1936) A. C. 85 : (A. I. R. (23) 1936 P. C. 34) the Privy Council made a decree against the retailer of the underwear for breach of contract and against the manufacturer of the underwear in tort."

The Privy Council decision is *R. T. Grant* v. *Australian Knitting Mills Ltd.*, and it is also reported in A.I.R (23) 1936 P. C 34. The Privy Council upheld a decision of the Australian Court awarding damages in the same suit against a retailer for breach of contract and against the manufacturer for the negligence of tort. I would refer to p. 39 of the report where the Lordship said :

"The liability of each respondent depends on a different cause of action though it is for the same damage. It is not claimed that the appellant should recover his damage twice over."

The claim against both retailer and manufacturer was upheld. This principle would apply to the present case.

[19] I would also refer to the case of *Frankenburg* v. *Great Horseless Carriage Co.*, (1900) 1 Q. B. 504 at p. 509 : (69 L. J. Q. B. 147) where the Court of Appeal refused to give effect to a similar technical objection. They said :

"In substance the shareholder had one grievance. Call it a cause of action or what you like, and in substance he has one complaint and all the persons he sues have, according to him, been guilty of conduct which gives him a right to relief in respect of that one thing which they have done, namely, the issuing of a prospectus."

The position here is the same. The plaintiff has one grievance viz : that the contract has been broken and he alleges that all the defendants have joined or conspired together in causing this breach. I can see no reason why one suit against all should not be allowed.

[20] I do not propose to deal with the cases on this point before the amendment of 1908. There were two lines of thought one favouring the view propounded on behalf of the petitioner and the other in favour of the view I have taken. The one view was taken in the case of *Narsingh Das* v. *Mangal Dubey*, 5 ALL. 163 : (1882 A. W. N. 202 F. B.) and the other view in *Dampanaboyina Gangi* v. *A. Ramaswami* 25 Mad 736 : (12 M.L.J. 103). The amendment of the old law by changing the words "in respect of the same matter" into "in respect of or arising out of the same act or series of acts or transaction" have given effect to the latter view. The case-law on the question before 1908 is in my opinion of little use in determining what the law now is under the Code of 1908 and it would be unsafe and inappropriate to adopt the principles laid down in those cases to cases arising after 1908 when the Legislature amended the Code radically on this question by the provisions of O. 1 and O. 2. We are bound by the decisions interpreting the rules contained in these new orders and these decisions I would respectfully repeat lay down the correct principles of interpretation of these rules.

[21] I hold therefore that the order of the Court below is correct. The rule must be discharged with costs.

[22] **K. C. Chunder J.**—The facts are very simple. (After stating the facts of the case, his Lordship proceeded as follows:) Mr. Sen appearing on behalf of the petitioners, defendants 2 to 5 contended that as there was a misjoinder of defendants and causes of action, defendants 2 to 5 should be dismissed from the suit, and we should decide the point instead of sending the case back to the Court below as all the materials are also before us.

[23] It is unnecessary for me to go into the question when joinder of parties and causes of action are allowed under O. 1 and O. 2, Civil P. C. There are various kinds of joinders and different principles have been applied in different classes of cases. The present case is one of joinder of defendants and causes of action though the plaintiff is the same. I do not want to express any opinion on the law as to misjoinder of defendants and causes of action. Such cases have already been decided by this Court and by the Judicial Committee.

[23a] I agree with the order discharging the rule solely on the special facts and circumstances of this case.

[24] In the present case the cause of action, i. e., the fact in which right to relief, and not mere relief depends against defendant 1 is only that of breach of contract. All that he is interested in is the proof that there was a contract and that the contract was broken by him without just or lawful excuse. He is not concerned at all with the cause of action against the other defendants, namely, the procurement of the breach, and not the actual breach by defendant 1, in their own interest and adverse to the interest of the plaintiff by defendants 2 to 5. In the present case defendant 1 would no doubt be entitled to say that as far as he is concerned he is not at all interested in the cause of action against the other defendants, i. e., whether they or any one else procured the breach and the joining of his case with that of the other defendants may be said by him to be harassing and vexatious to him. But in the case of defendants 2 to 5 the breach of contract by defendant 1 will also have to be proved by the plaintiff in order to get damages. That will, therefore, be a necessary question to decide in the case of all the defendants. Therefore, as far as the case of de-

fendants 2 to 5 is concerned a joinder of their case with those of defendant 1 really does not cause any harassment or vexation to them. I have to point this out as this case is a very special and peculiar nature unlike any other case of misjoinder. Here, all the facts that will have to be proved against defendant 1 will have to be proved in the case of defendants 2 to 5 but not vice versa. Here, the person really entitled to complain of misjoinder and of harassment and vexation is defendant 1 alone. Defendant 1 was a party to the first application before the Subordinate Judge for amendment of plaint and joinder of parties which was then rejected by the Subordinate Judge. He was a party in the revision petition before this Court which revision petition was allowed *ex parte* against him and the joinder and the amendment of the plaint allowed. Since then he has not contested that order. The contest is by other persons, namely, defendants 2 to 4 who would not be in any way harassed and vexed by the joint trial of the claim against them with that against defendant 1, and as far as they, i. e., defendants 2 to 5, are concerned the trial of the suit will not be at all embarassed.

[25] Therefore, in view of the special and very peculiar facts of this case I am of opinion that the order previously passed allowing the amendment of the plaint and the joinder should not be disturbed and defendants 2 to 5 should not be dismissed from the suit and the suit should be allowed to proceed as it is being done now.

[26] The rule is, therefore, discharged with costs.

D.R.R. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 485 *[C. N. 182.]*

R. P. MOOKERJEE AND MITTER JJ.

Bhupendra Nath Mukherjee and another — Judgment-debtors — Appellants v. *Jyosit Mookerji and others—Decree-holders — Respondents.*

A. F. O. O. Nos. 34 and 35 of 1947, D/- 21-9-1949, against order of Sub-Judge, 1st Court Hooghly at Chinsurah, D/- 14-12-1946.

Tenancy laws—Bengal Tenancy Act (VIII [8] of 1885), S. 168A — Non-compliance with, by decree-holder auction-purchaser—Effect.

Where the decree-holder auction-purchaser applies for confirmation of sale without complying with the provisions of S. 168A (3) he thereby enters satisfaction, by implication of the amount which has accrued due to him for the period up to the confirmation of sale and the objection by the judgment-debtor raised after confirmation on the ground that the Court had no jurisdiction to confirm sale as the decree-holder had not fulfilled the imperative provisions of S. 168A must be overruled. [Para 7a]

Apurba Charan Mukherjee and Ganga Narain Chandra — for Appellants.

Sarat Chandra Janah — for Respondents.

Judgment.—These are two appeals on behalf of the judgment-debtors arising out of orders, passed by the Subordinate Judge, Hooghly, disposing of objections raised by them under S. 47, Civil P. C.

[2] The judgment-debtors hold certain Patnis under the decree-holders opposite parties. Two suits were brought by the landlord for the realisation of Patni rent which had fallen due. In September 1944, the suits were decreed: in one case for rent upto the end of 1348 B. S. and in the other upto Ashar 1349 B. S. On 12th March 1945, the landlord decree-holder purchased the Patnis for Rs. 30,000 and Rs. 25,000 respectively, which covered a portion of the amounts due under the decrees, viz., Rs. 42,639 11-9 and Rs. 53,254-10-11½ respectively. On 8th April 1945, some of the judgment-debtors filed applications for setting aside the sale and immediately, thereafter, the landlord moved the Court for the appointment of a Receiver. The two matters were taken up together for hearing on 21st August 1945. After the Subordinate Judge had expressed the view that the application for setting aside the sale was not in a proper form the said petition was withdrawn. The provisions of S. 168A, Ben. Ten. Act had been in force from 8th January 1941; but on 27th August 1945, the sales were confirmed by the Court without requiring the decree-holders to satisfy the provisions contained in sub-s. (3) of S. 168A of the Act. More than 14 months later on 7th November 1946, the present applications were filed on behalf of the judgment debtors under S. 47, Civil P. C., praying for setting aside of the order dated 27th August 1945, confirming the sales. It was maintained that the Court had no jurisdiction to confirm the sales as the decree-holders had not fulfilled the imperative conditions laid down in S. 168A of the Act.

[3] The decree-holders auction-purchasers contend that as the judgment-debtors had come up to the High Court in Appeal (F. M. A. 2 and 3 of 1946) against the order dated 27th August 1945, confirming the sale, and the point now raised had not been urged before this Court before the said appeals were dismissed on 4th July 1946, the judgment-debtors are not entitled to raise this question at this stage. Further the sales having been confirmed the judgment-debtors are not entitled to obtain any relief in the present proceedings.

[4] The learned Subordinate Judge held that as the present objection had not been raised before the confirmation of sale or even in the High Court on the previous occasion he could

not, after the disposal of the appeals by this Court, set aside the orders confirming the sale. But at the same time he held that the provisions of S. 168A (1) (b) and (3), Ben. Ten. Act were mandatory and he made the following conditional order:

"As there has been no deposit or certificate with regard to the rent falling due from the date of the suit till the date of the confirmation of sales, so the decree-holder landlords will be directed to certify satisfaction of this rent within certain date. If they comply with this order of the Court the sales will remain confirmed, otherwise they will be set aside as contemplated in *Amano Barmanya* v. *Uma Charan Das*, 50 C. W. N. 803: (A I.R. (34) 1947 Cal. 330)."

[5] This Court had occasion to consider in *Phani Bhusan* v. *Purna Chandra*, 48 C. W. N. 210: (A.I.R. (31) 1944 Cal. 199) where the word 'purchaser' in cl. (b) of sub-s. (1) and in sub-s. (3) of S. 168A, Bengal Tenancy Act, was not limited to a stranger purchaser only but also included a decree-holder purchaser. The decree-holder purchaser being held to be included within that term a question arose whether such a decree-holder auction purchaser was also bound to make the deposit as under sub-s. (3) of the rent that had accrued due subsequent to the institution of the suit. B. K. Mukerji and Pal JJ. held that in such a case a cash deposit was not necessary but a certificate of payment of the dues made by the decree-holder purchaser would be deemed to be a sufficient compliance of the requirements of this sub-section. It was pointed out that neither party urged before the Court that by reason of the decree-holder himself being the purchaser and thus being made liable by cl. (b) of S. 168A (1) to himself to pay the amount of arrears subsequently accruing due, the obligation itself was discharged by the operation of law. No opinion was expressed on such a contention but the learned Judges proceeded to observe at p. 215:

"It however seems obvious if this be the contention of the decree-holder purchaser the judgment-debtor will have no possible objection to it. He is discharged of the liability all the same and that is all that he is concerned with."

[6] *Amano Barmanya* v. *Uma Charan Das*, 50 C. W. N. 803: (A.I.R. (34) 1947 Cal. 330) is an authority for the proposition that the provisions contained in sub-s. (3) of S. 168A, Bengal Tenancy Act, were mandatory in character which thus imposed a duty upon the Court which had to be discharged by it whenever rent sales took place after that section had come into force. The direction given in that case was to the effect that when the landlord auction-purchaser applies for the execution of a decree for subsequent rent accrued due after the rent sale, the execution Court cannot refuse to execute the decree. The Court should call upon the landlord either to deposit the amount of rent previously decreed in his favour or to enter satisfaction not of the entire decretal dues but the amount actually payable as rent. If the money is paid the judgment-debtor would be entitled to withdraw the amount and pay the same towards the satisfaction of his dues under the decree for rent and the decree will be executed only for the balance of the decretal amount if there remains anything unpaid. If no cash deposit were made by the landlord but the latter certifies partial satisfaction of the decree that he was executing, acknowledging receipt of the amount that is due as rent the effect will be the same. If no payments are made the previous order confirming the sale made by the Court will be set aside and the Execution Case restored to file and proceeded with in accordance with law.

[7] Recently the point now in issue had come up for consideration in *Naresh Chandra* v. *Bhupendra Narain Singh*. Appeal from Original Order No. 138 of 1945: (A.I.R. (37) 1950 Cal. 15) and Appeals from Appellate Orders Nos. 1 and 2 of 1946, decided on 12th May 1949. I was a party to that decision and as the judgment is unreported the conclusions arrived at by us may usefully be quoted here:

"When the decree-holder himself is the auction purchaser the payment of the subsequent arrears which had accrued due is to be made to himself and the said decree-holder is entitled to an order confirming sale by either paying himself or on declaring that the amount due is wiped out. When a decree-holder auction purchaser applies for the confirmation of the sale without either depositing the amount of subsequent arrears or discharging the said dues formally he must be taken to have given up his right to claim such arrears at any subsequent stage. We must be deemed to have done what he was required to do before he could get an order confirming the sale. Under the circumstances when the attention of the executing Court is drawn subsequently to the fact that the sale had already been confirmed without the decree-holder auction purchaser fulfilling the conditions laid down under S. 168A, Bengal Tenancy Act, all that the executing Court need do is to record an order that the total amount of rent, cess and interest which had accrued due up to the date of confirmation is deemed to be satisfied by the decree-holder auction purchaser having applied for such confirmation and the confirmation having been made. Unless the decree-holder auction purchaser files an application entering satisfaction of the dues which had so accrued the Court is, in our opinion competent to declare the said dues as having been satisfied by implication."

[7a] Applying the principles enunciated above we hold that the decree-holders when they applied for the confirmation of the sales they thereby entered satisfaction by implication of the amount which had accrued due to them for the period upto the date of confirmation of sale. The objection raised at this stage about the legality of the order for confirmation is, therefore, overruled.

[8] It may be further noticed that after the order was passed by the learned Subordinate Judge the decree-holders filed a petition stating that the rents falling due from the date of the institution of the suit till confirmation of sale have been wiped off.

[9] These appeals are accordingly dismissed. In the circumstances of this case each party will bear his respective costs in this Court.

D.H. *Appeals dismissed.*

[C. N. 183.]

*A. I. R. (37) 1950 Calcutta 487

R. P. MOOKERJEE J.

Jubilee Bank Ltd. Calcutta — Defendant 2 — Appellant v. *Sm. Santimoyee Debi and others — Respondents.*

A. F. A. D. No. 125 of 1949, D/- 22-12-1949 against decree of A. Sub-Judge, 7th Court, Alipore, D/-17-11-1948.

(a) Provincial Insolvency Act (1920), S. 2 (1) (d) —"Property"—Present disposing power.

The definition of "property" in S. 2 (1) (d) appears to be modelled on S. 60 (1), Civil Procedure Code. Unless the insolvent has got a present disposing power, which he may exercise for his own benefit, over a property, it will not be considered to be one coming within this definition. [Para 8]

Annotation : ('46-Man.) Prov. Ins. Act, S. 2 (1) (d) N. 3.

*(b) Provincial Insolvency Act (1920), S. 44 (2) —Effect of discharge under — Receiver if becomes *functus officio* after discharge of insolvent.

A reading of the provisions of the Provincial Insolvency Act shows that on the adjudication of insolvency of a debtor all the properties which come under the definition of S. 2 (1) (d) of that Act come into the hands of the Court and are subject to any order that the said assets be administered and such of the creditors whose debts can be proved in the insolvency proceedings may get payments *pro rata* from those assets. The Court takes charge of those properties. And the insolvent after fulfilling certain conditions is allowed an absolute discharge. He is given an opportunity to begin his career without any handicap or impediment. The order of discharge is made without any direction being given about the divesting of the properties which had, under S. 28, vested in the Court or the Receiver for distribution amongst the creditors. Even, therefore, after an order for discharge under sub-s. (2) of S. 44 the Receiver in Insolvency does not become *functus officio*: *Case law referred.* [Paras 12, 18]

Annotation : ('46-Man.) Prov. Ins. Act, S. 44, N. 4.

(c) Provincial Insolvency Act (1920), S. 44 (2) — Order of discharge—Its effect on debt.

The effect of an order of discharge under S. 44 (2) is not to extinguish the debts of the insolvent. The only limitation imposed is that the creditors who have got debts provable under the Act can, after the order of discharge, look only to those particular assets which the insolvent was possessed of and had accordingly vested in the Court or the Receiver on the date of the filing of the application for adjudication. The claims of the creditors cannot be directed against any other property which may be acquired by the insolvent after an order of discharge is made : (1922) 1 Ch. 22; (1878) 4 Ex. D. 26, *Rel. on.* [Para 14]

Annotation : ('46-Man.) Prov. Ins. Act, S. 44, N. 4.

C. S. Sen, Biswanath Naskar and Rabindra Nath Mitra—for Appellant.

S. C. Janah and Bhabesh Ch. Mitra — for Respondents.

Judgment.—This is an appeal on behalf of defendant 2 directed against the decision of the Subordinate Judge decreeing the plaintiff's claim that the properties in suit are trust properties and that Defendant Bank be restrained from getting possession thereof or from interfering with the plaintiff's possession in any way and granting further consequential reliefs.

[2] The plaintiff's case is that premises NO. 21/A/1 and 21/A/2, Satis Mukherjee Road, Calcutta, belonged to the estate of Upendra Lal Banerjee who had during his life-time executed a Deed of Family Settlement in May 1933. It is alleged that under that deed the properties in suit vested in the third son of the settlor, Dhirendranath Banerjee who is defendant 3 in the present suit and for his life only. The property had so vested subject to the rights of maintenance and residence of the settlor's surviving daughters and their children. Plaintiff 1 is the wife of defendant 3 and plaintiffs 2-11 are either the minor sons and daughters or the daughters and daughters' sons of the settlor. The plaintiffs allege that they have come to know that defendant 3 had been adjudged an insolvent and that defendant 1 the Official Receiver, 24-Parganas was about to sell the interest of defendant 3 in the properties in suit to defendant 2, Jubilee Bank Limited, which is the appellant before this Court. It was *inter alia* maintained that defendant 3 was merely a trustee, had no saleable interest in the properties and the plaintiffs having the right of beneficial enjoyment thereof defendants 1 and 2 should be restrained from so (*sic*). There had been a further prayer for the issue of a perpetual injunction to restrain defendant 1 from completing the same. But after the filing of the suit and when the temporary injunction was not in force the conveyance evidencing the sale was executed by defendant 1 in favour of defendant 2 on 9th June 1945.

[3] Defendant 2 alleged that the suit was a collusive one, defendant 3 was not a trustee but a full owner of the properties. The plaintiffs were not entitled in law to be maintained out of the income of the properties and that the Defendant Bank was a *bona fide* purchaser for value and entitled to possession. Defendant 3 supported the plaintiff company (*sic*).

[4] On an interpretation of the deed of Family Settlement the Munsif came to the conclusion that the settlor had intended the trust to come to an end on his death. Defendant 3 was found to have a life interest and the same was a saleable one. Further, the plaintiffs were

not entitled to be maintained out of the income of the suit properties and that had no *locus standi* to maintain the present suit which was accordingly dismissed.

[5] On an appeal by the plaintiffs, the learned Subordinate Judge held that defendant 3 had not an interest which was a saleable one and the transfer by the Official Receiver was neither legal nor valid. The direction contained in the deed about the maintenance and for the residence of some of the relations was not of a recommedatory nature and that thereby a charge had been created over the properties in suit in favour of those persons. He also accepted a further contention on behalf of the plaintiffs that after an absolute discharge of the insolvent defendant 3, the Official Receiver had no jurisdiction to effect the sale. This specific point though not raised in the trial Court was allowed to be agitated at the appellate stage. The Court found that the order of absolute discharge had the effect of giving a full release to the insolvent from all debts and liabilities and the authority of the Official Receiver ceased from the time of the discharge. A transfer, if any, purported to have been made after the discharge of the insolvent was without jurisdiction. The plaintiffs were found to have *locus standi* to maintain the suit. The suit was decreed against the Bank defendant 2, it being restrained from getting possession of the premises or from interfering with the plaintiff's possession. Defendants 4 and 5, who are tenants in a portion of the premises were restrained from paying rents to defendant 2. Hence this second appeal to this Court by the Bank, defendant 2.

[6] The arguments advanced on behalf of the purchaser Bank may be broadly divided under two heads: First, that the authority of the Official Receiver to sell the premises in question did not come to an end on the insolvent being discharged by the Court. Secondly, on an interpretation of the deed of family Settlement it ought to be held that the plaintiffs had no interest in the properties and defendant 3, had a saleable interest in those properties.

[7] Defendant 3, had been adjudicated insolvent on his own petition. Under S. 28 (2), Provincial Insolvency Act the whole of the property of the insolvent vested in the Court or in the Receiver when appointed and was divisible amongst the creditors. Under sub s. (4) of the same section, all other properties which might devolve upon the insolvent or be subsequently acquired by him after the date of the order of adjudication and before the discharge, also vested in the Court or Receiver for the same purpose as in respect of properties which the insolvent was possessed of at the time of the application for adjudication. The order of adjudicatinn relates back to and takes effect from the date of the presentation of the application on which the adjudication is made. It is therefore, clear that the properties which defendant 3 was possessed of at the time when the petition for adjudication was filed vested in the Court for distribution amongst the creditors.

[8] "Property" is defined for the purposes of this Act under S. 2 (1) (d) in the following terms:

"Property includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit".

This definition appears to be modelled on S. 60 (1), Civil P. C. Unless the insolvent has got a present disposing power, which he may exercise for his own benefit over a property it will not be considered to be one coming within this definition. As to whether the properties in suit come within the definition will be considered when we take up the second point dependent on the interpretation of the terms of the deed of Family Settlement. We proceed to consider now whether the Official Receiver was competent in law to sell, whatever interest the insolvent had after the order for final discharge.

[9] For considering the question whether the sale on 3rd March 1945 by the Official Receiver was or was not valid we shall have to refer to certain other admitted facts. On an application filed by the defendant 3 on 6th February 1941 he was finally adjudicated an insolvent on 25th April 1941 on which date the Official Receiver, 24 Parganas, was also directed to take charge of the properties as under the Provincial Insolvency Act. On 21st July 1941, a report was submitted by the Official Receiver stating that the properties now in suit were practically valueless and on the next day the insolvent defendant 3 was allowed by the Court to realise directly the rents which were being paid by the tenants from a portion of the said properties. On 13th September 1941 the insolvent made an application for discharge under S. 41 of the Act. This application was not disposed of till about one year later. In the meantime, on 5th December 1941, the learned Judge held that the insolvent had no saleable interest in the properties now in suit. Creditor No. 3 having later on made an offer to purchase whatever rights the insolvent had in that property the learned Judge directed the Official Receiver to put up the properties to sale. Against this order an appeal was taken by the insolvent to the Court of the District Judge and on 13th May 1942 the order for sale was discharged on a finding that the insolvent had no saleable interest in those properties.

[10] The petition for discharge which had been pending from September 1941 came up for hearing in July 1942, after the Official Receiver had filed an objection to the prayer for discharge and had also submitted a further report on 13th June 1942 that the insolvent had no assets except certain properties situate at Modhupur and Gobrapur. On a consideration of the objections raised a conditional order for discharge was passed by the learned Judge on 10th July 1942. The conditions imposed were about sales of the properties at Modhupur and Gobrapur. It was anticipated that the sales of the properties at Madhupur and Gobrapur would be completed before 11th August 1942 and on this latter date an order for absolute discharge was passed. The Official Receiver, however, was directed to continue in respect of the properties of the two places mentioned above. After the order for discharge had been made an appeal was preferred by creditor No. 3 Jubilee Bank Ltd., to the High Court being S. M. A. 266 of 1942 against the order by the learned District Judge holding that the insolvent had no saleable interest in the two houses now in suit. This appeal was disposed of by a judgment delivered on 18th July 1944. It was held that the appeal which had been preferred by the debtor before the District Judge was an incompetent one as the insolvent cannot be aggrieved by the order directing the sale of his interest in the property:

"It appears that he claims to be a trustee on behalf of certain other persons and as such has an interest in the house. His appeal was filed not as an insolvent but in an ouside capacity. In that capacity he is not aggrieved by the order because it is only his personal right as insolvent that will be sold. The order of the lower appellate Court is set aside and that of the Subordinate Judge restored with this modification that the words 'the interest of the insolvent in' will be inserted between the words 'sell' and 'these'."

[11] There was no adjudication as to whether the insolvent had any saleable interest and also whether the present plaintiffs, who were not parties to those proceedings, or any other person or persons had any present right in those properties. After the passing of this order, the Official Receiver reported to the insolvency Court that he had agreed to sell to defendant 2 creditor No. 3 the interest of the insolvent in the properties now in suit for Rs. 8,050. The present suit was filed on 19th March 1945 on which date a temporary injunction restraining further steps proposed to be taken by the Official Receiver were stayed *(sic)*. The plaintiffs' prayer for time during the hearing of the injunction matter being refused on 18th April 1945 the order issuing temporary injuction was withdrawn. The Kobala by the Official Receiver in favour of defendant 2 was executed on 9th June 1945. The order for injunction was restored on 19th June 1945.

[12] It is argued on behalf of the plaintiff respondent that under sub-s. (2) of S. 44, Provincial Insolvency Act the order for absolute discharge passed on 11th August 1942 had, subject to the provisions of sub-s. (1) of S. 44, the effect of releasing "the insolvent from all debts proveable under this Act." It is contended that the Official Receiver cannot function after such an order of discharge. This argument ignores the principles underlying the Bankruptcy Legislation and the purpose for which the Court takes charge of the properties of an insolvent. On a reading of the provisions of the Provincial Insolvency or for the matter of that of similar other bankruptcy statutes all the properties which come under the definition of S. 2 (1) (d), Provincial Insolvency Act come into the hands of the Court and are subject to any order that the said assets be administered and such of the creditors whose debts can be proved in the insolvency proceedings may get payments *pro rata* from those assets. The Court takes charge of those properties but a person being adjudicated an insolvent is also given a chance after he has placed in Court his entire assets for the benefit of his creditors, to start life anew. A person who acts in that manner is allowed an absolute discharge. He is given an opportunity to begin his career without any handicap or impediment. The order of discharge is made without any direction being given about the divesting of the properties which had, under S. 28 Provincial Insolvency Act, vested in the Court or the Receiver for distribution amongst the creditors.

[13] If the interpretation attempted to be placed on S. 44 (2) of the Act be accepted, we have to hold, considered with that view that the assets which had already vested in Court for distribution are also all released or alternatively that until such assets are distributed amongst the creditors no application for discharge ought to be entertained. If as a result of the order for discharge the properties previously belonging to the insolvent revert back to the latter that would not only be most inequitable but would be against the spirit of the statute.

[14] I do not think that the effect of S. 44 (2) extinguishes the debts of the insolvent. The only limitation, imposed is that the creditors who have got debts provable under the Act can, after the order of discharge, look only to those particular assets which the insolvent was possessed of and had accordingly vested in the Court or the Receiver on the date of the filing of the application for adjudication. The claims of the creditors cannot be directed against any other property which may be acquired by the insolvent after an order of discharge is made.

[15] It has been held consistently in a long series of decisions that if at the time when the order for discharge is issued the Court or the Official Receiver has got funds realised from the properties belonging to the insolvent which had vested in the Court or Receiver after adjudication such assets are to be distributed amongst the creditors even after the order for discharge. (*Rowe & Co. Ltd.* v. *Tan Theon Taik*, 2 Rang. 643: (A. I. R. (12) 1925 Rang. 105), *K. P. S. P. P. Firm* v. *C. A. P. C. Firm* 7 Rang. 126 : (A. I. R. (16) 1929 Rang. 168). *Arjundas Kundu* v. *Marchia Telini*, I. L. R. (1937) Cal. 127: (A. I. R. (23) 1936 Cal. 434), *Kriparam* v. *Sawana Ram*, A. I. R. (26) 1939 Lah. 300 : (184 I. C. 472). In *Bishanchand Jagannath* v. *Kishonlal Sheo Singh*, I. L. R. (1939) Nag 478: (A. I. R (26) 1939 Nag. 103). It was not only held that the insolvency proceedings do not terminate with the order of discharge of the insolvent but a decree-holder creditor even if he had not notice of the insolvency proceedings and was not represented in them must seek his relief for recovering his debts from the insolvency Court and out of the assets which are still in the hands of the Court or of the Receiver.

[16] The Courts have gone further and have held that it is not only competent for the Court and the Receiver to distribute the assets which were held by the Receiver or by the Court but the latter can direct the sale of properties which were still held by the Court or by the Official Receiver if there were any other proveable debts still remaining to be paid. *Sukea* v. *Ramchandra Sankar*, I. L. R. (1937) Nag. 380: (A. I. R. (24) 1937 Nag. 171), *Mahangelal* v. *Firm Suraj Prosad Chandulal*, 1938 A. L. J. 1151: (A. I. R. (26) 1939 ALL. 114), *Kanshiram* v. *Hariram* 17 Lah. 775,* *Parsu Vithoba Patil* v. *Balaji Vishwanath Rao*, I. L. R. 1944 Nag. 14: (A. I. R. (31) 1944 Nag. 28). In a recent decision in Madras High Court, *Soma Sundaram Pillai* v. *Official Receiver, South Arcot*, A. I. R. (34) 1947 Mad. 95 : (230 I. C. 213) an insolvent had been discharged and subsequently the insolvent made an application in respect of debts not yet satisfied for relief under the Provincial Debt Relief Act. The Court indicated that even after a discharge order the debts then outstanding as also the properties previously vested under the Insolvency Act continue to remain under the control of the bankruptcy Court. The debts are not payable personally by such an insolvent and the properties also cannot be deemed to be properties belonging to the insolvent. Such an insolvent could not be regarded as a debtor entitled to invoke the aid of the Debt Relief Act for such debts.

[17] The provisions contained in sub-s. (2) of S. 44 is in terms almost similar to S. 28 (2), English Bankruptcy Act of 1944. It has been held that under this Act an order of discharge releases the bankrupt from certain debts provable in bankruptcy but its effect is not to destroy the debt as though it had never been. See in this connection *In re*: *Ainsworth*; *Millington* v. *Ainsworth*, (1922) 1 Ch. 22: (91 L. J. Ch. 51). The object of the Bankruptcy Acts has thus been explained in *Jakeman* v. *Cook* (1878) 4 Ex. D. 26: (48 L. J. Ex. 165):

"One object of the Bankruptcy Act was to enable the debtor who has given all his property for the benefit of his creditor to obtain his discharge was that he might begin the world freed from all his obligation and protected from oppression of creditors. Another object is to prevent fraud by the debtor in giving an undue preference between creditor and creditor and promising to pay after the discharge to the prejudice of the general body of creditors."

[18] The extreme contention as urged on behalf of the plaintiff that after an order for discharge under sub-s. (2) of S. 44, Provincial Insolvency Act, the Receiver in Insolvency becomes *functus officio*, must be overruled. It is, however, further contended that in view of the special circumstances of this case the Receiver had no jurisdiction to sell the property after the order of discharge. It is pointed out that on 21st July 1941, the Official Receiver submitted a report to Court that the properties now in suit were practically valueless and on 5th December 1941, the Court came to the conclusion that the insolvent had no saleable interest in the properties. Immediately thereafter creditor No. 3 offered to purchase whatever rights the insolvent had in this property and the trial Court directed accordingly. On appeal to the Court of District Judge, it was held on 13th May 1942, that the insolvent had no saleable interest. When this order by the District Judge was in force the order for discharge of the insolvent was passed on 10th August 1942.

[19] It is contended that on the date the discharge order was passed it was on the basis that the insolvent had no saleable interest in the properties. The conditional order for discharge which had been passed was for the purpose of collecting the proceedings of two other properties. An appeal had, thereafter, been taken to this Court against the order passed by the District Judge declaring that the insolvent had no saleable interest. Henderson J. set aside the order of the District Judge and restored the direc-

* This seems to be a mistake. The correct citation would be A. I. R. (24) 1937 Lah. 87. The case that is printed as 17 Lah. 775 does not deal with the question under consideration.—*Ed.*

tion for sale previously given by the Sub-Judge with the modification that the sale will be of the interest of the insolvent in the properties in question. After this order of the High Court had reached the lower Court, the sale was arranged for on 3rd March 1945. The present suit was filed on 19th March and a temporary injunction was issued restraining the Official Receiver from executing the conveyance or to complete the transaction. This temporary injunction was withdrawn on 18th April and before it was restored on 19th June, the kobala had been executed by the Official Receiver on 9th June.

[20] In my view the order passed by this Court had the effect of reviving the authority of the Official Receiver to apply the proceedings of this property also for the benefit of the general body of creditors.

[21] The next question for consideration is whether the insolvent had any saleable interest or not, and even if he had a saleable interest whether the sale by the Official Receiver binds or affects the plaintiffs. Exhibit 1, the Deed of Family Settlement, requires a closer examination. The relevant terms are as follows:

"4th .....That after the death of the settlor the Trust Estate more fully described and mentioned in the Schedules 'A', 'B', 'C', 'D' and 'E' hereunder shall vest unto his wife and sons and their respective heirs in the manner and subject to the conditions, charges and uses, hereinafter stated:

* * * *

(d).....The South Eastern portion of the premises No. 60A (1), Satish Mukherjee Road, Sahebbagan, Kalighat consisting of three rooms on the First floor and three rooms on the ground floor together with privies and kitchens as well as the North Eastern Block of P60A (2), Satish Mukherjee Road, Sahebbagan Kalighat consisting of three rooms on the first floor and three rooms on the ground floor together with privies and kitchess hereinafter described in the Schedule 'D' shall vest in the third son of the settlor named Dhirendra Nath Banerjee an insurance agent having not much income to be held and enjoyed by him during his natural life and on his demise during the lifetime of the settlor or thereafter the same premises shall vest in the legal heirs of the said Dhirendra Nath Banerjee absolutely for ever. He may have the option of temporarily residing in the family dwelling house No. 15, Vidyasagar Street with the Settlor's second son Debendra Nath Banerjee on his contributing the income of the property allotted to him for family expenses.

(e).....The family dwelling house and premises No. 15, Vidyasagar Street in Calcutta hereinafter described in the Schedule 'E' shall subject to the following rights of residence and charges vest in the second son of the settlor named Debendra Nath Banerjee who is a Medical Practitioner having practice in that locality with a dispensary in the building to be held and enjoyed by him during his natural life and on his demise either during the life time of the settlor or thereafter the said premises shall vest in the legal heirs of the said Debendra Nath Banerjee absolutely and for ever. And it is hereby declared and expressed by the settlor with the consent of the said Debendra Nath Banerjee. * * * *

5th.....That after the death of the settlor his wife Sreemati Sushila Debi and his four sons Jitendra Nath Banerjee, Debendra Nath Banerjee, Dhirendra Nath Banerjee and Nirendra Nath Banerjee shall support the settlor's surviving daughters and their children who may be dependant on him who may be in helpless and indigent circumstances out of the income of the properties allotted to them respectively and shall provide accommodation for them in their houses, if necessary. They shall have no claim on the properties of the settlor."

Clause 6 is the vesting clause after the death of the settlor. Such vesting is subject to certain conditions.

[22] It is quite clear from the terms of the Deed of Family Settlement that defendant 3 had a limited interest in the property in suit, subject no doubt to the rights of certain other persons. Such interest even if sold cannot affect the rights of the beneficiaries. The question whether on the facts proved the plaintiffs are dependants in helpless condition and whether they are staying in the house have been answered by the learned Subordinate Judge in favour of the plaintiffs. I do not see any reason to disturb that finding.

[23] Although I hold that the interest of Defendant 3, was saleable the plaintiffs are entitled to the declaration that their interest is not affected by the sale. The defendant bank has rightly been restrained from interfering with the plaintiff's possession of the premises in suit.

[24] The appeal is accordingly dismissed. Each party to bear its costs in this Court, Leave to appeal under Cl. 15, Letters Patent has been asked for and is refused.

V.S.B. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 491 *[C. N. 184.]*

SINHA J.

In re Ambica Textiles Ltd.

O. O. C. J. Suit, D/- 9-2-1949.

Companies Act (1913), S. 103 (3) — Provisional contract — Meaning — Pre-incorporation expenses —Contract Act (1872), S. 70.

The word "provisional" in S. 103 (3) means that the contract made by a Company is to be read as if it contained a provision that it shall not be binding on the Company unless and until the Company became entitled to commence business. The section applies to all the contracts of a Company whether preliminary or final or in the course of carrying on its business. The Company is not, therefore, liable for costs and expenses incurred in respect of its formation and promotion and in the case of a Company which never commenced its business, also for the expenses such as stamp and registration fees, postal and other charges and publicity and travelling expenses incurred even after incorporation : (1906) 2 Ch. 390, *Rel. on.* [Paras 12, 13, 15, 16]

Moreover, as the statute prohibits a Company from making a binding contract before the commencement of its business no implication of a promise to pay can be made in respect of the expenses incurred before its incorporation. The expenses of a Company which had

never become entitled to commence its business cannot be said to be for its benefit and hence cannot be recovered under S. 70, Contract Act. [Para 17]

Annotation : ('46-Man.) Contract Act, S. 70, N. 1 and 5 ; ('46-Man.) Companies Act, S. 103, N. 1.

R. Chaudhury — for Official Liquidator.

Samar Sen — for Claimant.

Judgment. — This matter has come before me for settlement of the list of debts and claims.

[2] The Company was incorparated on 5th April 1945. The Company never carried on any business nor was any commencement certificate taken. Certain applications were made for shares in the Company and a total sum of Rs. 78,750 was paid to the Company by intending shareholders. The money received from the shareholders was deposited with the Central Bank of India Ltd., Clive Street Branch, a sum of Rs. 445-14-0 has since accrued as interest on the said deposit.

[3] As the promoters of the Company found it difficult to commence business of the Company, at a meeting held on 10th March 1947 it was resolved that the share money received from the applicants should be refunded in full to the respective applicants. It was also resolved that the Central Bank of India be requested to honour the cheques in respect of such refund by debiting the current account of the Company. The Central Bank of India, however, did not agree to pay.

[4] On 28th April 1947, the Registrar, Joint Stock Company, issued notice under S. 247, Companies Act, for striking out the name of the Company from the register and on 18th September 1947, the Company's name was struck off.

[5] On 31st December 1947, a resolution was passed for voluntary winding up of the Company. The Central Bank of India, however, did not agree to pay out the money deposited in the current account of the Company in the Bank in spite of the said resolution.

[6] On 12th March 1948, an application was made "in the matter of Trustees Act" for distribution of the money lying with the Central Bank of India amongst the share-holders. On 12th April 1948, Das J. treated the application as an application for restoration of the Company under S. 247, Companies Act, and made an order for restoration.

[7] On 15th April 1948, an application was presented for winding up of the Company. On 10th May 1948, the winding up order was made and Mr. G. S. Mukherjee was appointed the Official Liquidator. The Liquidator advertised in the papers inviting claims against the Company. No claim was filed.

[8] On 1st December 1948, I gave directions for filing the list of creditors and contributories.

[9] The Liquidator has filed an affidavit and in Part 1 of Annexure "A" to the said affidavit the names of the intending share-holders who deposited money with the Company for taking shares have been set out. In Part 2 of Annexure "A" the claim of Sharda Agencies for Rs. 7913-5-3 has been set out but the claim is not accepted by the Liquidator.

[10] An affidavit was filed, affirmed on 24th January 1949, by Sharda Agencies, a partnership firm carrying on business at 22, Canning Street claiming a sum of Rs. 7913-5-3. As the affidavit did not disclose sufficient materials, I gave directions for the filing of a further affidavit in compliance with which a fresh affidavit has been filed by Rati Lal.

[11] It appears from the affidavit that Sharda Agencies is a partnership firm and they were appointed the Managing Agents by the Articles of the Association of the Company for a period of twenty years from the date of incorporation at a monthly allowance of Rs. 2000 in addition to a commission on the annual net profits of the Company. It is claimed that the said firm paid Rs. 4008-11-3 under the directions of the Company's Directors on account of the expenses incidental to the formation of the Company. They also claim to have paid Rs. 3904-10-0 on account of expenses after its incorporation and for its management. The relevant vouchers have been annexed to the affidavit.

[12] As regards pre-incorporation expenses, there can be no doubt that they are not payable by the company. It was conceded and, I think rightly, by learned counsel for the claimants that they could not claim pre incorporation expenses in the liquidation proceedings. I, therefore, hold that the Company is not liable for costs and expenses incurred in respect of its formation and promotion.

[13] Learned counsel however contended that expenses incurred by the claimants after incorporation should be allowed. They consist of a stamp and registration fees for registering the company and postal and other charges and publicity and travelling expenses. I am not quite sure whether all these expenses were made after the incorporation. Stamp and registration charges seem to me to be really pre incorporation expenses. Be that as it may, I do not think the claimants are entitled to be paid for these expenses and for the following reasons:

[14] Section 103 (3), Companies Act, provides as follows :

"Any contract made by Company before the date on which it is entitled to commence business shall be provisional only and shall not be binding on the Com-

pany until that date and on that date it shall become binding."

[15] It was held in *In re: "Otto" Electrical Manufacturing Co. Ltd.* (1906) 2 Ch. 390 :(75 L. J. Ch. 682) under the corresponding section of the English Act that the section applied to all contracts of a company, whether preliminary or final or in the course of carrying on its business.

[16] In that a case, one Mr. Jenkins bought some furniture for £240 and put it into an office which he took for the company. He claimed the money. The claim was disallowed as the Company had never become entitled to commence business. Buckley J., said as follows:

"How does he claim? Obviously in contract; he claims upon this ground that, expressly or by implication, the Company promised to pay him for the furniture if he would pay the furniture dealer for it. Of course, that is contract. The Act of parliament says that that contract is not binding on the Company, and he cannot sue here. The other claims are for moneys which he advanced to a man to come up to town when he was going to serve the Company, and other payments of a like kind. They are all claims in contract. In my judgment he cannot be heard to say that there was such a contract; the Act of Parlirment forbids it."

He also observed that the word "provisional" in section means that the contract is to be read as if contained a provision that it shall not be binding on the company unless and until the Company became entitled to commence business.

[17] Mr. Sen contends that under S. 70 of the Indian Contract Act, his clients are entitled to claim expenses incurred after the incorporation of the company. I do not agree. I think that inasmuch as the company never became entitled to commence business, the expenses were not incurred for its benefit. Farther, the section does not apply to persons who are incompetent to contract. It can only apply where the law can imply, from the circumstances, a promise to pay. Where the statute prohibits the Company from making a binding contract before commencement of business no implication of a promise to pay can or should be made.

[18] Mr. Sen next contended that his clients were entitled to recover registration fees and expenses inasmuch as the Company was under a statutory liability to pay them. In support of his contention, he referred me to the judgement of Buckley J. *In re: English and Colonial Produce Co. Ltd.* (1906) 2 Ch. 435 : (75 L. J. Ch. 831) This judgment however was overruled in *In re: National Motor Mail coach Co. Ltd.* (1908) 2 Ch. 515 : (77 L. J. Ch. 790) where Cozens-Hardy M. R. observed as follows:

"I need hardly say that any opinion expressed by Buckley J. especially upon this branch of the law, deserves the greatest respect, but I cannot concur in the view which he took, and Mr. Eustace Smith confessed that he had not been able to find any other authority differentiating between a statutory liability and any other liability in relation to this question. There is no other ground upon which the judgment can be supported, and I know of no principle or authority on which that distinction can be maintained."

The result is that the claim of Sharda Agencies must be dismissed I settle list by deleting the claim of Sharda Agencies.

D.R.R. *Claim dismissed.*

A. I. R. (37) 1950 Calcutta 493 *[C. N. 185.]*

G. N. DAS AND GUHA JJ.

Sm. Akshoy Kumari Debi—Decree-holder—Appellant v. *Nalini Ranjan Mukherjee and others—Judgment-debtors—Respondents.*

Letters Patent Appeal No. 5 of 1949, D/- 27-6-1950, against judgment of K. C. Chunder J., in A. F. A. O. No. 197 of 1947. D/-11-8-1949.

(a) Civil P. C. (1908), S. 11—Execution proceeding — Order for execution after period of limitation — Decision operates as res judicata in subsequent proceedings.

Where on an application for execution the Court passes an order directing execution to issue after placing on record all the legal representatives of the deceased judgment-debtor and they do not object to the order on the ground of limitation the order is one deciding between the parties that the execution is not barred by limitation and operates as res judicata, and whether right or wrong cannot be challenged in subsequent proceedings: A. I. R (10) 1923 Pat. 180, *Rel. on*; A. I. R. (32) 1945 Cal. 335 and A. I. R. (32) 1945 Cal. 387, *Ref.* [Para 4.]

Annotation: ('50-Com.) Civil P. C., S. 11, N. 23.

(b) Limitation Act (1908), Art. 182—Scope—Article should be liberally construed.

Article 182, Limitation Act, should receive a fair and liberal and not a technical construction so as to enable the decree-holder to reap the fruits of his decree. [Para 5]

Annotation: ('42-Com.) Limitation Act, Art. 182 N. 2 Pt. 7.

(c) Limitation Act (1908), Art. 182 (5) — Step-in-aid—Application for transfer of decree—Application is step-in-aid even though no application for execution is pending: A.I.R. (18) 1931 Cal. 312, *Ref.* [Para 5]

Annotation : ('42-Com.) Limitation Act, Art. 182 N. 121 Pt. 1.

(d) Limitation Act (1908), Art. 182 (5) — Step-in-aid — Application for issue of notice under O. 21, R. 22 without execution application — Whether step-in-aid.

If an application for transfer of a decree can be regarded as a step-in-aid of execution even when no execution is pending, there is no conceivable reason why it is necessary that an execution proceeding should be pending when the decree-holder makes an application for the issue of a notice under O. 21, R. 22, Civil P. C. which step he has to take before he can obtain relief by way of execution as in a case where he applies after one year of passing of the decree. *Case law discussed.* [Para 5]

Annotation: ('42-Com.) Limitation Act, Art. 182 N. 116.

(e) Limitation Act (1908), Art. 182 (5) — 'In accordance with law' —Meaning — Application for

execution by attachment of movables as per list — No list filed — Application is in accordance with law.

The main test of an application for execution being in accordance with law would appear to be whether it is possible for the Court to issue execution upon it, that is whether it is within the power of the Court to grant the kind of relief asked for, though in the particular case the relief may not, on the merits, be granted, for example, owing to some finding on facts, not to the nature of the application itself: A. I. R. (30) 1943 Bom. 353, *Rel. on.* [Para 8]

Where, therefore, an application for execution prayed for 'attachment and sale of defendant's movables as per list' but no list of movables was filed:

Held, that the application, though defective was not a nullity as there is no rule requiring the decree-holder to file an inventory of movables when the judgment-debtor is in possession and hence was in accordance with law. The defect was one which could be cured by amendment at a subsequent stage: A. I. R. (28) 1941 Nag. 152, *Ref.*; A. I. R. (14) 1927 Bom. 52, *Disting.* [Paras 9, 10, 11]

Annotation: ('42-Com.) Limitation Act, Art. 182 N. 52.

(f) Limitation Act (1908), Art. 182 (5), Expl. I — Death of sole judgment-debtor—Execution against one of his legal representatives saves limitation against all representatives :3 All. 517, *Rel. on*; 12 Bom. 48 *Ref.* [Para 15]

Annotation: ('42 Com.) Limitation Act, Art. 182 N. 142 Pt. 5.

Manindra Nath Ghose, Anil Kumar Sen for Sibadas Ghose— for Appellant.

Chandra Sekhar Sen and Mritunjoy Dey —for Respondents.

G. N. Das J. — This is an appeal by the decree-holder against a decision of our learned brother Chunder J.

[2] The facts of the case were not fully placed before this Court. We have therefore to state those facts in some detail.

[3] On 23rd March 1942, the appellant obtained a decree in the Presideney Court of Small Causes, 4th Court, against Rati Kanta Mukherji for a sum of Rs. 1127-10-9. It appears from the order sheet which is on the record that there was an attachment before judgment on 6th March 1942 which was confirmed by the Court. On 18th June 1942, the attached properties were released from attachment and the order of that date goes on to state that the execution case was dismissed. On some date which it is not possible for us to discover from the records but prior to June 1944, the sole judgment-debtor Rati Kanta Mukherji died. He was survived by his widow and four sons, Nalini Ranjan Mukherji, Anil Krishna Mukherji, Ranjit Kumar Mukherji and Sailen Mukherji the latter two being minors. On 26th June 1944 the decree-holder made an application which purports to be one for execution of the decree passed on 23rd March 1942. In Column 9 of the application which is headed as "Mode in which the assistance of the Court is required" the following statement occurs :

"I pray that the total amount of Rs. 1127-10-9 together with interest on the principal sum up to date of payment and the costs of taking out this execution be realised by attachment and sale of defendant's moveable property as per annexed list and paid to me. A notice do issue upon Nalini Ranjan Mukherjee of village Nalta, P. O. Maju, district Howrah, to show cause why his name should not be substituted in record in place of defendant Rati Kanta Mukherjee now deceased and execution be issued against him and notice be sent under registered cover. Grounds: That Nalini Ranjan Mukherjee is the son, heir and legal representative of the defendant Rati Kanta Mukherji now deceased."

On the day following the following order was recorded :

"On the plaintiff's application for substitution of the name of Nalini Ranjan Mukherji in place of defendant deceased ordered; Issue notice returnable on 1st August 1944."

The order sheet shows that the case was adjourned on 1st August 1944, 22nd August 1944, 9th September 1944, 11th November 1944 on which date it was adjourned to 2nd December 1944, when the application was dismissed for default. Some time thereafter, on 8th June 1945, an application on terms similar to that which was filed on 26th June 1944, was presented to the Small Cause Court on behalf of the decree-holder. The Court thereupon issued a notice on 13th June 1945. The case was adjourned on 7th July 1945, 4th August 1945 and then to 1st September 1945. Meanwhile, on 25th August 1945, the following order was recorded :

"On the plaintiffs' application for substitution of the names of Anil Krishna Mukherji, Ranjit Kumar Mukherji, Sailen Mukherji and Mrs. Rati Kanta Mukherji the minors represented by their mother Mrs. Rati Kanta Mukherji ordered: Issue notice returnable on 1st September 1945."

On 1st September 1945, it was ordered :

"Ordered that the names of the opposite parties Anil Krishna Mukherji, Ranjit Kumar Mukherji, Sailen Mukherji, the minors represented by their mother Mrs. Rati Kanta Mukherji as guardian and Mrs. Rati Kanta Mukherjee be placed on record as heirs and legal representatives of deceased defendant. No order is made as to Nalini Ranjan Mukherji."

Nothing further was done till 1st October 1945, when the following order is recorded :

"On the plaintiff's application for substitution of the name of Nalini Ranjan Mukherji in place of deceased defendant ordered: Notice do issue returnable on 24th November 1945."

On 3rd October 1945 notice was issued as prayed for. The matter was adjourned on 24th November 1945 to 1st December 1945 on which date the Court passed the following order :

"Application granted : Let the name of Nalini Ranjan Mukherji be placed on record as son, heir, legal representative of the defendant since deceased. Execution to issue."

On 12th December 1945 an application was made by the decree-holder for transfer of the decree to the Munsif's Court at Howrah on 17th De-

cember 1945 the decree was transferred under letter No. 2736 dated 20th December 1945. The execution was thereupon started at Howrah. The judgment-debtors appeared and raised an objection to the effect that the execution of the decree was barred by limitation. The trial Court overruled the objection and directed execution to proceed. On appeal, the first appellate Court allowed the appeal and dismissed the execution case. Against this order a further appeal was taken to this Court being appeal from Appellate Order No. 197 of 1947. This appeal was heard on 11th August 1949 and the appeal was dismissed. It is the propriety of this decision which is now in question before us.

[4] The judgment of this Court proceeds on the following grounds: (1) In case the judgment-debtor dies after the decree and if an execution case is pending at the time, the decree-holder has merely to pray to carry forward the execution case. (2) If no such execution is pending, the decree-holder is required to make an application for execution in terms of O. 21, R. 11 read with S. 50, Civil P. C. if the judgment-debtor was dead within one year of the passing of the decree but if the death took place before one year, a further prayer has to be made under O. 21, R. 22, Civil P. C. As in the present case there was no proper application for execution, the steps taken by the decree-holder were not in accordance with law and did not save limitation. The view of the learned Judge was that there must be an application for execution started in which a prayer should be made under O. 21, R. 22, Civil P. C. Before we deal with this question it is necessary to refer to a matter which was not placed before the Court. From the facts stated already it appears that after all the heirs of the deceased judgment-debtor had been placed on the record, the Court made an order directing execution to issue and thereafter transferred the case for execution to Howrah. The heirs of the judgment debtor who were then on record did not take any steps to have the order set aside. In these circumstances, it was not open to the judgment-debtor to raise the plea of limitation. As was observed in the case of *Gour Chandra* v. *Janardan Prasad*, A. I. R. (10) 1923 Pat. 180: (68 I. C. 337), the order directing execution to issue was an order "deciding as between the parties that the execution was not barred by limitation." Such an order has been held to operate as *res judicata* and whether right or wrong, the order cannot be challenged in subsequent proceedings. See also the cases of *Promotha Nath* v. *Habu Mia*, 49 C. W. N. 260: (A. I. R. (32) 1945 Cal. 335), *Satya Narayan* v. *Kalyani Prosad*, 49 C. W. N. 558 : (A. I. R. (32) 1945 Cal. 387). In this view, no further question arises. But as the matter has been argued at length on other points we desire to record our opinion on those points.

[5] The first point which fell to be decided before our learned brother Chunder J. was whether when a judgment-debtor dies after the decree at a time when no execution case is pending against him, the proper procedure for the decree-holder is to take out an execution and pray for bringing the legal representatives of the deceased judgment-debtor on record and if the judgment-debtor had died more than one year ago to pray for issue of a notice under O. 21, R. 22, Civil P. C. The learned Judge answered the question in the affirmative. The view so taken is supported by the decision in *Kuppuswami Chettiar* v. *Rajagopal Aiyar*, 45 Mad. 462 : (A. I. R. (9) 1922 Mad. 79) and by some other cases of the Madras High Court. It is also supported by certain observations of Ghose J. in *Amar Krishna* v. *Jagat Bandhu*, 59 Cal. 760 at p. 771 : (A. I. R. (18) 1931 Cal. 719 F. B.), where the learned Judge incidentally observed :

> "It must be remembered that a step-in-aid of execution can only be taken in the course of an execution proceeding which is pending or capable of being kept alive and there can be no step-in-aid of execution when the execution itself is already barred."

The above view however has not been taken in the cases of *Sankara Nainar* v. *Thangamma*, 45 Mad. 202 : (A. I. R. (9) 1922 Mad. 247), *M. Kannan* v. *P. Avvulla Haji*, 50 Mad. 403 : (A. I. R. (14) 1927 Mad. 288), *Chathangali* v. *P. Kunhamu*, 57 Mad. 803 : (A. I. R. (21) 1934 Mad. 392), *Ghanayalal* v. *Punjab National Bank*, 111 I. C. 259 : (A. I. R. (15) 1928 Lah. 7), *Jagdeo Narain Singh* v. *Rani Bhubaneswari Kuer*, 7 Pat. 708 : (A. I. R. (15) 1928 Pat. 612), *Gopal Shankar* v. *Raising Premji*, 36 Bom. L. R. 510: (A. I. R. (21) 1934 Bom. 266), *Ramchandra* v. *Uka*, 103 I. C. 279 : (A. I. R. (14) 1927 Nag. 308). I have not been able to discover a direct Bench decision of this Court on this point. In my view the latter class of cases which take a more liberal view of Art. 182 (5), Limitation Act, should be accepted. The article should receive a fair and liberal and not a technical construction so as to enable the decree-holder to reap the fruits of his decree. The view taken in the latter class of cases is also correct on principle. It is well settled that an application for the transfer of a decree is a step-in-aid of execution even though no application for execution is pending: *Sreenath Chakravarti* v. *Priyanath Bandopadhya*, 58 Cal. 832 at p. 841: (A. I. R. (18) 1931 Cal. 312). If therefore an application for transfer of a decree can be regarded as a step-in-aid of execution even when no execution is pending, there is no conceivable reason why it is necessary

that an execution proceeding should be pending when the decree-holder makes an application for the issue of a notice under O. 21, R. 22, Civil P. C., which step he has to take before he can obtain relief by way of execution. The question whether an application for the issue of notice under O. 21, R. 22 is a step-in-aid of execution has been answered in the affirmative in the case of *Gopal Chunder Manna* v. *Gossain Das*, 25 Cal. 594 : (2 C. W. N. 556 F.B.). Banerjee J. who was the referring Judge was of opinion that even if the application for execution be defective regarded as an application for execution of a decree, if the application contained a prayer for issue of a notice under O. 21, R. 22, the application would still be regarded as one to take some step in aid of execution, in cases where issue of such a notice was necessary, the decree having been passed more than a year before. The view of Banerjee J. was affirmed by the Full Bench. In a later case, namely, *Abdul Aziz* v. *Yakub Abdul Gani*, 54 I. C. 433: (A. I. R. (7) 1920 Cal. 166) Chitty J. was of opinion that even if there was no application for execution, a mere prayer for the issue of a notice under O. 21, R. 22 is a step-in-aid of execution. Walmsley J. agreed in the result but reserved his opinion on this point. Reference may be made to the case of *Saday Chandra* v. *Pares Nath* 35 C. L. J. 82 : (A. I R (9) 1922 Cal. 44) to which our attention was drawn by Mr. Ghosa appearing for the appellant. It is necessary to set out the facts of that case. In that case, the decree was obtained on 2nd December 1912. An execution was started within three years. Nothing came out of it. On 22nd May 1917 a second application for execution was filed. The application for execution was defective in three respects namely, (1) the date of disposal of the previous application for execution was not correctly stated: (2) the sum due under the decree was wrongly calculated and (3) that col. 10 which deals with the mode of execution was not duly filled up. It, however, contained the following prayers: for substitution of the heirs of one of the decree-holders: (2) for a notice on the other decree-holders under O. 21, R. 15 and (3) as one of the judgment-debtors was dead for the issue of a notice under O. 21, R. 22. It was contended that this application for execution did not save limitation. This contention was overruled, Mookerjee J. observed that an application to take a step in aid of execution in order that it may be in accordance with law must pray for some relief which the Court can grant, and then proceeded to say that the three prayers which were made in the application were such as could be granted by the Court on the application then presented. It was therefore held that the application was a step-in-aid of execution and extended the period of limitation.

[6] Before Chunder J. reliance was placed on behalf of the judgment-debtors on certain decision of the Bombay High Court, namely *Mahomed Bhai* v. *Dawood Bhai Co.*, A. I. R (25) 1938 Bom. 405 : (I. L. R. (1938) Bom. 708). The question, however, which arose for decision in that case was as regards the propriety of the application regarded as an application for execution. The application suffered from the defect that the particulars of the property to be attached under O. 21, R. 54 were not specified. The case was heard by Engineer J. The learned Judge granted an amendment of the application. Against his decision an appeal was taken under the Letters Patent which was heard by a Division Bench presided over by Beaumont C. J. In dismissing the appeal it was observed that the amendment was properly made. It was further observed that the application though defective was not a mere nullity merely because the application did not describe the property in detail. Reliance was also placed on the case of *Gopal Parsharam* v. *Damodar Janardan*, A. I. R (36) 1943 Bom. 353 : (210 I. C. 376). The question then before the Court was whether the application which prayed for rateable distribution but not against the same judgment-debtor was one in accordance with law. The question now before us did not arise in that case. Reference was also made to the case of *Vallabhdas Narandas* v. *Kantilal G. Parekh*, A. I. R. (34) 1947 Bom. 430 : (49 Bom. L. R. 420). Our attention was drawn to the observation of Kania J. to the effect that the prayer for the issue of a notice under O. 21, R. 22 is not a mode of execution and is not a relief which a party asks as one awarded by the decree. It is a hurdle which the decree-holder has to cross before he can get the relief awarded by the decree. It asks the Court to extend the life of the decree. The observations do not touch the question which are now before us. On the other hand, they support the view that the prayer for the issue of a notice under O. 21, R. 22 can in certain circumstances be regarded as a step-in-aid of execution of a decree. The observations were made in connection with a contention then raised that the prayer for issue of a notice under O. 21, R. 22 was one which came within the purview of O. 21, R. 11 (2) (j). It was this question which was decided by the learned Judge the decision being that a prayer for issue of a notice as aforesaid was not a relief which the decree-holder can claim under O. 21, R. 11 (2) (j). The cases relied on on behalf of the judgment-debtor do not, therefore assist

in the absence of express enactment or necessary intendment: A. I. R. (14) 1927 P. C. 242, *Rel. on.* [Para 2]

Dr. Sen Gupta and Satya Charan Pain —for Petitioner.

Sitaram Banerjee and Chandidas Roy Chowdhury —for Opposite Party.

Sen J. — The facts giving rise to this Rule briefly are as follows: The petitioner who is the landlord let out certain premises to the opposite party Rai Sahib Sakti Bhusan Roy sometime in March 1942 at a rental of Rs. 50 per month. An application was made under the House Rent Control Order 1943, by the landlord for fixing the rent and by consent the rent was fixed at Rs. 72 per month on 2nd November 1943. On 19th January 1944, the opposite party instituted a suit for the recovery of money paid as occupier's share of taxes stating that the sum of Rs. 72 included taxes. The trial Court dismissed the suit. The Full Bench of the Court of Small Causes decreed it. The matter came up before this Court and the matter was remanded and is still pending. On 27th April 1949, the landlord applied for setting aside the consent order which was passed on 2nd November 1943, the application purporting to be made under S. 151, Civil P. C. The application was dismissed by the Additional Rent Controller. An appeal was taken to the Chief Judge of the Court of Small Causes and he dismissed the appeal. Then there was an application for review on 25th August 1949 before the Chief Judge of the Court of Small Causes and that application was rejected. Against that order the present Rule has been obtained.

[2] In our opinion, this Rule must be discharged. It has been held by a Division Bench of this Court in the case of *Indian Homeopathic Medical Association* v. *Kanailal Pal*, 54 C. W. N. 389 : (A.I.R. (37) 1950 Cal. 263) that this Court has no power of revising the orders passed by the Chief Judge of the Court of Small Causes in matters like these. It is contended on behalf of the petitioner that although this Court had no power to interfere before the Constitution came into force, it has now power to do so under Art. 227, Constitution Act, and we are invited to exercise that power. When the order was passed it was a final order with which this Court could not interfere. The Constitution Act was not in force then. Assuming that subsequently this Court has been given powers of interference that would not in our opinion entitle this Court to interfere with an order which was passed at a time when such power of interference did not exist. In this connection I would refer to the decision of the Judicial Committee in the case of *Delhi Cloth and General Mills Co. Ltd.* v. *Income-tax Commissioner, Delhi*, 54 I. A. 421 : (A. I. R. (14). 1927 P. C. 242). The passage in which this principle has been laid down appears at page 425. This is what their Lordships said :

"The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in the *Colonial Sugar Refining Co.* v. *Irving*, (1905) A. C. 369: (74 L. J. P. C. 77) where it is in effect laid down that, while provisions of a statute dealing merely with matter of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment."

There is nothing in Art. 227, Constitution Act, which would indicate that there was such an intendment as is sought to be attributed to Art. 227. Certainly there are no express words in the Article which would give the Court the right to interfere with a right in existence at the time of the passing of the Constitution Act.

[3] In these circumstances we are of opinion that this Rule must be discharged with costs. Certificate to appeal to the Supreme Court is granted.

[4] **K. C. Chunder J.**—I agree.

R.G.D. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 513 *[C. N. 192.]*

HARRIES C. J. AND BANERJEE J.

Karali Prasad Roy—*Decree-holder*—*Appellant* v. *Probodh Chandra Mitra and others* — *Respondents.*

A. F. A. O. No. 91 of 1948, D/- 9th June 1950. Against order of D. J., Burdwan, D/- 30th June 1948,

(a) Civil P. C. (1908), O. 21, R. 22—Proof of service of notice—Entries in suit register.

Mere entries in suit register showing that the notices were issued cannot by themselves prove that notices were served. [Para 5]

Annotation : ('44-Com.) Civil P. C., O. 21, R. 22, N. 4.

(b) Civil P. C. (1908), S. 11, O. 21, R. 22—Execution application—Issue of notice — Failure to serve notice—Subsequent execution application — Question of limitation—Res judicata.

When on an application for execution, a notice is issued under O. 21, R. 22 followed by an order under O. 21, R. 66 but the notice is not served, the judgment-debtor cannot be said to have an opportunity to raise the question of limitation and, therefore, he will not be debarred from raising the question in subsequent execution application. [Para 5]

Even assuming that the notice under O. 21, R. 22 was served but the judgment-debtor did not appear, the judgment-debtor can raise objection to the sale and take the point of limitation in subsequent proceedings : A. I. R. (2) 1915 Cal. 350, *Rel. on.* [Para 8]

Annotation : ('50-Com.) Civil P. C, S. 11 N. 23, O. 21 R. 22 N. 5.

(c) Limitation Act (1908), S. 3—Execution application—Failure to decide point of limitation — Subsequent execution application — Point of limitation—Bar of res judicata—Civil P. C. (1908), S. 11.

The principles of S. 3 apply to execution proceedings. The Court, therefore, is bound to take the point of

limitation itself and dismiss the execution application if it is not in time. Where it fails to do so, it cannot be said that the judgment-debtor is hit by *res judicata* or any principles analogous thereto and, therefore, is not precluded from raising the point of limitation in subsequent execution proceedings. [Para 9]

Annotation : ('50-Com.) Civil P. C., S. 11, N. 23 ; ('42-Com.) Limitation Act, S. 3 N. 19.

Jagadish Chandra Ghose—for Appellant.

Panchanan Chowdhury, Purushottam Chatterjee and Nirmal Chandra Chowdhury—for Respondents.

Banerjee J.—This second appeal arises out of an execution proceeding instituted in the following circumstances. The decree in the suit was made on 30th June 1933. An appeal from it was dismissed on 30th January 1934. An application for execution of the decree was made on 14th August 1934. In due course sale proclamation was published on 21st July 1935. But no further step having been taken, it was dismissed for default on 4th December 1935.

[2] On 23rd June 1937, one Surjya Narayan Roy claiming to be an assignee of the decree filed an execution case. It was registered. On 20th August 1937 the order registering the application was cancelled and the petition was treated as an application for substitution. The decree-holder made another application which gave rise to execution Case No. 139 of 1939. This application was filed on 1st September 1939 and was dismissed for want of prosecution on 4th June 1941. In this execution case notice under O. 21, R. 22, Civil P. C., had been issued, followed by a notice under O. 21, R. 66. This application again was dismissed for non-prosecution on 4th June 1941.

[3] Execution case No. 21 of 1943 from which this appeal arises was started on 3rd June 1943. In this execution case, after notices under O. 21, R. 22 and O. 21, R. 66, Civil P. C., the properties attached were sold. The question is whether this last execution case is out of time. It is quite clear that if the application made on 23rd June 1937 is not regarded as a step-in-aid of execution, the application which was filed on 1st September 1939, was out of time. Therefore, any order made in that application would be ineffective. Consequently, the present application would be time barred. Originally the learned Subordinate Judge in this last mentioned execution case held that it was out of time. But on appeal the District Judge remanded the matter and the learned Subordinate Judge has revised his previous opinion and held that it is not time barred. From that there was an appeal to the District Judge who has held that it is out of time. From the order of the District Judge the present appeal has been filed.

[4] The learned advocate appearing on behalf of the appellant has taken before us one point and one point only, in support of the appeal namely that it is not open to the judgment-debtor to take the plea of limitation by reason of the fact that in the application which was started on 1st September 1939, there was an order for the issue of a notice under O. 21, R. 22, Civil P. C., followed by an order for publication of the sale proclamation under O. 21, R. 66. According to counsel, when the Court after issue of notice under O. 21, R. 22 directed sale of the properties, it came to an implied finding that the application was not barred by time, otherwise, it could not order the sale.

[5] The question before us is whether the notice under O. 21, R. 22 was served on the judgment-debtor. If the notice was not served the judgment-debtor had no opportunity to raise the question of limitation and, therefore, no question of *res judicata* arises. The only evidence the judgment-debtor produced before the Courts below in proof of service of the notice was a certified copy of the suit register. There was no other evidence on this point. In the register there are entries showing that the notices were issued. But that does not mean that the notices were served. Such entries by themselves cannot prove service. It has been laid down in a Bench decision of this Court *Mohiuddin* v. *Pirthichand Lal*, 19 C. W. N. 1159 : (A. I. R (2) 1915 Cal. 444), where it was observed that the mere entry in the order sheet is no proof that the notice had been served. In this case we are unable to hold that there was service.

[6] The Court issues notice under O. 21, R. 22 where the decree is more than one year old or when the decree is sought to be executed against the legal represnetative of the judgment-debtor. If the person to whom notice is issued under O. 21, R. 22 does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court *shall* order the decree to be executed (O. 21, R, 23, Civil P. C.). In this case after the issue of notice under O. 21, R. 22 when there was no appearance by the defendant, the Court was bound to order the decree to be executed in such manner as the decree could be executed.

[7] In this case the judgment-debtor had not been served and did not appear to the notice under O. 21, R. 22 so he did not raise nor had the opportunity to raise the issue of limitation. The Court issued notice under O. 21, R. 66 and directed sale of the properties as it was incumbent on it to do so. We do not see how any question of *res judicata* arises.

[8] Furthermore, in the case of *Chatterput Singh* v. *Daya Chand*, 23 C. L. J. 641 : (A.I.R (2) 1915 Cal. 350), it has been held that if the judgment-debtor does not appear to contest a

notice under O. 21, R. 22 he is not precluded from raising an objection when his property is attached. Assuming, in this case that the notice under order O. 21, R. 22 was served, which we do not hold is the fact the judgment-debtor can raise objection to the sale and take the point of limitation.

[9] There is another point of view from which we can come to the conclusion that the question of limitation is not *res judicata*. It is this: under S. 3, Limitation Act, whether or not the point of limitation is taken by the defendant or the respondent in a suit or an application, the Court is bound to notice it in disposing of the matter before it. It has been held that the principles of this section apply to execution proceedings. In this case, therefore, the Court was bound to take the point of limitation itself and dismiss the application if it was not in time. Having failed to do so, it cannot be said that the judgment-debter is hit by *res judicata* or any principle analogous thereto.

[10] We, therefore, hold that the plea of *res judicata* is no bar to the judgment-debtor taking the point ot limitation to the application under consideration. As the application was not in time, the Court was bound to dismiss it.

[11] On these considerations we hold that the District Judge was right. The application is barred by time.

[12] The appeal, therefore, is dismissed with costs, one set two gold mohurs.

[13] **Harries C. J.**—I agree.

G.M.J. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 515 *[C. N. 193]*

ROXBURGH J.

S. K. Chaudhuri —Defendant — Appellant **v.** *Joy Kumar Sarkar —Plaintiff — Respondent.*

A. F A. D. No. 453 of 1948, D/9-6-1950, against decree of Sub-J., 2nd Court, 24 Parganas, D/-2-3-1948.

(a) Transfer of Property Act (1882), S. 113—Proceeding for fixing standard rent — If amounts to waiver.

Where a landlord institutes a proceeding for fixing a standard rent before the Rent Controller before the date of the notice of ejectment and continues it after that and during the hearing of the suit for ejectment, he cannot be said to have waived the notice

[Paras 3 and 4]

Annotation: ('50-Com). T. P. Act, S. 113 N, 3.

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (XVII [17] of 1950), S. 18 (5) —Suit for ejectment brought under Calcutta House Rent Control Order, 1943— Second appeal pending when Act came in to force —S. 18 (5), if applies.

Where a suit for ejectment of a tenant brought under the Calcutta House rent Control Order of 1943 was pending in second appeal when the Rent Control Act of 1950 came into force, the second appeal is to be disposed of under the West Bengal Premises Rent Control (Temporary Provisions) Act of 1948 and if the tenant has not complied with the provisions of S. 12 (1) (b) of that Act a decree has to be passed against him under that Act and that brings into operation the provisions of S. 18 (5) of the 1950 Act and a decree has to be passed accordingly. [Para 9]

(c) Interpretation of Statutes—Retrospective operation.

Though an Act may have some retrospective effect and apply to pending proceedings it does not follow that every provision of the Act will have retrospective effect. [Para 12]

(d) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (XVII [17] of 1950), S. 18 (5), 14 (3), Proviso and 12 (1), Proviso (i) —Landlord, if can show that tenant has committed default described in S. 12 (1), Proviso (i) and that he is not entitled to protection of S. 12 — Amendment of pleadings to assert above — Landlord, if entitled to amend pleadings to show some other ground of eviction.

Reference to S. 14, in S. 18 (5) does not mean that a landlord will be entitled to show that the tenant committed a default as described in S. 12 (1) proviso (i) of the Act, nor does it mean that he will be entitled to show that the tenant is not entitled to the protection of S. 12 because of the proviso to sub-s. (3) of S. 14. The landlord will not be entitled to amend his pleadings for asserting the above, nor will he be entitled to amend them for the purpose of showing that he has some other ground for eviction of the tenant under Rent Control Act of 1948, e. g. that the landlord *bona fide* requires the premises for his own use.

[Paras 10, 17 and 19]

Chandra Sekhar Sen, Rabindra Nath Choudhury and Bejoy Bhose —for Appellant.

Ajit Kumar Dutt and Kiran Bhusan Mukherji — for Respondent.

Judgment.—This appeal arises out of a suit for ejectment filed on 18th June 1946 under the provisions of the Calcutta Rent Control Order. The premises had been let in July 1942 at a rental of Rs. 32. The plaintiff based his suit on the grounds that notice had been served and that the defendant was a habitual defaulter. There was also a claim for damages for the period subsequent to the notice. The trial Court decreed the suit giving damages only up to the date of suit.

[2] There was an appeal by the defendant to the Subordinate Judge, 2nd Court, Alipore, and a cross objection by the plaintiff for damages from the date of suit to the date of recovery of possession. The lower appellate Court dismissed the appeal with costs and allowed the defendant's (plaintiff's ?) cross objection. The defendant now appeals.

[3] For the appellant three points were argued before me (1) that as the plaintiff had instituted a proceeding for fixing a standard rent before the Rent Controller before the date of the notice of ejectment and continued it after that and during the hearing of the suit, he had waived the notice; (2) that notice had not been properly served; and (3) that the provisions

of S. 18 (5) of the latest West Bengal Premises Rent Control Act, 1950, are applicable to the case.

[4] There seems to me to be no substance in the first point. Standard rent is fixed for premises whoever may be the tenant. Again the landlord could not be sure that he would win his suit, he has not yet finally won it. He was surely entitled to protect his interest by obtaining an order from the Rent Controller as to the rent payable in case his suit failed. His proceedings in doing so could not in any sense amount to waiver of his contention that after the notice the tenant was a trespasser liable to ejectment on the ground given by him. Lastly the Rent Controller had power to make his order with retrospective effect, and in fact did so in part for a period prior to the notice. The landlord was entitled to have that established in so far as it affected the period prior to the notice when there was no question that the defendant was a tenant, without any question of waiver.

[5] As to the second point this is concluded by the findings of fact, no error of law having been committed in arriving at those findings. Four attempts to serve notice were made. The third attempt was by way of sending a registered cover with the notice, which was returned with the endorsement 'left' made by the postal peon. The fourth attempt was by attempt at personal service, no one at the premises would accept the notice, and it was stuck up. There is authority that the first, or rather third attempt, amounted to good service, but in any case the fourth attempt certainly did so. This contention therefore also fails.

[6] We have now to attempt to understand and apply S. 18 (5), West Bengal Premises Rent Control Act, 1950 (hereafter called the 1950 Act) which runs as follows:

"*18 (5).* If at the date when this Act comes into force, a suit for ejectment of a tenant is pending whether in trial Court, or in Court of first or second appeal in which no decree for ejectment would be passed except on the ground of default in payment of arrears of rent under the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act, Act 38 (XXXVIII) of 1948, the Court shall exercise the powers of granting relief against ejectment given by S. 14 of this Act following the provisions and procedure of that section as far as may be necessary, and for the said purpose shall make such order for amendment of pleadings, production of evidence, remand, payment of costs as may be just."

[7] The following dates and facts are important in this case:

(1) Calcutta House Rent Control Order came into force on 23rd June 1943.
(2) Suit was filed on 18th June 1946.
(3) All arrears were paid by 14th September 1946.
(4) Tenant has paid or deposited rent regularly in due time since then.
(5) Calcutta Rent Ordinance came into force on 1st October 1946 (later continued in force by the West Bengal Expiring Laws Act, 1948).
(6) Trial Court decreed the suit on 30th September 1947.
(7) Lower Appellate Court decreed appeal on 2nd March 1948.
(8) Appeal presented to High Court on 5th April, 1948.
(9) West Bengal Premises Rent Control (Temporary Provisions) Act came into force on 1st December 1948.
(10) West Bengal Rent Control Act 17 (XVII) of 1950 came into force on 31st March 1950.

[8] The suit was brought under the Calcutta House Rent Control Order, 1943. Ordinarily it would be disposed of throughout under the provisions of that Act. The decree was passed by the trial Court on 30th September 1947. In the meantime the Calcutta Rent Ordinance, 1946 (hereafter called the Ordinance) had come into force on 1st October 1946. Under S. 17 of that Ordinance, it was provided that if any decree had been passed before the Ordinance came into force but possession had not been recovered the Court, if it was of opinion that the decree would not have been made if the Ordinance had been in operation at the date of the making of the decree might rescind or vary it for the purpose of giving effect to the provisions of the Ordinance. There is nothing specific in the Ordinance relating to pending proceedings, unless we are to take S. 26 as covering legal proceedings; but it can hardly be suggested that relief in accordance with the provisions of the Ordinance was to be given in respect of decrees passed before it came into force, and none in cases pending when it came into force. There is sufficient provision in the Ordinance to show that the context requires some modification of the effect of S. 8, Bengal General Clauses Act. The decree then must be taken to have been made under the provisions of the Ordinance.

[9] By a parity of reasoning as given above to show that the case started under the Calcutta House Rent Control Order was to be disposed of in the trial and appeal Courts under the provisions of the Ordinance, then this second appeal is to be disposed of primarily under the West Bengal Premises Rent Control Act, 1948 (hereafter called the 1948 Act). If the tenant had complied with the provisions of S. 12 (1) (b), then no decree could be passed against him under that Act; but admittedly he has not, so a decree would now be so passed by affirmance of the decree of the lower Courts. That then brings

into operation the provisions of S. 18 (5) of the 1950 Act, and a decree is to be passed accordingly.

[10] For the landlord-respondent here it is argued, (1) that the reference to S. 14 in S. 18 (5) of the 1950 Act means that he will be entitled to show that the defendant has committed a default as described in S. 12 (1) proviso (i) of that Act, (2) that for similar reasons he will be entitled to show that the tenant is not entitled to the protection of S. 12 because of the proviso to sub-s. (3) of S. 14, (3) that the reference to amendment of pleadings in S. 18 (5) shows that he will be entitled to amend his pleadings for asserting the above, (4) that he will also be entitled to amend them for the purpose of showing that he has some other ground for eviction of the tenant under the 1948 Act, e. g., that the landlord *bona fide* requires the premises for his own use.

[11] To dispose of these contentions, it is necessary to consider the general structure of the previous legislation, as well as that of the 1950 Act in order to appreciate the marked difference between them. It will be sufficient probably if we refer to the Ordinance of 1946 and the Act of 1948 only as regards earlier legislation. All three enactments recognise the existence of a right to eject under the Transfer of Property Act. They then substantially take this right away by a provision which on the face of it is merely one of procedure, each enacts (S. 11 Ordinance, S. 12 of the 1948 and 1950 Act) that notwithstanding anything contrary in other Act no decree for ejectment shall be passed (with some qualification in the Ordinance, and 1948 Act). They then by way of provisos give back the right to eject in certain cases. Section 12 (4) of the Ordinance then again takes away the benefit of the provisos from the tenant unless he fulfils certain conditions, under S. 12 (4) (a) he must pay regularly by the fifteenth of the month or the contract date ; under S. 12 (4) in the case of arrears accrued before the commencement of the Ordinance he must pay them up within one month of the date of commencement of the Ordinance. Similar though slightly different provision is made in the 1948 Act in S. 12 (1) (a) and (b). The effect of these provisions is to lay down certain conditions in which a tenant can be ejected, though the form is by way of saying in what cases decrees can be passed. *Prima facie* when it is enacted that no decree shall be passed except in certain conditions the provision will apply to all cases, any case pending whether in trial Court or in appeal at the date the enactment comes into force, and any case started after the commencement of the Act but the real intention can only be gathered by examining the whole enactment in question. As I have said above under the Ordinance and the 1948 Act it was clear that the provisions applied (subject to a caution to be discussed below) to pending litigation. Sections 17 and 26 of the Ordinance, and Ss. 18 and 45 of the 1948 Act make that clear.

[12] A word of caution is necessary here. Though an Act may have some retrospective effect and apply to pending proceedings, it does not follow that every provision of the Act will have retrospective effect. Without elaborating the point, it may be stated that examination of the various enactments shows many provisions which are clearly not to take effect before the commencement of the Act. Section 12 (3) of the Act of 1948 is one example (with respect it may be pointed out that the recently reported case of *Akhil Ranjan Das* v. *B. N Biswas*, 54 C. W. N. 536 : (A. I. R. (37) 1950 Cal. 472)) appears to overlook this fact. The distinction as regards S. 14 of the Ordinance was recognised in *Abanindra Mohan* v. *Khazamull Sardar*, 52 C. W. N. 698.

[13] When we come to the 1950 Act the case is clearly different. The root provision in S. 12 is more drastic than that in S. 11 of the Ordinance or S. 12 of the 1948 Act ; there is no qualification. But there is no provision corresponding to S. 17 of the former or S. 18 of the latter. Section 18 of the 1950 Act has a much more limited scope. Section 18 (1) deals with decrees passed before the Act came into force, S. 18 (5) with suits pending in the trial Court or in appeal. In the case of decrees passed (before the commencement of 1950 Act) under the 1948 Act on the ground of default S. 18 (1) provides that the tenant shall be relieved from ejectment provided he pays up all arrears assuming that the tenancy had continued up to the month in which an order is made under the section directing the tenant to pay that amount plus interest and costs on a date not later than forty days from the date of the order. No question arises as to applicability of any other provision of the 1950 Act to decrees passed before its commencement.

[14] Then in S. 18 (5) specific provision is made for pending cases where (but for the provision of S. 18 (5)) a decree would be passed under the 1948 Act. Section 18 (5) provides that the Court is to exercise the powers given under S. 14 of the Act. Unless the wording of the provisions clearly provides otherwise, we may take it that the provision made under S. 18 (5) is intended to achieve much the same substantial result in these pending cases as is provided (in S. 18 (1)) for cases where a decree for default had already been passed under the 1948 Act before

the 1950 Act came into force. This is the same assumption as we made in regard to the 1948 Act, and the Ordinance, but the result is the opposite. Section 18 of the 1948 Act, and S. 17 of the Ordinance clearly applied the provisions of those enactments to cases where decrees were passed before their commencement, hence, (coupled with the effect of S. 45 and S. 26 respectively of those enactments) we deduced that the enactments applied to pending cases. But in the 1950 Act the intention seems clear not to apply its provisions to either type of case except in the limited respect provided in S. 18 (1) and S. 18 (5).

[15] If we turn then to S. 14 (1) we find that by applying its provisions practically the same result will be achieved as under S, 18 (1), for the Court will under S. 14 (1) calculate the amount in 'arrears' up to the date of the order mentioned thereafter, as also the amount of interest on such arrears of rent calculated at the rate of 9 and three-eighths per centum per annum from the day when the rents became arrears up to such date, together with the amount of such cost of the suit as is fairly allowable to the plaintiff landlord, and shall make an order on the tenant for paying the aggregate of the amounts (specifying in the order such aggregate sum) on or before the date fixed in the order. Under sub-s. (2), the date in question is to be the fifteenth day from the date of the order, excluding the date of the order.

[16] It is to be noted that under S. 18 (5) of the 1950 Act, the Court is to exercise the powers of granting relief against ejectment given by S. 14 of the Act following the provisions and procedure of that section as far as may be necessary. It does not provide that the relief is to be given against the same default as that against which S. 14 is to give relief, namely, the default created by the effect of proviso (i) to sub-s. 1 of S. 12 of the Act. The default against which relief is to be given following the provisions and procedure of S. 14, is the default under the 1948 Act which would result in the decree for ejectment under that Act.

[17] This disposes of the first three points argued for the landlord respondent set out above. If the tenant is not liable for the default created by S. 12 (2) (i), the first point is disposed of. Consequently the proviso in S. 12 (3) equally cannot apply against the tenant, for that refers to three defaults as created by S. 12 (1) (i) within a period of 18 months, and if that does not apply against the tenant, the latter proviso cannot apply.

[18] It remains to consider the fourth point urged for the landlord respondent. Is he to be allowed now to show that under the 1948 Act he could get a decree on a ground other than the ground of default. In this connection Mr. Datt laid stress on the provision in S. 18 (5) for amendment of pleadings. The Court is to exercise the powers of granting relief against ejectment given by S. 14 of the Act . . . , and for the said purpose is to make such order for amendment of pleadings, production of evidence, remand, payment of costs as may be necessary or just. The words "for the said purpose" suggest that the amendment is to be limited to the purpose of giving relief in a case assumed to be one to which S. 18 (5) is applicable. Mr. Datt urges that they mean also for the purpose of showing that the case is not one to which S. 18 (5) is applicable, i. e., for showing that there is some other ground for ejectment other than default. He contends that no amendment would apparently be necessary merely for the limited purpose of giving relief. I do not think this is strictly correct. In determining the amount payable under S. 14 there might be some question as to amount of arrears at the date when the rent became arrears, and possibly as to subsequent payments. In a suit for ejectment for default actual arrears might not have been claimed. For example default which was made the ground for ejectment might be that provided for in S 12 (3) of the 1948 Act, a mere case of delay in payment for three consecutive months.

[19] On the other hand, it can be argued that if another ground for ejectment does exist, it will save multiplicity of litigation to allow, with suitable orders as to costs, the landlord still to establish that ground, especially in view of the fact that the latest Act has given a new privilege to the tenant to avoid ejectment. There is however one reason why in this case I think this should not now be allowed. The ground proposed to be established is that of *bona fide* requirement by the landlord. If the amendment is allowed the issue will be tried under the 1948 Act since 1950 Act applies to the suit only to the limited extent laid down in S. 18 (5). But under the present law if the landlord brings his suit he must establish reasonable requirement, his rights are more restricted under the new Act. I think therefore, that he ought to establish them under the new Act. An additional reason in favour of this view, is that under S. 18 (1) in the case of decrees passed before the 1950 Act came into force, clearly the landlord would not be allowed to agitate fresh grounds to meet the tenant's claim for relief thereunder.

[20] The decree of the lower Court is therefore set aside. Order is hereby passed under S. 14 (1), West Bengal Premises Rent Control Act, 1950, for the defendant to pay rent at Rs. 50 per month from 1st August 1945, up till the date

of this order together with interest at 9¾ ths per centum per annum, plus costs throughout less the amounts of costs already deposited in the Courts below, which the landlord may withdraw, the aggregate sum being Rs. 3725-13-0. The amount will be paid into this Court on or before 8th June. The case will be put up on 9th June with a report whether the amount has been paid or not, when further order will be passed. The defendant will be at liberty to withdraw the sum of Rs. 400 deposited in the trial Court on account of damages. The defendant will also be at liberty to withdraw the sum of Rs. 2800 out of the total amount deposited with the Rent Controller to the credit of the plaintiff.

[21] The amount has been paid in time, the suit is accordingly dismissed under S. 14 (3), West Bengal Premises Rent Control Act, 1950.

[22] Leave to appeal under Cl. 15 of the Letters Patent is granted.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 519 *[C. N. 194.]*

ROXBURGH J.

Jatindranath Naskar and others — *Petitioners* v. *Baharaddi Molla and others* — *Opposite Party.*

Civil Rule No. 1314 of 1949, D/- 19th June 1950, from order of Munsif 1st Court, Baruipore, D-/ 14th May 1949.

Debt Laws — Bengal Agricultural Debtors Act, 1935 (VII [7] of 1936), S. 37A (8) —Award and order of restoration of possession to debtor — Proceedings under sub-s. (8) — Objection by objectors, not parties to proceedings under Act, when can be taken — Applicability of Civil P. C., to proceedings under sub-s. (8) —Civil P. C. (1908), O. 21, Rr. 97, 100.

The Act itself provides no procedure for the Court to follow in a proceeding under S 37A (8) of that Act. The proper procedure for a Court to follow is the procedure of the Civil Procedure Code in regard to execution of decrees. [Para 2]

Where the judgment-debtor obtains an award and order for restoration of possession of property and applies under sub-s. (8), objection by the lessees on the basis of a lease from landlord cannot be raised as they are not parties to proceedings under the Act. The proper time for them to be heard is if and when delivery of possession is sought to be given they resist delivery when the applicant under S. 37A (8) can come in with an application under O. 21, R. 97, Civil P. C , or in the event that the objectors are dispossessed they can come in under O. 21, R. 100. [Para 5]

Annotation : ('44 Com.) Civil P. C., O. 21, R. 98 N. 1, 5; R. 100, N. 2.

Hiralal Chakravarti and Harideb Chatterji — for Petitioners.

Shyama Charan Mitra and Rabindra Nath Choudhury — for Opposite Party.

Order. — This rule arises out of proceedings under S. 37A (8), Bengal Agricultural Debtors Act. The judgment-debtors obtained an award and order for restoration and applied to the Munsif, 1st Court, Baruipur, under the provisions of that sub-section. Objection was made by the present petitioners (who were opposite parties Nos. 15 and 16 in that petition) on the basis of a lease from the landlord. It is unnecessary for me to give details of the nature of the objection. The objection was overruled. The objectors were not parties to the proceedings under the Bengal Agricultural Debtors Act, a position which is quite in accordance with the decision in *Taraprasanna Roy* v. *Adwaita Charan*, A. I. R. (35) 1948 Cal. 329 and subsequent decisions.

[2] On behalf of the petitioners, my attention has been called to the case of *Narayan Chandra* v. *Rash Behari*, Civil Revn. C. N. 1721 of 1946 : (I. L. R. (1948) 2 Cal. 68) in which it was held by Mukherjea and Ormond JJ. that where the judgment-debtor was obstructed in endeavouring to get possession through Court under S. 37A (8) he could make an application under O. 21, R 97, Civil P. C. The Bengal Agricultural Debtors Act itself provides no procedure for the Court to follow in a proceeding under S. 37A (8) of that Act which has many affinities with a proceeding under S. 144, Civil P. C. The case cited amounts to a decision that the proper procedure for a Court to follow is the procedure of the Code in regard to execution of decrees.

[3] The ground on which this rule was obtained was that the order of the learned Munsif directing restoration to applicants 1 to 4 and incidentally overruling the objections of opposite parties 15 and 16 was incorrect. In argument here however a different position was taken and on the basis of the case cited it was urged that the objection of the objectors should not have been dealt with by the lower Court in the proceedings under S. 37A (8).

[4] On behalf of the opposite parties, it is in turn objected that the petitioners ought not now to be allowed to change their ground.

[5] If the procedure indicated in the case cited is followed, there can be no doubt that the objectors as lessees from the landlord were not entitled to be heard at the time when the application was made under S. 37A (8). The proper time for them to be heard was if and when delivery of possession was sought to be given they resisted delivery when the applicants under S. 37A (8) could come in with an application under O. 21, R. 97, Civil P. C. as laid down in that case, or in the event that the objectors were dispossessed they could come in under O 21, R. 100. Even if the present order stands, in my opinion, they could still come before the Court in the manner above indicated and take the objection that the decision in the order of the learned Munsif so far as it affected the

objectors, opposite parties 15 and 16 was without jurisdiction; in other words, that the decision was not *res judicata*. In that view of the matter, it is not necessary for me to decide whether the decision overruling the objection is right or wrong. It is sufficient if I make it clear that so far as the present petitioners are concerned, it is without jurisdiction and the matter of their rights and position still remains open to be decided, if at all, in proceedings under O. 21, R. 97 or R. 100 as the case may be.

[6] The result is that the present rule is discharged. I make no order as to costs.

G.M.J. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 520 *[C. N. 195]*

G. N. DAS AND DAS GUPTA JJ.

Mihirlal — Auction-purchaser — Petitioner v. *Panchkari Santra and others — Judgment-debtors — Respondents.*

Civil Rule No. 970 of 1949, D/- 15th December 1949, against order of D. J., Hooghly, D/- 17th May 1949.

(a) Tenancy Laws — Bengal Tenancy Act (VIII [8] of 1885), S. 174 (3) — Delay in applying for delivery of possession — Civil P. C. (1908), O. 21, R. 90.

The mere fact that the auction-purchaser makes delay in applying for delivery of possession cannot be any ground for thinking that he is acting fraudulently with a view to prevent the judgment-debtors from knowing about the sale. [Para 3]

Annotation: ('44-Com.) Civil P. C. O. 21, R. 90 N. 37.

(b) Civil P. C. (1908), S. 115 — Material irregularity in the exercise of jurisdiction.

Omission on the part of the Court to look into the record and basing its decision upon a faulty or non-reading of the record that the auction-purchaser was guilty of fraud when in fact he was not, is a gross irregularity in exercise of jurisdiction. [Para 4]

Annotation: ('50-Com.) Civil P. C. S. 115 N. 12.

(c) Civil P. C. (1908), O. 21, R. 90 — Fraud in publishing and conducting sale — Tenancy Laws — Bengal Tenancy Act (VIII [8] 1885), S. 174.

Fact that the auction-purchaser was present at the time of the service of the sale proclamation where the decree-holder was also present and that the auction-purchaser has given false evidence in Court as regards service of sale proclamation not even remotely justify a conclusion that he was guilty of any fraud by which he intended to or managed to prevent the judgment debtors from knowing of the sale. [Para 6]

Annotation: ('44-Com.) Civil P. C., O. 21, R. 90 N. 37.

(d) Tenancy Laws — Bengal Tenancy Act (VIII [8] of 1885), S. 174 (3) — Extension of time on ground of fraud — Limitation Act (1908), S. 18 — Civil P. C. (1908), O. 21, Rr. 90, 92.

The auction-purchaser is a necessary party to an application for setting aside a sale. The auction-purchaser is not a person claiming through the decree-holder. Before any extension of time can be given under S. 18 of the Limitation Act in an application for setting aside a sale under S. 174 (3), Bengal Tenancy Act, it must be proved that the auction-purchaser was either guilty of the fraud or an accessory to the fraud that prevented the judgment-debtor from knowing of the sale : 44 C. L. J. 565 and A. I. R. (36) 1949 Cal. 212, *Dissent.* [Paras 15, 16, 22]

Annotation: ('42-Com.) Limitation Act, S. 18 N. 14. ('44-Com.) Civil P. C., O. 21 R. 90 N. 47; R. 92 N. 4.

Apurba Dhan Mukherji and Chandra Narayan Laik — for Petitioner.

Heramba Chandra Guha — for Opposite Party 1.

Das Gupta J. — The applicant before us purchased at auction an occupancy raiyati holding in execution of a rent decree. The sale was held on 13th March 1946. On 25th April 1946, an application was filed by one Kachimannessa Bibi claiming to have purchased the interest of the judgment-debtors, for setting aside the sale under the provisions of S. 174 (3), Bengal Tenancy Act. This application was dismissed by the Court on 13th December 1947. On 5th January 1948, the auction-purchaser the petitioner before us filed an application for confirmation of the sale. The sale was ultimately confirmed on 27th March 1948. On 27th June 1948, an application was filed by two of the 17 judgment-debtors who are Panch Kari Santra and Satya Bala Dasi, opposite parties Nos. 1 and 2, under S. 174 (3), Bengal Tenancy Act, for setting aside the sale on the ground of fraud and irregularity in publishing and conducting the sale. The learned Munsif allowed the application and the learned District Judge has dismissed the appeal that was filed by the present petitioner against that decision. The learned District Judge has come to the conclusion that the decree-holder was guilty of fraud inasmuch as he mentioned the value of the holding at Rs. 10 only in the sale proclamation and further that he fraudulently suppressed the sale proclamation and other notices. He also came to the conclusion that the auction-purchaser was also guilty of fraud and that consequently the applicants under S. 174 (3), Bengal Tenancy Act, were entitled to the benefit of S. 18, Limitation Act, and so, the application though filed long after six months after the date of the sale, was not barred by limitation.

[2] The first question agitated before us is whether the learned District Judge acted irregularly and illegally in the exercise of his jurisdiction in coming to the conclusion that the auction purchaser was also guilty of fraud. The learned District Judge appears to have based his decision in this matter on two facts, first, that the auction purchaser has benefited by the fraud on the part of the decree-holder inasmuch as there was paucity of the bidders because of the gross under valuation in the sale proclamation and the auction-purchaser was thus able to have the land for an inadequate price. The other ground on which the learned District Judge relied was that the auction purchaser did not apply for delivery of possession for two years after the date of the sale.

[3] It has been pointed out to us by Mr. Mukherji on behalf of the petitioner that the learned District Judge misread the evidence, inasmuch as he omitted to notice that the sale was confirmed as late as 21st February 1948 so that the delay of the auction-purchaser was not 2 years but only one month. I am myself unable to agree that the mere fact that the auction-purchaser makes delay in applying for delivery of possession can be any ground for thinking that he is acting fraudulently with a view to prevent the judgment-debtors from knowing about the sale. But even if such delay can justify any conclusion as regards fraud, it is abundantly clear that there was no such delay as the learned District Judge seems to have wrongly thought. From the facts pointed out above it appears that though the sale was actually held on 13th March 1946 the application under S. 174 (3) filed by Kachimannessa was not disposed of till 13th December 1947. It was only after that application was disposed of that the auction-purchaser could take any steps for getting the sale confirmed. That he did, as we have seen, on 5th January 1948 and the sale was confirmed on 21st February 1948 and he put his application for delivery of possession on 27th March 1948. There was therefore, as already stated above, no appreciable delay on his part.

[4] In my judgment the omission to look into the record in the case is a gross irregularity in the exercise of jurisdiction and the learned Judge's decision based upon a faulty reading or rather a non-reading of the record that the auction purchaser was guilty of fraud cannot be allowed to stand.

[5] Mr. Guha has however taken us through the evidence and has tried to convince us that quite apart from this question of delay in applying for delivery of possession there was other evidence which would justify such a conclusion. Of the two items of evidence pointed out one was that the auction purchaser was present at the time when the sale proclamation was served when the decree-holder was also present; the other was that in Court he has given false evidence as regards the service of the sale proclamation.

[6] Assuming that both these facts are true, namely that the auction-purchaser was present at the time of the service of the sale proclamation where the decree-holder was also present and also that the auction-purchaser has given false evidence in the present proceedings I am unable to see how these can even remotely justify a conclusion that he was guilty of any fraud by which he intended to or managed to prevent the judgment-debtors from knowing of the sale.

[7] My unhesitating conclusion is that there is no evidence on the record to show that the auction-purchaser was guilty of any fraud in connection with the sale or that by any fraudulent conduct on his part the judgment-debtors were prevented from knowing the date of the sale.

[8] If therefore it is necessary before the applicant under S. 174 (3), Bengal Tenancy Act, can get the benefit of S. 18, Limitation Act, in the present application that the auction purchaser must be shown to have been guilty of fraud or to have been accessory to the fraud, it must be held that the applicants could not get the benefit of the S. 18 and the application filed on 27th June 1948, was barred by limitation.

[9] It has, however, been contended by Mr. Guha for the opposite party that it is not really necessary in law that the auction purchaser should be shown to be guilty of any fraud in order that the extension of time under S. 18, Limitation Act, can be given.

[10] The relevant portion of S. 18, Limitation Act, runs as follows:

"Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right the time limited for instituting a suit or making an application:

(a) against the person guilty of the fraud or accessory thereto, or

(b) against any person claiming through him, otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby ....."

[11] Here, the application was made against the decree-holder and the auction-purchaser. As against the decree-holder, on the finding with which we find no reason to interfere that he was guilty of fraud and by that fraud, namely, the suppression of processes he had kept the applicants from the knowledge of the sale, it must be held that the application is within time if we accept that the judgment-debtors first came to know of the fraud at the time when the auction-purchaser went to take delivery of possession.

[12] What however is the position of the application as against the auction-purchaser? In order that the applicants may succeed, the application must be made in time as against him also unless he be considered to be an unnecessary party. It is not within the period of six months allowed by S. 174, Bengal Tenancy Act. Obviously the applicant can succeed only if they can get the benefit of S. 18, Limitation Act. The words of the section as already mentioned above, give a special rule of computation against two kinds of persons: a person guilty of the fraud or accessory thereto or a person claiming through such other person guilty of fraud otherwise than in good faith and for valuable consi-

deration, when such fraud has kept the plaintiff or the applicant from knowledge of this right to sue. It is difficult to see from the words of the section how the application against a person who is neither guilty of the fraud nor accessory thereto, nor is a person claiming through such other person can attract the provisions of S. 18.

[13] If the auction-purchaser is not a necessary party to an application for setting aside the sale under S. 174 (3), Bengal Tenancy Act, no question of limitation would arise at all, and the application would not fail, because such unnecessary party comes on the record beyond the period of limitation.

[14] The question therefore is whether the auction-purchaser is a necessary party to an application for setting aside a sale.

[15] Section 174 (3) does not in words state as to who should be made a party. In S. 174A, there is a provision that no order setting aside a sale shall be made, unless notice of the application had been given to all persons affected thereby. Whatever view may be taken as regards the stage where such notice is to be given, there can be no doubt, in my opinion, that an application for setting aside the sale cannot be considered at all unless the person against whom the relief is primarily claimed has been made a party and received notice. The relief asked for is that a sale be set aside. The one person who will suffer if this relief is granted, is the auction-purchaser. If anybody therefore is a necessary party the auction purchaser, in my opinion, the most necessary party, the decree-holder being the other party who, in my opinion, should also be brought on the record.

[16] The necessary conclusion which in my opinion cannot be escaped, unless we are to add certain things to S. 18, Limitation Act, or to ignore some of the words actually used therein, is that the extension of time under S. 18, Limitation Act cannot be made in an application for setting aside a sale as against the auction purchaser unless he is guilty of the fraud or accessory thereto. It need hardly be mentioned that the auction-purchaser is not a person claiming through the decree-holder.

[17] Reliance was placed by Mr. Guha on two decisions of this Court, one in the case of *Kedar Hura* v. *Asutosh Roy*, 44 C. L. J. 565 and the other in *Mahipati Haldar* v. *Atul Krishna*, 53 C. W. N. 587: (A. I. R (36) 1949 Cal. 212). In the case of *Kedar Hura*: (44 C. L J. 565), B. B. Ghose J. sitting singly was of the opinion that the fraud by which the judgment-debtor is kept from the knowledge of his right to apply for setting aside the sale must be the fraud only of the decree-holder and it is not necessary either to allege or to prove fraud on the part of the auction purchaser. A similar conclusion was reached by Mukherjea, J., sitting singly, in the case of *Mahipati Haldar*: (53 C. W. N. 587: A. I. R. (36) 1949 Cal. 212) quoted above. I find that in both these cases the learned Judges expressed their opinion that the auction purchaser was not a necessary party in an application for setting aside the sale. In fact B. B. Ghose J. refused to rely on the previous decision in the case of *Purna Ch. Mondal* v. *Anukul Biswas*, 36 Cal. 654: (2 I. C. 844) in the view that under the old Code in which the decision in *Purna Chandra's case*: (36 Cal. 654: 2 I. C. 844) was given the auction purchaser was a necessary party in an application for setting aside the sale. Mukherjea J. also appears to be of the same opinion and says that the application for setting aside the sale is directed primarily against the decree-holder at whose instance or for whose benefit the sale was held. If I could see my way to agree with these eminent Judges in this view that the auction purchaser is not a necessary party, I would have no difficulty in coming to the conclusion that the question of limitation does not arise at all, as regards the auction-purchaser. As stated however I am unable to agree that the auction purchaser is not a necessary party and in my view he is the most necessary party in a case where the sale at which he purchased is sought to be set aside.

[18] The other reason given by Mukherjea J. is that if fraud on the part of the auction purchaser is held to be necessary to be proved for an extension of time under S. 18, Limitation Act, the judgment-debtor would have absolutely no remedy where by the fraud of the decree-holder the judgment-debtor is totally kept out of the knowledge of the sale and the property has been sold for a nominal price, but the auction purchaser is not party to the fraud, or accessory thereto.

[19] With great respect, I think that this is not a reason why a different interpretation should be put on S. 18, Limitation Act. If the section is properly interpreted, it does not provide the judgment-debtor with any remedy in the cases as mentioned by Mukherjea J. The question of giving the remedy is in the hands of the Legislature. Of course, if there was any ambiguity in the language used, it would have been reasonable and possible to put the interpretation which would give the judgment-debtor a remedy. I am unable to detect any such ambiguity.

[20] I am therefore unable to accept the reasoning which found favour with the two learned Judges in the cases of *Kedar Hura* v. *Asutosh Roy*: (44 C. L. J. 565) and *Mahipati Haldar*:

(53 C. W. N. 587: A. I. R. (36) 1949 Cal. 212) mentioned above.

[21] It may be mentioned here that in a number of other cases Judges sitting singly have in this Court decided that fraud on the part of the auction purchaser is necessary to be proved in an application for setting aside a sale before extension of time under S. 18, Limitation Act can be given. Mention may be made of the decisions in the cases of *Majahar Ali* v. *Mafijaddi Sardar*, 166 I. C. 127: (A. I. R. (23) 1936 Cal. 706), *Saila Bala* v. *Atul Krishna*: 82 C. L. J. 9: (A. I. R. (35) 1948 Cal. 63) and *Jagiswar Das* v. *Deb Narain*, 46 C. W. N. 403.

[22] My conclusion is that before any extension of time can be given under S. 18, Limitation Act, in an application for setting aside a sale under S. 174 (3), Bengal Tenancy Act, it must be proved that the auction-purchaser was either guilty of the fraud or accessory to the fraud, that prevented the judgment-debtor from knowing of the sale.

[23] The result is that the application made by the present opposite parties NOS. 1 and 2 must be held to be barred by limitation and must therefore fail. Accordingly I would set aside the order passed by the learned Courts below and order that the application under S. 174 (3), Bengal Tenancy Act, be dismissed. There will be no order as to costs.

[24] **G. N. Das J.**—I agree in the order proposed by my learned brother.

D. H. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 523 *[C. N. 196.]*

HARRIES C. J. AND LAHIRI J.

Abdul Motalib — Accused — Petitioner v. *The State.*

Criminal Revn. No. 260 of 1950, D/- 21-6-1950.

Penal Code (1860), S. 405 — Applicability to Mahomedan co-owners.

The proposition of law that S. 405 does not apply to partners as they are joint owners or co-owners of the partnership property, that is to say, of the common stock, does not apply to the case of Mahomedan co-owner of whom it cannot be said that he is co-owner of the whole of the stock. The position of a Mahomedan co-owner is that he has a specific share in the property. [Para 5]

(It was, however, found that the accused was not a partner but an employee and was guilty under S. 406.)

Annotation : ('46-Man) Penal Code, S. 405 N. 19.

Debabrata Mukherji and Sambhu Nath Banerji (Sr)—for Petitioner.

Lahiri J.— This rule is directed against the conviction of the petitioner under S. 406, Penal Code and an order that he be released on probation of good conduct on executing a bond for Rs. 2,000 with two sureties of Rs. 1,000 each for a period of one year, from the date of the order.

[2] The prosecution case is that one Hazi Gura Mia used to carry on a business in confectionary and bakery in the town of Darjeeling. He died on 5th September 1946 leaving his confectionary and bakery shop and considerable assets. The prosecution case is that after the death of Guru Mia his widow inherited the assets and used to carry on the confectionary and bakery business. According to the practice followed by this business, the officer in charge of the bakery business used to hold in his hands the sale proceeds of the bakery shop and at the beginning of the next month he used to deposit the said sale proceeds in the account of the firm itself. On 1st September 1949, the petitioner who was in charge of the bakery business was entrusted with a sum of Rs. 478 as representing the sale proceeds of the previous month for the purpose of crediting the same in the account of the firm but the petitioner instead of crediting the said amount in the account of the firm credited it in his own private account in the bank of Jaylall Narsingdass. On these allegations, the petitioner was placed on his trial under S. 406, Penal Code.

[3] The defence was that after the death of Gura Mia the petitioner inherited part of his assets and became a co-owner of the business and the petitioner was in charge of the management of the shop and the bakery as one of the proprietors. The petitioner further denied that there was any entrustment with him of the sum of Rs. 478 on 1st September 1949 as alleged by the prosecution and upon these facts the petitioner pleaded that he was not guilty.

[4] The Courts below have overruled the defence and convicted and sentenced the petitioner as stated above.

[5] On behalf of the petitioner, Mr Mukherji appearing in support of the rule has argued that the conviction and sentence are not sustainable because a co-owner cannot be convicted of an offence under S. 406, Penal Code, and he relied upon the decision in *Bhupendra Nath* v. *Giridhari Lal*, 37 C. W. N. 952: (AIR (20) 1933 Cal. 582: 34 Cr.L.J. 958) in support of this proposition. This is a case which relates to the position of partners in a partnership business. Mr. Mukherji has relied upon a passage at p. 958 where the learned Judges make the following observation:

"Partners are joint owners or co-owners of the partnership property, that is to say, of the common stock. Each partner is co-owner of the whole of this common stock, though he receives or pays a share only in profits and losses arising therefrom and though his share in the partnership property is only

the value of his original contribution, increased or diminished by his share of profit or loss."

In our judgment, this proposition of law which was laid down with regard to the position of partners does not apply to the case of a Mahomedan co-owner of whom it cannot be said that he is a co-owner of the whole of the stock. The position of a Mahomedan co-owner is that he has a specific share in the property, which is left by the deceased and it is quite clear upon the evidence in this case and also upon the admission of the petitioner that he was an employee of the bakery business left by the deceased Gura Mia. If as an employee the petitioner was entrusted with a specific sum of money and if instead of crediting the said sum in the account of the firm he deposited it in his own private account, we think that the petitioner is guilty of the offence under S. 406, Penal Code.

[6] Mr. Mukherji next contended that the prosecution did not produce the account books of the bakery business to prove that the sum of Rs. 478 was entrusted to the petitioner on 1st September 1949. On this point, it is true that the prosecution did not produce the account books but the prosecution examined a number of witnesses to prove that the amount was actually handed over to the petitioner. Both the Courts below have believed the oral evidence which was adduced by the prosecution on this point. The witnesses for the prosecution who proved the handing over of the amount to the petitioner are P. Ws. Nos. 3, 4 and 5. If the evidence of these witnesses be believed there can be no doubt that the petitioner was actually entrusted with the sum of Rs. 478 on 1st September 1949. On these facts, there can be no doubt that the prosecution has satisfactorily proved the entrustment.

[7] Upon the findings arrived at by the Courts below and upon the evidence adduced in this case it is impossible to interfere with the order of conviction and sentence in this case. The rule is accordingly discharged.

[8] **Harries C. J.**—I agree.

G.M.J. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 524 *[C. N. 197.]*

HARRIES C. J. AND BANERJEE J.

Rambandhu Misra and others—Petitioners v. *Brahmananda Laik and another — Respondents.*

Civil Rules Nos. 1203 and 1206 of 1949, D/- 6th December 1949, against order of District Judge, Bankura, D/- 4th May 1949.

(a) Debt Laws—Bengal Agricultural Debtors Act (VII [7] of 1936), Ss. 2 (8) and 37A (5) and (7) and Rr. 145 and 146 — "Debt" in S. 37A (5)—Meaning of—Definition of "debt" in S. 2, if applies.

Where there is a dispute as to the amount of a debt stated by the applicant in his application, the Board may informally decide the matter and when it does consider the matter it must consider it in the light of R. 146. When it is considering what is the amount of the debt in an application under S. 37A, it must consider what the term 'debt' means in S. 37A, sub-s. (5). The word "debt" in sub-s. (5) of S. 37A cannot mean what is stated in the definition of that word in S. 2. There is another definition of the word "debt" in sub-s. (7) of S. 37A. Applying this definition it is quite clear that the amount excluded in the definition as being barred by limitation must be included in ascertaining the amount of the debt. The debt is the amount of the decree, in execution of which the property was sold together with certain other charges. [Paras 10 and 11]

Where, therefore, a decretal amount was over Rs. 31,000 but out of this Rs. 20,000 was barred by limitation at the date of the application by the debtor to the Board :

Held, that the amount of the decree was the amount of the debt for the purposes of S. 37A (5) and such amount being over Rs. 25,000 the Board had no jurisdiction to deal with the application by reason of R. 146 (2). [Para 11]

(b) Interpretation of Statutes—Definition.

The definition given is normally to be taken to apply wherever that word occurs in the statute. The definition, however, will not apply if the word appears in a subject or context which makes the application of the definition impossible and repugnant to the meaning of the context in which the word is found. [Para 7]

Chandra Sekhar Sen and Sailendra Nath Banerjee —for Petitioners.

Phanindra Nath Das—for Opposite Party.

Harries C. J.—These two applications are for revision of orders made by a learned District Judge in revision under S. 40A, Bengal Agricultural Debtors Act.

[2] The decree-holders opposite parties had obtained against the petitioners or their predecessors a mortgage decree for Rs. 20,100 in mortgage Suit No. 75 of 1325 in the Court of the Subordinate Judge of Bankura. By the decree the petitioners were jointly and severally liable. The decree provided that in default of payment by *Bhadra* 1335 B. S., interest would run at 9 annas per cent. per mensum until realisation. A preliminary decree was obtained on 3rd August 1927, which was made final on 22nd September 1928. In the year 1935, the decree-holders executed the decree for recovery of Rs. 31,584 which was the sum then due on the mortgage after adding the interest which had accrued to the decretal amount and execution costs. The mortgaged properties were put up for sale and purchased by the decree-dolders for Rs. 10,000 on 16th March 1936, and the sale was confirmed on 22nd July 1936 possession being delivered on 1st and 2nd May 1937.

[3] In the year 1942, the petitioners who were the mortgagors filed two separate applications under S. 37A, Bengal Agricultural Debtors Act, in which they alleged that the total debt due

from both sets of petitioners was Rs. 10,000 and that each set of petitioners owed only Rs. 5000.

[4] The Board came to the conclusion that the debt which was the subject-matter of each of these applications was Rs. 31,584 and held that under Rr. 146 and 147 the Board had no jurisdiction to deal with the matter. There were appeals to the appellate Officer which were dismissed, and applications in revision to the District Judge under S. 40A of the Act were also dismissed.

[5] Mr. Chandra Sekhar Sen on behalf of the petitioners has contended that the amount of the debt which was the subject-matter of the application under S. 37A of the Act was Rs. 10,000. He has referred to the definition of the word 'debt' in S. 2, sub-s. (8) (v) which is in these terms :

" 'Debt' includes all liabilities incurred prior to the first day of January 1940 of a debtor in cash or in kind, secured or unsecured, whether payable under a decree or order of a civil Court or otherwise, and whether payable presently or in future, but does not include the following.....any amount a suit or application for the recovery of which is barred by limitation, or which is otherwise irrecoverable under the law."

[6] Mr. Sen's argument is that the balance of the decretal amount which was over Rs. 25,000 was irrecoverable when this application under S. 37A was made. He pointed out that the sale was confirmed on 22nd July 1936 and possession actually given on 1st and 2nd May 1937. The decree-holders could apply within three years from the date of the confirmation of the sale for a simple money decree for the balance of Rs. 25,000 odd, but they did not do so. After three years admittedly an application for a simple money decree would be barred by limitation. That being so, Mr. Sen has contended that by reason of the definition, to which I have referred, the amount irrecoverable as being barred by limitation cannot be included in the amount of the debt. The debt, therefore, would be the sum of Rs. 31,584 less Rs. 21,584 which was the amount irrecoverable as being barred by limitation. The total debt was, therefore, only Rs. 10,000 and as there were two sets of mortgagors each could claim that they were only bound to pay half the amount. That being so, Mr. Sen urged that the debt was correctly stated in each application as Rs. 5000.

[7] It is to be observed that the definition S. 2 in which the definition of the word 'debt' occurs opens with these words : "In this Act, unless there is anything repugnant in the subject or context." The definition given is normally to be taken to apply wherever that word occurs in the statute. The definition however will not apply if the word appears in a subject or context which makes the application of the definition impossible and repugnant to the meaning of the context in which the word is found.

[8] The duty of the Board in connection with jurisdiction while dealing with applications made under the Act is dealt with by Rr. 144, 145 and 146 etc. Rule 144 reads as follows :

"The maximum amount of the sum total of all debts due from a debtor which can be dealt with under the provisions of the Act shall be Rs. 50,000 ;

Provided that with the previous sanction in writing of the Collector, a Board may deal with an application if the sum total of all debts due from the debtor exceeds Rs. 5000 but does not exceed Rs. 25,000."

Rule 145 is in these terms :

"If there is any doubt or dispute as to the amount of any debt, the Board shall in accordance with the principles of S. 18 and R. 50 or sub-s. (7) of S. 37A and Rr. 77D to 77F, as the case may be and as far as the same may be applicable, informally decide for the purpose of R. 144 the amount of such debt."

Rule 146 provides :

"(1) If the sum total of all debts mentioned by the debtor in his application under S. 8 or S. 37A or statement of debt under sub-s. (1) of S. 13 exceeds Rs. 5000 but does not exceed Rs. 25,000 the Board shall forward the application to the Collector for sanction under the proviso to R. 144 before passing any order upon it under sub-s. (2) of S. 13 or under S. 18 or sub-s. (7) of S. 37A. (2) If the amount so mentioned by the debtor exceeds Rs. 25,000 the Board shall not entertain the application."

[9] Mr. Sen has contended that what really matters in R. 146 is the sum total of the debts mentioned by the debtor and it matters not what the real debt is if the debtor stated the debts to be below Rs. 5000. In other words, Mr. Sen has urged that the debtor can give the Board jurisdiction by understanding his debts. The words used in R. 146 are not very happy, but I think it is clear from Rr. 144 and 145 what is really meant. The words "if the sum total of all debts mentioned by the debtor in his application etc., mean if the actual amount of the debts of the debtor exceeds Rs. 5000 or Rs. 25,000 as the case may be, then certain consequences follow.

[10] It seems to me quite clear from R. 145 that where there is a dispute as to the amount of a debt stated by the applicant in his application, the Board may informally decide the matter and when it does consider the matter it must consider it in the light of R. 146. When it is considering what is the amount of the debt in an application under S. 37A it must consider what the term 'debt' means in S. 37A sub-s. 5. Mr. Sen's argument is that 'debt' must mean in S. 37A, sub-s. 5 what it means in other portions of the Act. In other words, the definition of the word 'debt' in S. 2 must be applied to the word 'debt' in S. 37A, sub-s. 5. I have pointed out however that in the definition section it is expressly stated that the definition given will

not apply if there is anything repugnant in the subject or context, and I think it is clear that the word 'debt' in sub-s. (5) of S. 37A cannot mean what is stated in the definition of that word in S. 2. In short, there is another definition of the word 'debt' in sub-s. (7) of S. 37A of the Act. This sub-section reads :

"For the purposes of an award made under sub-s. (5) (a) the debt shall be deemed to be (i) the amount of the decree or certificate in execution of which the property was sold together with all costs of such execution including the cost of delivery of possession or the property to the decree-holder calculated in the manner prescribed."

[11] Applying this definition it is quite clear that the amount excluded in the definition as being barred by limitation must be included in ascertaining the amount of the debt. The debt is the amount of the decree, in execution of which the property was sold together with certain other charges. The amount of the decree in this case was over Rs. 31,000 and that is the amount of the debt for the purposes of Sub-s. (5) of S. 37A. The amount being over Rs. 25,000, it is clear that the Board had no jurisdiction to deal with the application by reason of sub-r. (2) of R. 146. That being so the Board properly rejected the application and the views of the Appellate Officer and of the learned District Judge cannot be assailed.

[12] Mr. Sen did not really contend that each group of petitioners was only liable for half the decretal amount, namely, Rs. 15,500 odd. He conceded that each of the groups was liable for Rs. 31,000 odd.

[13] For the reasons which I have given both these petitions fail and the Rules are discharged with costs.

[14] **Banerjee J.**—I agree.

V.R.B. *Rules discharged.*

A. I. R. (37) 1950 Calcutta 526 *[C. N. 198.]*

R. P. MOOKERJEE J.

Debendra Nath Mandal—Plaintiff—Appellant v. *Sakhilal Kar and others —Defendants —Respondents.*

A. F. A. D. No. 393 of 1947, D/- 13-6-1950, against decree of Sub-Judge, Fourth Court, Zillah 24 Paraganas, D/- 27-8-1946.

(a) Contract Act (1872), Ss. 55, 51 and 52—Contract for sale of immovable property — Payment of purchase-money within stipulated time — Stipulation not essence of contract—Decree for specific performance—Principles stated —T. P. Act (1882), S. 55 (1) (d).

In a case where the Court comes to the conclusion that time is not the essence of the contract for the purchase of immovable property, the failure by the plaintiff to fulfil the condition of paying a portion of the purchase-money required of him under the contract within the stipulated period will not *ipso facto*, disentitle him to get a decree for specific performance. In the circumstances of a particular case the Court has to enquire whether the delay which has taken place is properly explained by the plaintiff. The mere fact that there has been some delay is not sufficient to put him out of Court. [Paras 3, 5]

The question whether the lapse of time destroys the plaintiff's right has also to be considered with reference to other attendant circumstances. If the plaintiff has been in substantial possession of the benefits under the contract and is in effect claiming the completion of the legal estate, delay will not, if properly explained, affect his right to obtain specific performance. [Para 6]

This principle, however, is subject to a proviso. If the fact that the plaintiff has been in possession is used in extenuation of the delay which has taken place in filing the suit for specific performance, such possession must, in order to have that effect, be a possession under the contract and such that the vendor must know or be taken to know that the purchaser claims to be in possession under the contract. [Para 7]

The provisions contained in S. 55, T. P. Act, read with Ss. 51 and 52, Contract Act, are not inconsistent with the principle stated above. [Para 8a]

Annotation : ('46-Man.) Contract Act, S. 55 N. 3; ('50-Com.) T. P. Act, S. 55 N. 5.

(b) Civil P. C. (1908), S. 20—Cause of action how determined.

The cause of action is to be determined with reference to the pleadings and not the subsequent finding which may be reached by the Court. [Para 10]

Annotation : ('50 Com.) Civil P. C., S. 20 N. 14.

Rabinara Nath Chaudhuri — for Appellant.

Hem Chandra Dhar and Binodebehari Haldar — for Respondents.

Judgment.—The plaintiff appellant filed a suit for the specific performance of a contract, the terms of which are contained in a compromise petition which had been filed in an earlier suit between the parties. The plaintiff had paid either the whole or a substantial portion of the consideration money for a certain property under the terms agreed upon, and the plaintiff was required to pay an additional amount of Rs. 28 within one month from the date of the compromise, namely, 18th November 1943, and the defendants were required to execute the conveyance according to the agreement. The plaintiff's case was that after the compromise had been entered into, he had attempted to pay the money and to get the conveyance, but without success. Hence, the present suit for specific performance of the contract and for getting a conveyance from the defendants. It may be stated further that out of the properties which were to be conveyed under that agreement, possession of one of them had been delivered to the plaintiff already. The plaintiff continued in possession of that plot and is still continuing in possession thereof. Delivery of possession is also prayed for in respect of the property of which delivery of possession had not been given. The defence in the main was that the allegation of tender as made by the plaintiff was not true. The payment not having been made within the stipulated period of one month, the contract was neither

operative nor enforceable. It is not necessary for our present purpose to refer to other points which had been raised in the pleadings.

[2] The learned Munsif decreed the plaintiff's suit holding in favour of the plaintiff on all the material points. On an appeal being taken by the defendants to the Court of the Subordinate Judge, the suit was dismissed. It has been found by the learned Subordinate Judge that (1) time was not the essence of this contract; (2) the plaintiff has not proved that he was all along ready and willing to fulfil his part of the contract; and (3) the plaintiff did not pay the money as stipulated in the contract. On these findings, the plaintiff's suit was dismissed. Hence this appeal by the plaintiff to this Court.

[3] The short question for decision in the present appeal is whether in a case where the Court comes to the conclusion that time is not the essence of the contract, the failure by the plaintiff to fulfil the condition required of him under the contract within the stipulated period will *ipso facto*, disentitle him to get a decree for specific performance.

[4] It is now well settled that a plaintiff who seeks specific performance of a contract has to show first that he has performed or been ready and willing to perform the terms of the contract on his part to be then performed and secondly that he is ready and willing to do all matters and things on his part thereafter to be done. If there is a default on his part in either of these two respects, that furnishes a ground upon which the plaintiff's claim may be resisted. *Manik Chandra* v. *Abhoy Charan*, 24 C. L. J. 90 : (A. I. R (4) 1917 Cal. 283).

[5] If it is found that time is not the essence of the contract then the non-fulfilment of the condition within the time fixed is not by itself destructive of the claim for specific performance. In the circumstances of a particular case the Court has to enquire whether the delay which has taken place is properly explained by the plaintiff. The mere fact that there has been some delay is not sufficient to put him out of Court. Reference may in this connection be made to the observations of the Judicial Committee in the case of *Meenakshi Naidoo* v. *Subramaniya Sastri*, 14 I. A. 160 . (11 Mad. 26 P.C.) Their Lordships pointed out the circumstances under which lapse of time and delay are most material for determining the rights of the plaintiff to obtain specific performance in the following terms :

> "Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might clearly be regarded as equivalent to a waiver of it; where by his conduct and neglect he has, though perhaps not waived that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted; in either of these cases lapse of time and delay are most material."

[6] The question whether the lapse of time destroys the plaintiff's right has also to be considered with reference to other attendant circumstances. If the plaintiff has been in substantial possession of the benefits under the contract and is in effect claiming the completion of the legal estate, delay will not, if properly explained, affect his right to obtain specific performance. In the case of *Clarke* v. *Moore*, 1 Jo. & Lat. 723: (7 Ir. Eq. R. 515), the Lord Chancellor had explained that the circumstances under which the fact of the plaintiff being in possession materially affected and assisted the plaintiff in obtaining specific performance even though such prayer was made after lapse of time This view has been accepted in the case of *Arjuna Mudaliar* v. *Lakshmi Ammal*, (1948) 2 M. L. J. 271 : (A. I. R. (36) 1949 Mad. 265), where a Division Bench of the Madras High Court observed that mere delay does not by itself preclude the plaintiff from obtaining specific performance if his suit is otherwise in time. The delay must be such that it may be properly inferred that the plaintiff has abandoned his right, or on account of the delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant as from long delay alone, without anything further an abandonment of rights would be presumed. Reference may in this connection be also made to Ss. 473 and 474 of 31 Halsbury's Laws of England, Hailsham Edition, pp. 404 to 405.

[7] This principle, however, is subject to a proviso. If the fact that the plaintiff has been in possession is used in extenuation of the delay which has taken place in filing the suit for specific performance, such possession must, in order to have that effect, be a possession under the contract and such that the vendor must know or be taken to know that the purchaser claims to be in possession under the contract. *Mills* v. *Haywood*, (1877) 6 Ch. D. 196.

[8] In the present case, it is an admitted fact that the plaintiff is in possession and had been in possession. It is, however, stated that the plaintiff had been in possession from before the compromise which had been filed in the earlier suit. What has been the nature of the possession from after the filing of the compromise has neither been enquired into by either of the Court nor any finding arrived at. If the proposition, as enunciated above, be given effect to there has to be a further enquiry as to the nature of the possession by the plaintiff from after the filing of the compromise in the earlier

suit to ascertain whether the conditions laid down in the case of *Mills* v. *Haywood*, (1877) 6 Ch. D. 196, are satisfied.

[8a] To the application of this principle an objection has, however, been raised on behalf of the respondents. It is contended that S. 55, T. P. Act read with Ss. 51 and 52, Contract Act provides the law which is applicable in the present case and the principle as stated above is inconsistent with the same. Reliance is placed upon sub-s. (3) of S. 55, T. P. Act, which provides that where the whole of the purchase-money has been paid to the seller he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power. This sub-section is not attracted on the facts of the present case. Reference is also made to cl. (d) of sub-s. (1) of S. 55, T. P. Act. Material portion of the section is in the following terms:

"In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities and rights mentioned in the Rules next following, or such of them as are applicable to the property sold.....

* * * * *

(1) (d) on payment or tender of the amount due in respect of the price to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place."

There is no question that these provisions are apposite but they do not in my view in any way contradict or run counter to the propositions to which I have made reference in the earlier part of this judgment. It is only on payment or tender of the amount due by the buyer that the seller is to execute the document. The whole question in this case is whether such payment or tender by the buyer has been at a proper time and place. In determining that question, the Court has to consider whether the lapse of time from the date of the contract to the date of payment is properly explained or not and whether the dealy that has taken place is excusable, or not.

[9] Similarly, the provisions contained in Ss. 51 and 52, Contract Act do not in any way affect the application of the principles. Section 51 simply provides that a promisor is not bound to perform his part of the contract unless the reciprocal promisee is ready and willing to perform the same. I shall deal with another part of the objection raised by the respondents as to the frame of the suit and the existence of the cause of action on the date the suit was filed. Section 52, Contract Act also provides for the order in which the reciprocal promises by the respective parties are to be performed. This section also does not in any way affect the application of the principles stated already.

[10] Lastly, it is contended on behalf of the respondents that the plaintiff had not, even on the date that the suit was filed, been ready or had actually deposited Rs. 28 which under the contract he was required to pay within a month of the filing of the compromise. The learned Munsif points out, and I think rightly, that although the deposit had not been made on the date that the suit had been filed, there are sufficient indications in the plaint to show the desire and readiness of the plaintiff on that day to fulfil his part of the contract. The cause of action is to be determined with reference to the pleadings and not the subsequent finding which may be reached by the Court. That there was a cause of action on which the suit had been filed by the plaintiff is beyond question. The deposit which had actually been made by the plaintiff was on 8th January 1946, two months before the suit had been disposed of and within three years of the filing of the compromise in November 1943. Even if the suit had been filed on 8th January 1946, or be deemed to have been filed on this latter date, such a suit will still be within time and there can be no objection to the prayer as made in the plaint being allowed if otherwise the plaintiff is within time, or if the relief has not otherwise become barred. That the plaintiff had a cause of action on the date the suit was filed cannot, therefore, be controverted.

[11] The plaintiff is entitled to relief provided it can be shown that the possession which he had exercised over a substantial portion of the property in suit was under the contract. This fact has not been enquired into, as I have already stated.

[12] The result, therefore, is that the appeal is allowed, the judgment and decree of the Court of appeal below are set aside and the case is remitted to that Court for a decision on the point as to what was the nature and character of the possession which had been exercised by the plaintiff in respect of Dag No. 564 and particularly whether that possession was a possession under the contract and such that the vendor must know or be taken to know that the plaintiff claimed to be in possession under the contract. If the answer be in the affirmative, the plaintiff is entitled to a decree in the present suit. If it is found against the plaintiff the suit will have to be dismissed. As this specific point had not been raised or considered in the form in which it has been done in this Court, both the parties will be entitled to lead evidence on this point only. Costs of this Court will abide the result.

V.S.B. *Case remanded.*

in the absence of express enactment or necessary intendment: A. I. R. (14) 1927 P. C. 242, *Rel. on.* [Para 2]

Dr. Sen Gupta and Satya Charan Pain —for Petitioner.

Sitaram Banerjee and Chandidas Roy Chowdhury —for Opposite Party.

Sen J. — The facts giving rise to this Rule briefly are as follows The petitioner who is the landlord let out certain premises to the opposite party Rai Sahib Sakti Bhusan Roy sometime in March 1942 at a rental of Rs. 50 per month. An application was made under the House Rent Control Order 1943, by the landlord for fixing the rent and by consent the rent was fixed at Rs. 72 per month on 2nd November 1943. On 19th January 1944, the opposite party instituted a suit for the recovery of money paid as occupier's share of taxes stating that the sum of Rs. 72 included taxes. The trial Court dismissed the suit. The Full Bench of the Court of Small Causes decreed it. The matter came up before this Court and the matter was remanded and is still pending. On 27th April 1949, the landlord applied for setting aside the consent order which was passed on 2nd November 1943, the application purporting to be made under S. 151, Civil P. C. The application was dismissed by the Additional Rent Controller. An appeal was taken to the Chief Judge of the Court of Small Causes and he dismissed the appeal. Then there was an application for review on 25th August 1949 before the Chief Judge of the Court of Small Causes and that application was rejected. Against that order the present Rule has been obtained.

[2] In our opinion, this Rule must be discharged. It has been held by a Division Bench of this Court in the case of *Indian Homeopathic Medical Association* v. *Kanailal Pal*, 54 C. W. N. 389 : (A.I.R. (37) 1950 Cal. 263) that this Court has no power of revising the orders passed by the Chief Judge of the Court of Small Causes in matters like these. It is contended on behalf of the petitioner that although this Court had no power to interfere before the Constitution came into force, it has now power to do so under Art. 227, Constitution Act, and we are invited to exercise that power. When the order was passed it was a final order with which this Court could not interfere. The Constitution Act was not in force then. Assuming that subsequently this Court has been given powers of interference that would not in our opinion entitle this Court to interfere with an order which was passed at a time when such power of interference did not exist. In this connection I would refer to the decision of the Judicial Committee in the case of *Delhi Cloth and General Mills Co. Ltd.* v. *Income-tax Commissioner, Delhi*, 54 I. A. 421 : (A. I. R. (14) 1927 P. C. 242). The passage in which this principle has been laid down appears at page 425. This is what their Lordships said :

"The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in the *Colonial Sugar Refining Co.* v. *Irving*, (1905) A. C. 369: (74 L. J. P. C. 77) where it is in effect laid down that, while provisions of a statute dealing merely with matter of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment."

There is nothing in Art. 227, Constitution Act, which would indicate that there was such an intendment as is sought to be attributed to Art. 227. Certainly there are no express words in the Article which would give the Court the right to interfere with a right in existence at the time of the passing of the Constitution Act.

[3] In these circumstances we are of opinion that this Rule must be discharged with costs. Certificate to appeal to the Supreme Court is granted.

[4] **K. C. Chunder J.**—I agree.

R.G.D. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 513 *[C. N. 192.]*

HARRIES C. J. AND BANERJEE J.

Karali Prasad Roy—Decree-holder—Appellant v. *Probodh Chandra Mitra and others — Respondents.*

A. F. A. O. No. 91 of 1948, D/- 9th June 1950. Against order of D. J., Burdwan, D/- 30th June 1948,

(a) Civil P. C. (1908), O. 21, R. 22—Proof of service of notice—Entries in suit register.

Mere entries in suit register showing that the notices were issued cannot by themselves prove that notices were served. [Para 5]

Annotation : ('44-Com.) Civil P. C., O. 21, R. 22, N. 4.

(b) Civil P. C. (1908), S. 11, O. 21, R. 22—Execution application—Issue of notice — Failure to serve notice—Subsequent execution application — Question of limitation—Res judicata.

When on an application for execution, a notice is issued under O 21, R. 22 followed by an order under O. 21, R. 66 but the notice is not served, the judgment-debtor cannot be said to have an opportunity to raise the question of limitation and, therefore, he will not be debarred from raising the question in subsequent execution application. [Para 5]

Even assuming that the notice under O. 21, R. 22 was served but the judgment-debtor did not appear, the judgment-debtor can raise objection to the sale and take the point of limitation in subsequent proceedings : A. I. R. (2) 1915 Cal. 350, *Rel. on.* [Para 8]

Annotation : ('50-Com.) Civil P. C, S. 11 N. 23, O. 21 R. 22 N. 5.

(c) Limitation Act (1908), S. 3—Execution application—Failure to decide point of limitation — Subsequent execution application — Point of limitation—Bar of res judicata—Civil P. C. (1908), S. 11.

The principles of S. 3 apply to execution proceedings. The Court, therefore, is bound to take the point of

limitation itself and dismiss the execution application if it is not in time. Where it fails to do so, it cannot be said that the judgment-debtor is hit by *res judicata* or any principles analogous thereto and, therefore, is not precluded from raising the point of limitation in subsequent execution proceedings. [Para 9]

Annotation : ('50-Com.) Civil P. C., S. 11, N. 23 ; ('42-Com.) Limitation Act, S. 3 N. 19.

Jagadish Chandra Ghose—for Appellant.

Panchanan Chowdhury, Purushottam Chatterjee and Nirmal Chandra Chowdhury—for Respondents.

Banerjee J.—This second appeal arises out of an execution proceeding instituted in the following circumstances. The decree in the suit was made on 30th June 1933. An appeal from it was dismissed on 30th January 1934. An application for execution of the decree was made on 14th August 1934. In due course sale proclamation was published on 21st July 1935. But no further step having been taken, it was dismissed for default on 4th December 1935.

[2] On 23rd June 1937, one Surjya Narayan Roy claiming to be an assignee of the decree filed an execution case. It was registered. On 20th August 1937 the order registering the application was cancelled and the petition was treated as an application for substitution. The decree-holder made another application which gave rise to execution Case No. 139 of 1939. This application was filed on 1st September 1939 and was dismissed for want of prosecution on 4th June 1941. In this execution case notice under O. 21, R. 22, Civil P. C., had been issued, followed by a notice under O. 21, R. 66. This application again was dismissed for non-prosecution on 4th June 1941.

[3] Execution case No. 21 of 1943 from which this appeal arises was started on 3rd June 1943. In this execution case, after notices under O. 21, R. 22 and O. 21, R. 66, Civil P. C., the properties attached were sold. The question is whether this last execution case is out of time. It is quite clear that if the application made on 23rd June 1937 is not regarded as a step-in-aid of execution, the application which was filed on 1st September 1939, was out of time. Therefore, any order made in that application would be ineffective. Consequently, the present application would be time barred. Originally the learned Subordinate Judge in this last mentioned execution case held that it was out of time. But on appeal the District Judge remanded the matter and the learned Subordinate Judge has revised his previous opinion and held that it is not time barred. From that there was an appeal to the District Judge who has held that it is out of time. From the order of the District Judge the present appeal has been filed.

[4] The learned advocate appearing on behalf of the appellant has taken before us one point and one point only, in support of the appeal namely that it is not open to the judgment-debtor to take the plea of limitation by reason of the fact that in the application which was started on 1st September 1939, there was an order for the issue of a notice under O. 21, R. 22, Civil P. C., followed by an order for publication of the sale proclamation under O. 21, R. 66. According to counsel, when the Court after issue of notice under O. 21, R. 22 directed sale of the properties, it came to an implied finding that the application was not barred by time, otherwise, it could not order the sale.

[5] The question before us is whether the notice under O. 21, R. 22 was served on the judgment-debtor. If the notice was not served the judgment-debtor had no opportunity to raise the question of limitation and, therefore, no question of *res judicata* arises. The only evidence the judgment-debtor produced before the Courts below in proof of service of the notice was a certified copy of the suit register. There was no other evidence on this point. In the register there are entries showing that the notices were issued. But that does not mean that the notices were served. Such entries by themselves cannot prove service. It has been laid down in a Bench decision of this Court *Mohuddin* v. *Pirthichand Lal*, 19 C. W N. 1159 : (A. I. R. (2) 1915 Cal. 444) where it was observed that the mere entry in the order sheet is no proof that the notice had been served. In this case we are unable to hold that there was service.

[6] The Court issues notice under O. 21, R. 22 where the decree is more than one year old or when the decree is sought to be executed against the legal represnetative of the judgment-debtor. If the person to whom notice is issued under O. 21, R. 22 does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court *shall* order the decree to be executed (O. 21, R, 23, Civil P. C.) In this case after the issue of notice under O. 21, R. 22 when there was no appearance by the defendant, the Court was bound to order the decree to be executed in such manner as the decree could be executed.

[7] In this case the judgment-debtor had not been served and did not appear to the notice under O. 21, R. 22 so he did not raise nor had the opportunity to raise the issue of limitation. The Court issued notice under O. 21, R. 66 and directed sale of the properties as it was incumbent on it to do so. We do not see how any question of *res judicata* arises.

[8] Furthermore, in the case of *Chatterput Singh* v. *Daya Chand*, 23 C. L. J. 641 : (A.I.R (2) 1915 Cal. 350), it has been held that if the judgment-debtor does not appear to contest a

notice under O. 21, R. 22 he is not precluded from raising an objection when his property is attached. Assuming, in this case that the notice under order O. 21, R. 22 was served, which we do not hold is the fact the judgment-debtor can raise objection to the sale and take the point of limitation.

[9] There is another point of view from which we can come to the conclusion that the question of limitation is not *res judicata*. It is this: under S. 3, Limitation Act, whether or not the point of limitation is taken by the defendant or the respondent in a suit or an application, the Court is bound to notice it in disposing of the matter before it. It has been held that the principles of this section apply to execution proceedings. In this case, therefore, the Court was bound to take the point of limitation itself and dismiss the application if it was not in time. Having failed to do so, it cannot be said that the judgment-debter is hit by *res judicata* or any principle analogous thereto.

[10] We, therefore, hold that the plea of *res judicata* is no bar to the judgment-debtor taking the point ot limitation to the application under consideration. As the application was not in time, the Court was bound to dismiss it.

[11] On these considerations we hold that the District Judge was right. The application is barred by time.

[12] The appeal, therefore, is dismissed with costs, one set two gold mohurs.

[13] **Harries C. J.**—I agree.

G.M.J. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 515 *[C. N. 193]*

ROXBURGH J.

S. K. Chaudhuri —Defendant — Appellant **v.** *Joy Kumar Sarkar —Plaintiff — Respondent.*

A F A. D. No. 453 of 1948, D/9-6-1950, against decree of Sub-J., 2nd Court, 24 Parganas, D/-2-3-1948.

(a) Transfer of Property Act (1882), S. 113—Proceeding for fixing standard rent — If amounts to waiver.

Where a landlord institutes a proceeding for fixing a standard rent before the Rent Controller before the date of the notice of ejectment and continues it after that and during the hearing of the suit for ejectment, he cannot be said to have waived the notice

[Paras 3 and 4]

Annotation: ('50-Com). T. P. Act, S. 113 N. 8.

(b) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (XVII [17] of 1950), S. 18 (5) —Suit for ejectment brought under Calcutta House Rent Control Order, 1943 — Second appeal pending when Act came in to force —S. 18 (5), if applies.

Where a suit for ejectment of a tenant brought under the Calcutta House rent Control Order of 1943 was pending in second appeal when the Rent Control Act of 1950 came into force, the second appeal is to be disposed of under the West Bengal Premises Rent Control (Temporary Provisions) Act of 1948 and if the tenant has not complied with the provisions of S. 12 (1) (b) of that Act a decree has to be passed against him under that Act and that brings into operation the provisions of S. 18 (5) of the 1950 Act and a decree has to be passed accordingly. [Para 9]

(c) Interpretation of Statutes—Retrospective operation.

Though an Act may have some retrospective effect and apply to pending proceedings it does not follow that every provision of the Act will have retrospective effect. [Para 12]

(d) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (XVII [17] of 1950), S. 18 (5), 14 (3), Proviso and 12 (1), Proviso (i) —Landlord, if can show that tenant has committed default described in S 12 (1), Proviso (i) and that he is not entitled to protection of S. 12 — Amendment of pleadings to assert above — Landlord, if entitled to amend pleadings to show some other ground of eviction.

Reference to S. 14, in S. 18 (5) does not mean that a landlord will be entitled to show that the tenant committed a default as described in S. 12 (1) proviso (i) of the Act, nor does it mean that he will be entitled to show that the tenant is not entitled to the protection of S. 12 because of the proviso to sub-s. (3) of S 14. The landlord will not be entitled to amend his pleadings for asserting the above, nor will he be entitled to amend them for the purpose of showing that he has some other ground for eviction of the tenant under Rent Control Act of 1948, e. g. that the landlord *bona fide* requires the premises for his own use.

[Paras 10, 17 and 19]

Chandra Sekhar Sen, Rabindra Nath Choudhury and Bejoy Bhose —for Appellant.

Ajit Kumar Dutt and Kiran Bhusan Mukherji — for Respondent.

Judgment.—This appeal arises out of a suit for ejectment filed on 18th June 1946 under the provisions of the Calcutta Rent Control Order. The premises had been let in July 1942 at a rental of Rs. 32. The plaintiff based his suit on the grounds that notice had been served and that the defendant was a habitual defaulter. There was also a claim for damages for the period subsequent to the notice. The trial Court decreed the suit giving damages only up to the date of suit.

[2] There was an appeal by the defendant to the Subordinate Judge, 2nd Court, Alipore, and a cross objection by the plaintiff for damages from the date of suit to the date of recovery of possession. The lower appellate Court dismissed the appeal with costs and allowed the defendant's (plaintiff's ?) cross objection. The defendant now appeals.

[3] For the appellant three points were argued before me (1) that as the plaintiff had instituted a proceeding for fixing a standard rent before the Rent Controller before the date of the notice of ejectment and continued it after that and during the hearing of the suit, he had waived the notice; (2) that notice had not been properly served; and (3) that the provisions

of S. 18 (5) of the latest West Bengal Premises Rent Control Act, 1950, are applicable to the case.

[4] There seems to me to be no substance in the first point. Standard rent is fixed for premises whoever may be the tenant. Again the landlord could not be sure that he would win his suit, he has not yet finally won it. He was surely entitled to protect his interest by obtaining an order from the Rent Controller as to the rent payable in case his suit failed. His proceedings in doing so could not in any sense amount to waiver of his contention that after the notice the tenant was a trespasser liable to ejectment on the ground given by him. Lastly the Rent Controller had power to make his order with retrospective effect, and in fact did so in part for a period prior to the notice. The landlord was entitled to have that established in so far as it affected the period prior to the notice when there was no question that the defendant was a tenant, without any question of waiver.

[5] As to the second point this is concluded by the findings of fact, no error of law having been committed in arriving at those findings. Four attempts to serve notice were made. The third attempt was by way of sending a registered cover with the notice, which was returned with the endorsement 'left' made by the postal peon. The fourth attempt was by attempt at personal service, no one at the premises would accept the notice, and it was stuck up. There is authority that the first, or rather third attempt, amounted to good service, but in any case the fourth attempt certainly did so. This contention therefore also fails.

[6] We have now to attempt to understand and apply S. 18 (5), West Bengal Premises Rent Control Act, 1950 (hereafter called the 1950 Act) which runs as follows:

"*18 (5)*. If at the date when this Act comes into force, a suit for ejectment of a tenant is pending whether in trial Court, or in Court of first or second appeal in which no decree for ejectment would be passed except on the ground of default in payment of arrears of rent under the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act, Act 38 (XXXVIII) of 1948, the Court shall exercise the powers of granting relief against ejectment given by S. 14 of this Act following the provisions and procedure of that section as far as may be necessary, and for the said purpose shall make such order for amendment of pleadings, production of evidence, remand, payment of costs as may be just."

[7] The following dates and facts are important in this case:

(1) Calcutta House Rent Control Order came into force on 23rd June 1943.
(2) Suit was filed on 18th June 1946.
(3) All arrears were paid by 14th September 1946.
(4) Tenant has paid or deposited rent regularly in due time since then.
(5) Calcutta Rent Ordinance came into force on 1st October 1946 (later continued in force by the West Bengal Expiring Laws Act, 1948).
(6) Trial Court decreed the suit on 30th September 1947.
(7) Lower Appellate Court decreed appeal on 2nd March 1948.
(8) Appeal presented to High Court on 5th April, 1948.
(9) West Bengal Premises Rent Control (Temporary Provisions) Act came into force on 1st December 1948.
(10) West Bengal Rent Control Act 17 (XVII) of 1950 came into force on 31st March 1950.

[8] The suit was brought under the Calcutta House Rent Control Order, 1943. Ordinarily it would be disposed of throughout under the provisions of that Act. The decree was passed by the trial Court on 30th September 1947. In the meantime the Calcutta Rent Ordinance, 1946 (hereafter called the Ordinance) had come into force on 1st October 1946. Under S. 17 of that Ordinance, it was provided that if any decree had been passed before the Ordinance came into force but possession had not been recovered the Court, if it was of opinion that the decree would not have been made if the Ordinance had been in operation at the date of the making of the decree might rescind or vary it for the purpose of giving effect to the provisions of the Ordinance. There is nothing specific in the Ordinance relating to pending proceedings, unless we are to take S. 26 as covering legal proceedings; but it can hardly be suggested that relief in accordance with the provisions of the Ordinance was to be given in respect of decrees passed before it came into force, and none in cases pending when it came into force. There is sufficient provision in the Ordinance to show that the context requires some modification of the effect of S. 8, Bengal General Clauses Act. The decree then must be taken to have been made under the provisions of the Ordinance.

[9] By a parity of reasoning as given above to show that the case started under the Calcutta House Rent Control Order was to be disposed of in the trial and appeal Courts under the provisions of the Ordinance, then this second appeal is to be disposed of primarily under the West Bengal Premises Rent Control Act, 1948 (hereafter called the 1948 Act). If the tenant had complied with the provisions of S. 12 (1) (b), then no decree could be passed against him under that Act; but admittedly he has not, so a decree would now be so passed by affirmance of the decree of the lower Courts. That then brings

into operation the provisions of S. 18 (5) of the 1950 Act, and a decree is to be passed accordingly.

[10] For the landlord-respondent here it is argued, (1) that the reference to S. 14 in S. 18 (5) of the 1950 Act means that he will be entitled to show that the defendant has committed a default as described in S. 12 (1) proviso (i) of that Act, (2) that for similar reasons he will be entitled to show that the tenant is not entitled to the protection of S. 12 because of the proviso to sub-s. (3) of S. 14, (3) that the reference to amendment of pleadings in S. 18 (5) shows that he will be entitled to amend his pleadings for asserting the above, (4) that he will also be entitled to amend them for the purpose of showing that he has some other ground for eviction of the tenant under the 1948 Act, e. g., that the landlord *bona fide* requires the premises for his own use.

[11] To dispose of these contentions, it is necessary to consider the general structure of the previous legislation, as well as that of the 1950 Act in order to appreciate the marked difference between them. It will be sufficient probably if we refer to the Ordinance of 1946 and the Act of 1948 only as regards earlier legislation. All three enactments recognise the existence of a right to eject under the Transfer of Property Act. They then substantially take this right away by a provision which on the face of it is merely one of procedure, each enacts (S. 11 Ordinance, S. 12 of the 1948 and 1950 Act) that notwithstanding anything contrary in other Act no decree for ejectment shall be passed (with some qualification in the Ordinance, and 1948 Act). They then by way of provisos give back the right to eject in certain cases. Section 12 (4) of the Ordinance then again takes away the benefit of the provisos from the tenant unless he fulfils certain conditions, under S. 12 (4) (a) he must pay regularly by the fifteenth of the month or the contract date ; under S. 12 (4) in the case of arrears accrued before the commencement of the Ordinance he must pay them up within one month of the date of commencement of the Ordinance. Similar though slightly different provision is made in the 1948 Act in S. 12 (1) (a) and (b). The effect of these provisions is to lay down certain conditions in which a tenant can be ejected, though the form is by way of saying in what cases decrees can be passed. *Prima facie* when it is enacted that no decree shall be passed except in certain conditions the provision will apply to all cases, any case pending whether in trial Court or in appeal at the date the enactment comes into force, and any case started after the commencement of the Act but the real intention can only be gathered by examining the whole enactment in question. As I have said above under the Ordinance and the 1948 Act it was clear that the provisions applied (subject to a caution to be discussed below) to pending litigation. Sections 17 and 26 of the Ordinance, and Ss. 18 and 45 of the 1948 Act make that clear.

[12] A word of caution is necessary here. Though an Act may have some retrospective effect and apply to pending proceedings, it does not follow that every provision of the Act will have retrospective effect. Without elaborating the point, it may be stated that examination of the various enactments shows many provisions which are clearly not to take effect before the commencement of the Act. Section 12 (3) of the Act of 1948 is one example (with respect it may be pointed out that the recently reported case of *Akhil Ranjan Das* v. *B. N Biswas*, 54 C. W. N. 536 : (A. I. R. (37) 1950 Cal. 472)) appears to overlook this fact. The distinction as regards S. 14 of the Ordinance was recognised in *Abanindra Mohan* v. *Khazamull Sardar*, 52 C. W. N. 698.

[13] When we come to the 1950 Act the case is clearly different. The root provision in S. 12 is more drastic than that in S. 11 of the Ordinance or S. 12 of the 1948 Act ; there is no qualification. But there is no provision corresponding to S. 17 of the former or S. 18 of the latter. Section 18 of the 1950 Act has a much more limited scope. Section 18 (1) deals with decrees passed before the Act came into force, S. 18 (5) with suits pending in the trial Court or in appeal. In the case of decrees passed (before the commencement of 1950 Act) under the 1948 Act on the ground of default S. 18 (1) provides that the tenant shall be relieved from ejectment provided he pays up all arrears assuming that the tenancy had continued up to the month in which an order is made under the section directing the tenant to pay that amount plus interest and costs on a date not later than forty days from the date of the order. No question arises as to applicability of any other provision of the 1950 Act to decrees passed before its commencement.

[14] Then in S. 18 (5) specific provision is made for pending cases where (but for the provision of S. 18 (5)) a decree would be passed under the 1948 Act. Section 18 (5) provides that the Court is to exercise the powers given under S. 14 of the Act. Unless the wording of the provisions clearly provides otherwise, we may take it that the provision made under S. 18 (5) is intended to achieve much the same substantial result in these pending cases as is provided (in S. 18 (1)) for cases where a decree for default had already been passed under the 1948 Act before

the 1950 Act came into force. This is the same assumption as we made in regard to the 1948 Act, and the Ordinance, but the result is the opposite. Section 18 of the 1948 Act, and S. 17 of the Ordinance clearly applied the provisions of those enactments to cases where decrees were passed before their commencement, hence, (coupled with the effect of S. 45 and S. 26 respectively of those enactments) we deduced that the enactments applied to pending cases. But in the 1950 Act the intention seems clear not to apply its provisions to either type of case except in the limited respect provided in S. 18 (1) and S. 18 (5).

[15] If we turn then to S. 14 (1) we find that by applying its provisions practically the same result will be achieved as under S. 18 (1), for the Court will under S. 14 (1) calculate the amount in 'arrears' up to the date of the order mentioned thereafter, as also the amount of interest on such arrears of rent calculated at the rate of 9 and three-eighths per centum per annum from the day when the rents became arrears up to such date, together with the amount of such cost of the suit as is fairly allowable to the plaintiff landlord, and shall make an order on the tenant for paying the aggregate of the amounts (specifying in the order such aggregate sum) on or before the date fixed in the order. Under sub-s. (2), the date in question is to be the fifteenth day from the date of the order, excluding the date of the order.

[16] It is to be noted that under S. 18 (5) of the 1950 Act, the Court is to exercise the powers of granting relief against ejectment given by S. 14 of the Act following the provisions and procedure of that section as far as may be necessary. It does not provide that the relief is to be given against the same default as that against which S. 14 is to give relief, namely, the default created by the effect of proviso (i) to sub-s. 1 of S. 12 of the Act. The default against which relief is to be given following the provisions and procedure of S. 14, is the default under the 1948 Act which would result in the decree for ejectment under that Act.

[17] This disposes of the first three points argued for the landlord respondent set out above. If the tenant is not liable for the default created by S. 12 (2) (i), the first point is disposed of. Consequently the proviso in S. 12 (3) equally cannot apply against the tenant, for that refers to three defaults as created by S. 12 (1) (i) within a period of 18 months, and if that does not apply against the tenant, the latter proviso cannot apply.

[18] It remains to consider the fourth point urged for the landlord respondent. Is he to be allowed now to show that under the 1948 Act he could get a decree on a ground other than the ground of default. In this connection Mr. Dutt laid stress on the provision in S. 18 (5) for amendment of pleadings. The Court is to exercise the powers of granting relief against ejectment given by S. 14 of the Act . . . , and for the said purpose is to make such order for amendment of pleadings, production of evidence, remand, payment of costs as may be necessary or just. The words "for the said purpose" suggest that the amendment is to be limited to the purpose of giving relief in a case assumed to be one to which S. 18 (5) is applicable. Mr. Dutt urges that they mean also for the purpose of showing that the case is not one to which S. 18 (5) is applicable, i. e., for showing that there is some other ground for ejectment other than default. He contends that no amendment would apparently be necessary merely for the limited purpose of giving relief. I do not think this is strictly correct. In determining the amount payable under S. 14 there might be some question as to amount of arrears at the date when the rent became arrears, and possibly as to subsequent payments. In a suit for ejectment for default actual arrears might not have been claimed. For example default which was made the ground for ejectment might be that provided for in S 12 (3) of the 1948 Act, a mere case of delay in payment for three consecutive months.

[19] On the other hand, it can be argued that if another ground for ejectment does exist, it will save multiplicity of litigation to allow, with suitable orders as to costs, the landlord still to establish that ground, especially in view of the fact that the latest Act has given a new privilege to the tenant to avoid ejectment. There is however one reason why in this case I think this should not now be allowed. The ground proposed to be established is that of *bona fide* requirement by the landlord. If the amendment is allowed the issue will be tried under the 1948 Act since 1950 Act applies to the suit only to the limited extent laid down in S. 18 (5). But under the present law if the landlord brings his suit he must establish reasonable requirement, his rights are more restricted under the new Act. I think therefore, that he ought to establish them under the new Act. An additional reason in favour of this view, is that under S. 18 (1) in the case of decrees passed before the 1950 Act came into force, clearly the landlord would not be allowed to agitate fresh grounds to meet the tenant's claim for relief thereunder.

[20] The decree of the lower Court is therefore set aside. Order is hereby passed under S. 14 (1), West Bengal Premises Rent Control Act, 1950, for the defendant to pay rent at Rs. 50 per month from 1st August 1945, up till the date

of this order together with interest at 9¾ ths per centum per annum, plus costs throughout less the amounts of costs already deposited in the Courts below, which the landlord may withdraw, the aggregate sum being Rs. 3725-13-0. The amount will be paid into this Court on or before 8th June. The case will be put up on 9th June with a report whether the amount has been paid or not, when further order will be passed. The defendant will be at liberty to withdraw the sum of Rs. 400 deposited in the trial Court on account of damages. The defendant will also be at liberty to withdraw the sum of Rs. 2800 out of the total amount deposited with the Rent Controller to the credit of the plaintiff.

[21] The amount has been paid in time, the suit is accordingly dismissed under S. 14 (3), West Bengal Premises Rent Control Act, 1950.

[22] Leave to appeal under Cl. 15 of the Letters Patent is granted.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 519 *[C. N. 194.]*

ROXBURGH J.

Jatindranath Naskar and others — Petitioners v. *Baharaddi Molla and others — Opposite Party.*

Civil Rule No. 1314 of 1949, D/- 19th June 1950, from order of Munsif 1st Court, Baruipore, D-/ 14th May 1949.

Debt Laws — Bengal Agricultural Debtors Act, 1935 (VII [7] of 1936), S. 37A (8) — Award and order of restoration of possession to debtor — Proceedings under sub-s. (8) — Objection by objectors, not parties to proceedings under Act, when can be taken — Applicability of Civil P. C., to proceedings under sub-s. (8) — Civil P. C. (1908), O. 21, Rr. 97, 100.

The Act itself provides no procedure for the Court to follow in a proceeding under S 37A (8) of that Act. The proper procedure for a Court to follow is the procedure of the Civil Procedure Code in regard to execution of decrees. [Para 2]

Where the judgment-debtor obtains an award and order for restoration of possession of property and applies under sub-s. (8), objection by the lessees on the basis of a lease from landlord cannot be raised as they are not parties to proceedings under the Act. The proper time for them to be heard is if and when delivery of possession is sought to be given they resist delivery when the applicant under S. 37A (8) can come in with an application under O. 21, R. 97, Civil P. C., or in the event that the objectors are dispossessed they can come in under O. 21, R. 100. [Para 5]

Annotation : ('44 Com.) Civil P. C., O. 21, R. 98 N. 1, 5; R. 100, N. 2.

Hiralal Chakravarti and Harideb Chatterji — for Petitioners.

Shyama Charan Mitra and Rabindra Nath Choudhury — or Opposite Party.

Order. — This rule arises out of proceedings under S. 37A (8), Bengal Agricultural Debtors Act. The judgment-debtors obtained an award and order for restoration and applied to the Munsif, 1st Court, Baruipur, under the provisions of that sub-section. Objection was made by the present petitioners (who were opposite parties Nos. 15 and 16 in that petition) on the basis of a lease from the landlord. It is unnecessary for me to give details of the nature of the objection. The objection was overruled. The objectors were not parties to the proceedings under the Bengal Agricultural Debtors Act, a position which is quite in accordance with the decision in *Taraprasanna Roy* v. *Adwaita Charan*, A. I. R. (35) 1948 Cal. 329 and subsequent decisions.

[2] On behalf of the petitioners, my attention has been called to the case of *Narayan Chandra* v. *Bash Behari*, Civil Revn. C. N. 1721 of 1946 : (I. L. R. (1948) 2 Cal. 68) in which it was held by Mukherjea and Ormond JJ. that where the judgment-debtor was obstructed in endeavouring to get possession through Court under S. 37A (8) he could make an application under O. 21, R 97, Civil P. C. The Bengal Agricultural Debtors Act itself provides no procedure for the Court to follow in a proceeding under S. 37A (8) of that Act which has many affinities with a proceeding under S. 144, Civil P. C. The case cited amounts to a decision that the proper procedure for a Court to follow is the procedure of the Code in regard to execution of decrees.

[3] The ground on which this rule was obtained was that the order of the learned Munsif directing restoration to applicants 1 to 4 and incidentally overruling the objections of opposite parties 15 and 16 was incorrect. In argument here however a different position was taken and on the basis of the case cited it was urged that the objection of the objectors should not have been dealt with by the lower Court in the proceedings under S. 37A (8).

[4] On behalf of the opposite parties, it is in turn objected that the petitioners ought not now to be allowed to change their ground.

[5] If the procedure indicated in the case cited is followed, there can be no doubt that the objectors as lessees from the landlord were not entitled to be heard at the time when the application was made under S. 37A (8). The proper time for them to be heard was if and when delivery of possession was sought to be given they resisted delivery when the applicants under S. 37A (8) could come in with an application under O. 21, R. 97, Civil P. C. as laid down in that case, or in the event that the objectors were dispossessed they could come in under O 21, R. 100. Even if the present order stands, in my opinion, they could still come before the Court in the manner above indicated and take the objection that the decision in the order of the learned Munsif so far as it affected the

objectors, opposite parties 15 and 16 was without jurisdiction; in other words, that the decision was not *res judicata*. In that view of the matter, it is not necessary for me to decide whether the decision overruling the objection is right or wrong. It is sufficient if I make it clear that so far as the present petitioners are concerned, it is without jurisdiction and the matter of their rights and position still remains open to be decided, if at all, in proceedings under O. 21, R. 97 or R. 100 as the case may be.

[6] The result is that the present rule is discharged. I make no order as to costs.

G.M.J. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 520 *[C. N. 195]*

G. N. DAS AND DAS GUPTA JJ.

Mihirlal — Auction-purchaser — Petitioner v. *Panchkari Santra and others — Judgment-debtors — Respondents.*

Civil Rule No. 970 of 1949, D/- 15th December 1949, against order of D. J., Hooghly, D/- 17th May 1949.

(a) Tenancy Laws — Bengal Tenancy Act (VIII [8] of 1885), S 174 (3) — Delay in applying for delivery of possession — Civil P. C. (1908), O. 21, R. 90.

The mere fact that the auction-purchaser makes delay in applying for delivery of possession cannot be any ground for thinking that he is acting fraudulently with a view to prevent the judgment-debtors from knowing about the sale. [Para 3]

Annotation: ('44-Com.) Civil P. C. O. 21, R. 90 N. 37.

(b) Civil P. C. (1908), S. 115 — Material irregularity in the exercise of jurisdiction.

Omission on the part of the Court to look into the record and basing its decision upon a faulty or non-reading of the record that the auction-purchaser was guilty of fraud when in fact he was not, is a gross irregularity in exercise of jurisdiction. [Para 4]

Annotation: ('50-Com.) Civil P. C. S. 115 N. 12.

(c) Civil P. C. (1908), O. 21, R. 90 — Fraud in publishing and conducting sale — Tenancy Laws — Bengal Tenancy Act (VIII [8] 1885), S. 174.

Fact that the auction-purchaser was present at the time of the service of the sale proclamation where the decree-holder was also present and that the auction-purchaser has given false evidence in Court as regards service of sale proclamation not even remotely justify a conclusion that he was guilty of any fraud by which he intended to or managed to prevent the judgment debtors from knowing of the sale. [Para 6]

Annotation: ('44-Com.) Civil P. C., O. 21, R. 90 N. 37.

(d) Tenancy Laws — Bengal Tenancy Act (VIII [8] of 1885), S. 174 (3) — Extension of time on ground of fraud — Limitation Act (1908), S. 18 — Civil P. C. (1908), O. 21, Rr. 90, 92.

The auction-purchaser is a necessary party to an application for setting aside a sale. The auction-purchaser is not a person claiming through the decree-holder. Before any extension of time can be given under S. 18 of the Limitation Act in an application for setting aside a sale under S. 174 (3), Bengal Tenancy Act, it must be proved that the auction-purchaser was either guilty of the fraud or an accessory to the fraud that prevented the judgment-debtor from knowing of the sale: 44 C. L. J. 565 and A. I. R. (36) 1949 Cal. 212, *Dissent.* [Paras 15, 16, 22]

Annotation: ('42-Com.) Limitation Act, S. 18 N. 14. ('44-Com.) Civil P. C., O. 21 R. 90 N. 47; R. 92 N. 4.

Apurba Dhan Mukherji and Chandra Narayan Laik — for Petitioner.

Heramba Chandra Guha — for Opposite Party 1.

Das Gupta J. — The applicant before us purchased at auction an occupancy raiyati holding in execution of a rent decree. The sale was held on 13th March 1946. On 25th April 1946, an application was filed by one Kachimannessa Bibi claiming to have purchased the interest of the judgment-debtors, for setting aside the sale under the provisions of S. 174 (3), Bengal Tenancy Act. This application was dismissed by the Court on 13th December 1947. On 5th January 1948, the auction-purchaser the petitioner before us filed an application for confirmation of the sale. The sale was ultimately confirmed on 27th March 1948. On 27th June 1948, an application was filed by two of the 17 judgment-debtors who are Panch Kari Santra and Satya Bala Dasi, opposite parties Nos. 1 and 2, under S. 174 (3), Bengal Tenancy Act, for setting aside the sale on the ground of fraud and irregularity in publishing and conducting the sale. The learned Munsif allowed the application and the learned District Judge has dismissed the appeal that was filed by the present petitioner against that decision. The learned District Judge has come to the conclusion that the decree-holder was guilty of fraud inasmuch as he mentioned the value of the holding at Rs. 10 only in the sale proclamation and further that he fraudulently suppressed the sale proclamation and other notices. He also came to the conclusion that the auction-purchaser was also guilty of fraud and that consequently the applicants under S. 174 (3), Bengal Tenancy Act, were entitled to the benefit of S. 18, Limitation Act, and so, the application though filed long after six months after the date of the sale, was not barred by limitation.

[2] The first question agitated before us is whether the learned District Judge acted irregularly and illegally in the exercise of his jurisdiction in coming to the conclusion that the auction purchaser was also guilty of fraud. The learned District Judge appears to have based his decision in this matter on two facts, first, that the auction purchaser has benefited by the fraud on the part of the decree-holder inasmuch as there was paucity of the bidders because of the gross under valuation in the sale proclamation and the auction-purchaser was thus able to have the land for an inadequate price. The other ground on which the learned District Judge relied was that the auction purchaser did not apply for delivery of possession for two years after the date of the sale.

[3] It has been pointed out to us by Mr. Mukherji on behalf of the petitioner that the learned District Judge misread the evidence, inasmuch as he omitted to notice that the sale was confirmed as late as 21st February 1948 so that the delay of the auction-purchaser was not 2 years but only one month. I am myself unable to agree that the mere fact that the auction-purchaser makes delay in applying for delivery of possession can be any ground for thinking that he is acting fraudulently with a view to prevent the judgment-debtors from knowing about the sale. But even if such delay can justify any conclusion as regards fraud, it is abundantly clear that there was no such delay as the learned District Judge seems to have wrongly thought. From the facts pointed out above it appears that though the sale was actually held on 13th March 1946 the application under S. 174 (3) filed by Kachimannessa was not disposed of till 13th December 1947. It was only after that application was disposed of that the auction-purchaser could take any steps for getting the sale confirmed. That he did, as we have seen, on 5th January 1948 and the sale was confirmed on 21st February 1948 and he put his application for delivery of possession on 27th March 1948. There was therefore, as already stated above, no appreciable delay on his part.

[4] In my judgment the omission to look into the record in the case is a gross irregularity in the exercise of jurisdiction and the learned Judge's decision based upon a faulty reading or rather a non-reading of the record that the auction purchaser was guilty of fraud cannot be allowed to stand.

[5] Mr. Guha has however taken us through the evidence and has tried to convince us that quite apart from this question of delay in applying for delivery of possession there was other evidence which would justify such a conclusion. Of the two items of evidence pointed out one was that the auction purchaser was present at the time when the sale proclamation was served when the decree-holder was also present; the other was that in Court he has given false evidence as regards the service of the sale proclamation.

[6] Assuming that both these facts are true, namely that the auction-purchaser was present at the time of the service of the sale proclamation where the decree-holder was also present and also that the auction-purchaser has given false evidence in the present proceedings I am unable to see how these can even remotely justify a conclusion that he was guilty of any fraud by which he intended to or managed to prevent the judgment-debtors from knowing of the sale.

[7] My unhesitating conclusion is that there is no evidence on the record to show that the auction-purchaser was guilty of any fraud in connection with the sale or that by any fraudulent conduct on his part the judgment-debtors were prevented from knowing the date of the sale.

[8] If therefore it is necessary before the applicant under S. 174 (3), Bengal Tenancy Act, can get the benefit of S. 18, Limitation Act, in the present application that the auction purchaser must be shown to have been guilty of fraud or to have been accessory to the fraud, it must be held that the applicants could not get the benefit of the S. 18, and the application filed on 27th June 1948, was barred by limitation.

[9] It has, however, been contended by Mr. Guha for the opposite party that it is not really necessary in law that the auction purchaser should be shown to be guilty of any fraud in order that the extension of time under S. 18, Limitation Act, can be given.

[10] The relevant portion of S. 18, Limitation Act, runs as follows:

"Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right the time limited for instituting a suit or making an application:

(a) against the person guilty of the fraud or accessory thereto, or

(b) against any person claiming through him, otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby ....."

[11] Here, the application was made against the decree-holder and the auction-purchaser. As against the decree-holder, on the finding with which we find no reason to interfere that he was guilty of fraud and by that fraud, namely, the suppression of processes he had kept the applicants from the knowledge of the sale, it must be held that the application is within time if we accept that the judgment-debtors first came to know of the fraud at the time when the auction-purchaser went to take delivery of possession.

[12] What however is the position of the application as against the auction-purchaser? In order that the applicants may succeed, the application must be made in time as against him also unless he be considered to be an unnecessary party. It is not within the period of six months allowed by S. 174, Bengal Tenancy Act. Obviously the applicant can succeed only if they can get the benefit of S. 18, Limitation Act. The words of the section as already mentioned above, give a special rule of computation against two kinds of persons: a person guilty of the fraud or accessory thereto or a person claiming through such other person guilty of fraud otherwise than in good faith and for valuable consi-

deration, when such fraud has kept the plaintiff or the applicant from knowledge of this right to sue It is difficult to see from the words of the section how the application against a person who is neither guilty of the fraud nor accessory thereto, nor is a person claiming through such other person can attract the provisions of S 18.

[13] If the auction-purchaser is not a necessary party to an application for setting aside the sale under S. 174 (3), Bengal Tenancy Act, no question of limitation would arise at all, and the application would not fail, because such unnecessary party comes on the record beyond the period of limitation.

[14] The question therefore is whether the auction-purchaser is a necessary party to an application for setting aside a sale.

[15] Section 174 (3) does not in words state as to who should be made a party. In S. 174A, there is a provision that no order setting aside a sale shall be made, unless notice of the application had been given to all persons affected thereby. Whatever view may be taken as regards the stage where such notice is to be given, there can be no doubt, in my opinion, that an application for setting aside the sale cannot be considered at all unless the person against whom the relief is primarily claimed has been made a party and received notice. The relief asked for is that a sale be set aside. The one person who will suffer if this relief is granted, is the auction-purchaser. If anybody therefore is a necessary party the auction purchaser, in my opinion, the most necessary party, the decree-holder being the other party who, in my opinion, should also be brought on the record.

[16] The necessary conclusion which in my opinion cannot be escaped, unless we are to add certain things to S. 18, Limitation Act, or to ignore some of the words actually used therein, is that the extension of time under S. 18, Limitation Act cannot be made in an application for setting aside a sale as against the auction purchaser unless he is guilty of the fraud or accessory thereto. It need hardly be mentioned that the auction-purchaser is not a person claiming through the decree-holder.

[17] Reliance was placed by Mr. Guha on two decisions of this Court, one in the case of *Kedar Hura* v. *Asutosh Roy*, 44 C. L. J. 565 and the other in *Mahipati Haldar* v. *Atul Krishna*, 53 C. W. N. 587 (A. I. R (36) 1949 Cal. 212). In the case of *Kedar Hura*: (44 C. L J. 565), B. B. Ghose J. sitting singly was of the opinion that the fraud by which the judgment-debtor is kept from the knowledge of his right to apply for setting aside the sale must be the fraud only of the decree-holder and it is not necessary either to allege or to prove fraud on the part of the auction purchaser. A similar conclusion was reached by Mukherjea, J., sitting singly, in the case of *Mahipati Haldar*: (53 C. W. N. 587: A. I. R. (36) 1949 Cal. 212) quoted above. I find that in both these cases the learned Judges expressed their opinion that the auction purchaser was not a necessary party in an application for setting aside the sale. In fact B. B. Ghose J. refused to rely on the previous decision in the case of *Purna Ch. Mondal* v. *Anukul Biswas*, 36 Cal. 654: (2 I. C. 844) in the view that under the old Code in which the decision in *Purna Chandra's case*: (36 Cal. 654: 2 I. C. 844) was given the auction purchaser was a necessary party in an application for setting aside the sale Mukherjea J. also appears to be of the same opinion and says that the application for setting aside the sale is directed primarily against the decree-holder at whose instance or for whose benefit the sale was held. If I could see my way to agree with these eminent Judges in this view that the auction purchaser is not a necessary party, I would have no difficulty in coming to the conclusion that the question of limitation does not arise at all, as regards the auction-purchaser. As stated however I am unable to agree that the auction purchaser is not a necessary party and in my view he is the most necessary party in a case where the sale at which he purchased is sought to be set aside.

[18] The other reason given by Mukherjea J. is that if fraud on the part of the auction purchaser is held to be necessary to be proved for an extension of time under S. 18, Limitation Act, the judgment-debtor would have absolutely no remedy where by the fraud of the decree-holder the judgment-debtor is totally kept out of the knowledge of the sale and the property has been sold for a nominal price, but the auction purchaser is not party to the fraud, or accessory thereto.

[19] With great respect, I think that this is not a reason why a different interpretation should be put on S. 18, Limitation Act. If the section is properly interpreted, it does not provide the judgment-debtor with any remedy in the cases as mentioned by Mukherjea J. The question of giving the remedy is in the hands of the Legislature. Of course, if there was any ambiguity in the language used, it would have been reasonable and possible to put the interpretation which would give the judgment-debtor a remedy. I am unable to detect any such ambiguity.

[20] I am therefore unable to accept the reasoning which found favour with the two learned Judges in the cases of *Kedar Hura* v. *Asutosh Roy*: (44 C. L. J. 565) and *Mahipati Haldar*;

(53 C. W. N. 587: A. I. R. (36) 1949 Cal. 212) mentioned above.

[21] It may be mentioned here that in a number of other cases Judges sitting singly have in this Court decided that fraud on the part of the auction purchaser is necessary to be proved in an application for setting aside a sale before extension of time under S. 18, Limitation Act can be given. Mention may be made of the decisions in the cases of *Majahar Ali* v. *Mafijaddi Sardar*, 166 I. C. 127: (A. I. R. (23) 1936 Cal. 706), *Saila Bala* v. *Atul Krishna*: 82 C. L. J. 9: (A. I. R. (35) 1948 Cal. 63) and *Jagiswar Das* v. *Deb Narain*, 46 C. W. N. 403.

[22] My conclusion is that before any extension of time can be given under S. 18, Limitation Act, in an application for setting aside a sale under S. 174 (3), Bengal Tenancy Act, it must be proved that the auction-purchaser was either guilty of the fraud or accessory to the fraud, that prevented the judgment-debtor from knowing of the sale.

[23] The result is that the application made by the present opposite parties Nos. 1 and 2 must be held to be barred by limitation and must therefore fail. Accordingly I would set aside the order passed by the learned Courts below and order that the application under S. 174 (3), Bengal Tenancy Act, be dismissed. There will be no order as to costs.

[24] **G. N. Das J.**—I agree in the order proposed by my learned brother.

D. H. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 523 *[C. N. 196.]*

HARRIES C. J. AND LAHIRI J.

Abdul Motalib — Accused — Petitioner v. *The State.*

Criminal Revn. No. 260 of 1950, D/- 21-6-1950.

Penal Code (1860), S. 405 — Applicability to Mahomedan co-owners.

The proposition of law that S. 405 does not apply to partners as they are joint owners or co-owners of the partnership property, that is to say, of the common stock, does not apply to the case of Mahomedan co-owner of whom it cannot be said that he is co-owner of the whole of the stock. The position of a Mahomedan co-owner is that he has a specific share in the property. [Para 5]

(It was, however, found that the accused was not a partner but an employee and was guilty under S. 406.)

Annotation : ('46-Man) Penal Code, S. 405 N. 19.

Debabrata Mukherji and Sambhu Nath Banerji (Sr.)—for Petitioner.

Lahiri J.— This rule is directed against the conviction of the petitioner under S. 406, Penal Code and an order that he be released on probation of good conduct on executing a bond for Rs. 2,000 with two sureties of Rs. 1,000 each for a period of one year, from the date of the order.

[2] The prosecution case is that one Hazi Gura Mia used to carry on a business in confectionary and bakery in the town of Darjeeling. He died on 5th September 1946 leaving his confectionary and bakery shop and considerable assets. The prosecution case is that after the death of Guru Mia his widow inherited the assets and used to carry on the confectionary and bakery business. According to the practice followed by this business, the officer in charge of the bakery business used to hold in his hands the sale proceeds of the bakery shop and at the beginning of the next month he used to deposit the said sale proceeds in the account of the firm itself. On 1st September 1949, the petitioner who was in charge of the bakery business was entrusted with a sum of Rs. 478 as representing the sale proceeds of the previous month for the purpose of crediting the same in the account of the firm but the petitioner instead of crediting the said amount in the account of the firm credited it in his own private account in the bank of Jaylall Naraingdass. On these allegations, the petitioner was placed on his trial under S. 406, Penal Code.

[3] The defence was that after the death of Gura Mia the petitioner inherited part of his assets and became a co-owner of the business and the petitioner was in charge of the management of the shop and the bakery as one of the proprietors. The petitioner further denied that there was any entrustment with him of the sum of Rs. 478 on 1st September 1949 as alleged by the prosecution and upon these facts the petitioner pleaded that he was not guilty.

[4] The Courts below have overruled the defence and convicted and sentenced the petitioner as stated above.

[5] On behalf of the petitioner, Mr Mukherji appearing in support of the rule has argued that the conviction and sentence are not sustainable because a co-owner cannot be convicted of an offence under S. 406, Penal Code, and he relied upon the decision in *Bhupendra Nath* v. *Giridhari Lal*, 37 C. W N. 982: (AIR (20) 1933 Cal. 582: 34 Cr.L.J. 958) in support of this proposition. This is a case which relates to the position of partners in a partnership business. Mr. Mukherji has relied upon a passage at p. 988 where the learned Judges make the following observation:

"Partners are joint owners or co-owners of the partnership property, that is to say, of the common stock. Each partner is co-owner of the whole of this common stock, though he receives or pays a share only in profits and losses arising therefrom and though his share in the partnership property is only

the value of his original contribution, increased or diminished by his share of profit or loss."

In our judgment, this proposition of law which was laid down with regard to the position of partners does not apply to the case of a Mahomedan co-owner of whom it cannot be said that he is a co-owner of the whole of the stock. The position of a Mahomedan co-owner is that he has a specific share in the property, which is left by the deceased and it is quite clear upon the evidence in this case and also upon the admission of the petitioner that he was an employee of the bakery business left by the deceased Gura Mia. If as an employee the petitioner was entrusted with a specific sum of money and if instead of crediting the said sum in the account of the firm he deposited it in his own private account, we think that the petitioner is guilty of the offence under S. 406, Penal Code.

[6] Mr. Mukherji next contended that the prosecution did not produce the account books of the bakery business to prove that the sum of Rs. 478 was entrusted to the petitioner on 1st September 1949. On this point, it is true that the prosecution did not produce the account books but the prosecution examined a number of witnesses to prove that the amount was actually handed over to the petitioner. Both the Courts below have believed the oral evidence which was adduced by the prosecution on this point. The witnesses for the prosecution who proved the handing over of the amount to the petitioner are P. Ws. Nos. 3, 4 and 5. If the evidence of these witnesses be believed there can be no doubt that the petitioner was actually entrusted with the sum of Rs. 478 on 1st September 1949. On these facts, there can be no doubt that the prosecution has satisfactorily proved the entrustment.

[7] Upon the findings arrived at by the Courts below and upon the evidence adduced in this case it is impossible to interfere with the order of conviction and sentence in this case. The rule is accordingly discharged.

[8] **Harries C. J.**—I agree.

G.M.J. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 524 *[C. N. 197.]*

HARRIES C. J. AND BANERJEE J.

Rambandhu Misra and others—*Petitioners* v. *Brahmananda Laik and another* — *Respondents.*

Civil Rules Nos. 1203 and 1206 of 1949, D/- 6th December 1949, against order of District Judge, Bankura, D/- 4th May 1949.

(a) Debt Laws—Bengal Agricultural Debtors Act (VII [7] of 1936), Ss. 2 (8) and 37A (5) and (7) and Rr. 145 and 146 — "Debt" in S. 37A (5)—Meaning of—Definition of "debt" in S. 2, if applies.

Where there is a dispute as to the amount of a debt stated by the applicant in his application, the Board may informally decide the matter and when it does consider the matter it must consider it in the light of R. 146. When it is considering what is the amount of the debt in an application under S. 37A, it must consider what the term 'debt' means in S. 37A, sub-s. (5). The word "debt" in sub-s. (5) of S. 37A cannot mean what is stated in the definition of that word in S. 2. There is another definition of the word "debt" in sub-s. (7) of S. 37A. Applying this definition it is quite clear that the amount excluded in the definition as being barred by limitation must be included in ascertaining the amount of the debt. The debt is the amount of the decree, in execution of which the property was sold together with certain other charges. [Paras 10 and 11]

Where, therefore, a decretal amount was over Rs. 31,000 but out of this Rs. 20,000 was barred by limitation at the date of the application by the debtor to the Board :

Held, that the amount of the decree was the amount of the debt for the purposes of S. 37A (5) and such amount being over Rs. 25,000 the Board had no jurisdiction to deal with the application by reason of R. 146 (2). [Para 11]

(b) Interpretation of Statutes—Definition.

The definition given is normally to be taken to apply wherever that word occurs in the statute. The definition, however, will not apply if the word appears in a subject or context which makes the application of the definition impossible and repugnant to the meaning of the context in which the word is found. [Para 7]

Chandra Sekhar Sen and Sailendra Nath Banerjee —for Petitioners.

Phanindra Nath Das—for Opposite Party.

Harries C. J.—These two applications are for revision of orders made by a learned District Judge in revision under S. 40A, Bengal Agricultural Debtors Act.

[2] The decree-holders opposite parties had obtained against the petitioners or their predecessors a mortgage decree for Rs. 20,100 in mortgage Suit No. 75 of 1325 in the Court of the Subordinate Judge of Bankura. By the decree the petitioners were jointly and severally liable. The decree provided that in default of payment by *Bhadra* 1335 B. S., interest would run at 9 annas per cent. per mensum until realisation. A preliminary decree was obtained on 3rd August 1927, which was made final on 22nd September 1928. In the year 1935, the decree-holders executed the decree for recovery of Rs. 31,584 which was the sum then due on the mortgage after adding the interest which had accrued to the decretal amount and execution costs. The mortgaged properties were put up for sale and purchased by the decree-holders for Rs. 10,000 on 16th March 1936, and the sale was confirmed on 22nd July 1936 possession being delivered on 1st and 2nd May 1937.

[3] In the year 1942, the petitioners who were the mortgagors filed two separate applications under S. 37A, Bengal Agricultural Debtors Act, in which they alleged that the total debt due

from both sets of petitioners was Rs. 10,000 and that each set of petitioners owed only Rs. 5000.

[4] The Board came to the conclusion that the debt which was the subject-matter of each of these applications was Rs. 31,584 and held that under Rr. 146 and 147 the Board had no jurisdiction to deal with the matter. There were appeals to the appellate Officer which were dismissed, and applications in revision to the District Judge under S. 40A of the Act were also dismissed.

[5] Mr. Chandra Sekhar Sen on behalf of the petitioners has contended that the amount of the debt which was the subject-matter of the application under S. 37A of the Act was Rs. 10,000. He has referred to the definition of the word 'debt' in S. 2, sub-s. (8) (v) which is in these terms :

" 'Debt' includes all liabilities incurred prior to the first day of January 1940 of a debtor in cash or in kind, secured or unsecured, whether payable under a decree or order of a civil Court or otherwise, and whether payable presently or in future, but does not include the following.....any amount a suit or application for the recovery of which is barred by limitation, or which is otherwise irrecoverable under the law."

[6] Mr. Sen's argument is that the balance of the decretal amount which was over Rs. 25 000 was irrecoverable when this application under S. 37A was made. He pointed out that the sale was confirmed on 22nd July 1936 and possession actually given on 1st and 2nd May 1937. The decree-holders could apply within three years from the date of the confirmation of the sale for a simple money decree for the balance of Rs. 25,000 odd, but they did not do so. After three years admittedly an application for a simple money decree would be barred by limitation. That being so, Mr. Sen has contended that by reason of the definition, to which I have referred, the amount irrecoverable as being barred by limitation cannot be included in the amount of the debt. The debt, therefore, would be the sum of Rs. 31,594 less Rs. 21,581 which was the amount irrecoverable as being barred by limitation. The total debt was, therefore, only Rs. 10,000 and as there were two sets of mortgagors each could claim that they were only bound to pay half the amount. That being so, Mr. Sen urged that the debt was correctly stated in each application as Rs. 5000.

[7] It is to be observed that the definition S. 2 in which the definition of the word 'debt' occurs opens with these words : "In this Act, unless there is anything repugnant in the subject or context." The definition given is normally to be taken to apply wherever that word occurs in the statute. The definition however will not apply if the word appears in a subject or context which makes the application of the definition impossible and repugnant to the meaning of the context in which the word is found.

[8] The duty of the Board in connection with jurisdiction while dealing with applications made under the Act is dealt with by Rr. 144, 145 and 146 etc. Rule 144 reads as follows :

"The maximum amount of the sum total of all debts due from a debtor which can be dealt with under the provisions of the Act shall be Rs. 50,000 ;

Provided that with the previous sanction in writing of the Collector, a Board may deal with an application if the sum total of all debts due from the debtor exceeds Rs. 5000 but does not exceed Rs. 25,000."

Rule 145 is in these terms :

"If there is any doubt or dispute as to the amount of any debt, the Board shall in accordance with the principles of S. 18 and R. 50 or sub s. (7) of S. 37A and Rr. 77D to 77F, as the case may be and as far as the same may be applicable, informally decide for the purpose of R. 144 the amount of such debt."

Rule 146 provides :

"(1) If the sum total of all debts mentioned by the debtor in his application under S. 8 or S. 37A or statement of debt under sub-s (1) of S. 13 exceeds Rs. 5000 but does not exceed Rs. 25,000 the Board shall forward the application to the Collector for sanction under the proviso to R. 144 before passing any order upon it under sub-s. (2) of S. 13 or under S. 18 or sub-s. (7) of S. 37A. (2) If the amount so mentioned by the debtor exceeds Rs. 25,000 the Board shall not entertain the application."

[9] Mr. Sen has contended that what really matters in R. 146 is the sum total of the debts mentioned by the debtor and it matters not what the real debt is if the debtor stated the debts to be below Rs. 5000. In other words, Mr. Sen has urged that the debtor can give the Board jurisdiction by understanding his debts. The words used in R. 146 are not very happy, but I think it is clear from Rr. 144 and 145 what is really meant. The words "if the sum total of all debts mentioned by the debtor in his application etc., mean if the actual amount of the debts of the debtor exceeds Rs. 5000 or Rs. 25,000 as the case may be, then certain consequences follow.

[10] It seems to me quite clear from R. 145 that where there is a dispute as to the amount of a debt stated by the applicant in his application, the Board may informally decide the matter and when it does consider the matter it must consider it in the light of R. 146. When it is considering what is the amount of the debt in an application under S. 37A it must consider what the term 'debt' means in S. 37A sub-s. 5. Mr. Sen's argument is that 'debt' must mean in S. 37A, sub-s. 5 what it means in other portions of the Act. In other words, the definition of the word 'debt' in S. 2 must be applied to the word 'debt' in S. 37A, sub-s. 5. I have pointed out however that in the definition section it is expressly stated that the definition given will

not apply if there is anything repugnant in the subject or context, and I think it is clear that the word 'debt' in sub-s. (5) of S. 37A cannot mean what is stated in the definition of that word in S. 2. In short, there is another definition of the word 'debt' in sub-s. (7) of S. 37A of the Act. This sub-section reads :

"For the purposes of an award made under sub-s. (5) (a) the debt shall be deemed to be (i) the amount of the decree or certificate in execution of which the property was sold together with all costs of such execution including the cost of delivery of possession or the property to the decree-holder calculated in the manner prescribed."

[11] Applying this definition it is quite clear that the amount excluded in the definition as being barred by limitation must be included in ascertaining the amount of the debt. The debt is the amount of the decree, in execution of which the property was sold together with certain other charges. The amount of the decree in this case was over Rs. 31,000 and that is the amount of the debt for the purposes of Sub-s. (5) of S. 37A. The amount being over Rs. 25,000, it is clear that the Board had no jurisdiction to deal with the application by reason of sub-r. (2) of R. 146. That being so the Board properly rejected the application and the views of the Appellate Officer and of the learned District Judge cannot be assailed.

[12] Mr. Sen did not really contend that each group of petitioners was only liable for half the decretal amount, namely, Rs. 15,500 odd. He conceded that each of the groups was liable for Rs. 31,000 odd.

[13] For the reasons which I have given both these petitions fail and the Rules are discharged with costs.

[14] **Banerjee J.**—I agree.

V.R.B. *Rules discharged.*

A. I. R. (37) 1950 Calcutta 526 *[C. N. 198.]*

R. P. MOOKERJEE J.

Debendra Nath Mandal—Plaintiff—Appellant v. *Sakhilal Kar and others —Defendants —Respondents.*

A. F. A. D. No. 393 of 1947, D/- 13-6-1950. against decree of Sub-Judge, Fourth Court, Zillah 24 Paraganas, D/- 27-8-1946.

(a) Contract Act (1872), Ss. 55, 51 and 52—Contract for sale of immovable property — Payment of purchase-money within stipulated time — Stipulation not essence of contract—Decree for specific performance—Principles stated —T. P. Act (1882), S. 55 (1) (d).

In a case where the Court comes to the conclusion that time is not the essence of the contract for the purchase of immovable property, the failure by the plaintiff to fulfil the condition of paying a portion of the purchase-money required of him under the contract within the stipulated period will not *ipso facto*, disentitle him to get a decree for specific performance. In the circumstances of a particular case the Court has to enquire whether the delay which has taken place is properly explained by the plaintiff. The mere fact that there has been some delay is not sufficient to put him out of Court. [Paras 3, 5]

The question whether the lapse of time destroys the plaintiff's right has also to be considered with reference to other attendant circumstances. If the plaintiff has been in substantial possession of the benefits under the contract and is in effect claiming the completion of the legal estate, delay will not, if properly explained, affect his right to obtain specific performance. [Para 6]

This principle, however, is subject to a proviso. If the fact that the plaintiff has been in possession is used in extenuation of the delay which has taken place in filing the suit for specific performance, such possession must, in order to have that effect, be a possession under the contract and such that the vendor must know or be taken to know that the purchaser claims to be in possession under the contract. [Para 7]

The provisions contained in S. 55, T. P. Act, read with Ss. 51 and 52, Contract Act, are not inconsistent with the principle stated above. [Para 8a]

Annotation : ('46-Man.) Contract Act, S. 55 N. 3; ('50-Com.) T. P. Act, S. 55 N. 5.

(b) Civil P. C. (1908), S. 20—Cause of action how determined.

The cause of action is to be determined with reference to the pleadings and not the subsequent finding which may be reached by the Court. [Para 10]

Annotation : ('50-Com.) Civil P. C., S. 20 N. 14.

Rabinara Nath Chaudhuri — for Appellant.

Hem Chandra Dhar and Binodebehari Haldar — for Respondents.

Judgment.—The plaintiff appellant filed a suit for the specific performance of a contract, the terms of which are contained in a compromise petition which had been filed in an earlier suit between the parties. The plaintiff had paid either the whole or a substantial portion of the consideration money for a certain property under the terms agreed upon and the plaintiff was required to pay an additional amount of Rs. 28 within one month from the date of the compromise, namely, 18th November 1943, and the defendants were required to execute the conveyance according to the agreement. The plaintiff's case was that after the compromise had been entered into, he had attempted to pay the money and to get the conveyance, but without success. Hence, the present suit for specific performance of the contract and for getting a conveyance from the defendants. It may be stated further that out of the properties which were to be conveyed under that agreement, possession of one of them had been delivered to the plaintiff already. The plaintiff continued in possession of that plot and is still continuing in possession thereof. Delivery of possession is also prayed for in respect of the property of which delivery of possession had not been given. The defence in the main was that the allegation of tender as made by the plaintiff was not true. The payment not having been made within the stipulated period of one month, the contract was neither

operative nor enforceable. It is not necessary for our present purpose to refer to other points which had been raised in the pleadings.

[2] The learned Munsif decreed the plaintiff's suit holding in favour of the plaintiff on all the material points. On an appeal being taken by the defendants to the Court of the Subordinate Judge, the suit was dismissed. It has been found by the learned Subordinate Judge that (1) time was not the essence of this contract; (2) the plaintiff has not proved that he was all along ready and willing to fulfil his part of the contract; and (3) the plaintiff did not pay the money as stipulated in the contract. On these findings, the plaintiff's suit was dismissed. Hence this appeal by the plaintiff to this Court.

[3] The short question for decision in the present appeal is whether in a case where the Court comes to the conclusion that time is not the essence of the contract, the failure by the plaintiff to fulfil the condition required of him under the contract within the stipulated period will *ipso facto*, disentitle him to get a decree for specific performance.

[4] It is now well settled that a plaintiff who seeks specific performance of a contract has to show first that he has performed or been ready and willing to perform the terms of the contract on his part to be then performed and secondly that he is ready and willing to do all matters and things on his part thereafter to be done. If there is a default on his part in either of these two respects, that furnishes a ground upon which the plaintiff's claim may be resisted. *Manik Chandra* v. *Abhoy Charan*, 24 C. L. J. 90 : (A. I. R. (4) 1917 Cal. 283).

[5] If it is found that time is not the essence of the contract then the non-fulfilment of the condition within the time fixed is not by itself destructive of the claim for specific performance. In the circumstances of a particular case the Court has to enquire whether the delay which has taken place is properly explained by the plaintiff. The mere fact that there has been some delay is not sufficient to put him out of Court. Reference may in this connection be made to the observations of the Judicial Committee in the case of *Meenakshi Naidoo* v. *Subramanya Sastri*, 14 I. A. 160 (11 Mad. 26 P.C.) Their Lordships pointed out the circumstances under which lapse of time and delay are most material for determining the rights of the plaintiff to obtain specific performance in the following terms :

"Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might clearly be regarded as equivalent to a waiver of it; where by his conduct and neglect he has, though perhaps not waived that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted; in either of these cases lapse of time and delay are most material."

[6] The question whether the lapse of time destroys the plaintiff's right has also to be considered with reference to other attendant circumstances. If the plaintiff has been in substantial possession of the benefits under the contract and is in effect claiming the completion of the legal estate, delay will not, if properly explained, affect his right to obtain specific performance. In the case of *Clarke* v. *Moore*, 1 Jo. & Lat. 723: (7 Ir. Eq. R. 515), the Lord Chancellor had explained that the circumstances under which the fact of the plaintiff being in possession materially affected and assisted the plaintiff in obtaining specific performance even though such prayer was made after lapse of time This view has been accepted in the case of *Arjuna Mudaliar* v. *Lakshmi Ammal*, (1948) 2 M. L. J. 271 : (A. I. R. (36) 1949 Mad. 265), where a Division Bench of the Madras High Court observed that mere delay does not by itself preclude the plaintiff from obtaining specific performance if his suit is otherwise in time. The delay must be such that it may be properly inferred that the plaintiff has abandoned his right, or on account of the delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant as from long delay alone, without anything further an abandonment of rights would be presumed. Reference may in this connection be also made to Ss. 473 and 474 of 31 Halsbury's Laws of England, Hailsham Edition, pp. 404 to 405.

[7] This principle, however, is subject to a proviso. If the fact that the plaintiff has been in possession is used in extenuation of the delay which has taken place in filing the suit for specific performance, such possession must, in order to have that effect, be a possession under the contract and such that the vendor must know or be taken to know that the purchaser claims to be in possession under the contract. *Mills* v. *Haywood* (1877) 6 Ch. D. 196.

[8] In the present case, it is an admitted fact that the plaintiff is in possession and had been in possession. It is, however, stated that the plaintiff had been in possession from before the compromise which had been filed in the earlier suit. What has been the nature of the possession from after the filing of the compromise has neither been enquired into by either of the Court nor any finding arrived at. If the proposition, as enunciated above, be given effect to there has to be a further enquiry as to the nature of the possession by the plaintiff from after the filing of the compromise in the earlier

suit to ascertain whether the conditions laid down in the case of *Mills* v. *Haywood*, (1877) 6 Ch. D. 196, are satisfied.

[8a] To the application of this principle an objection has, however, been raised on behalf of the respondents It is contended that S. 55, T. P. Act read with Ss. 51 and 52, Contract Act provides the law which is applicable in the present case and the principle as stated above is inconsistent with the same. Reliance is placed upon sub-s. (3) of S. 55, T. P. Act, which provides that where the whole of the purchase-money has been paid to the seller he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power. This sub-section is not attracted on the facts of the present case. Reference is also made to cl. (d) of sub-s. (1) of S. 55, T. P. Act. Material portion of the section is in the following terms:

"In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities and rights mentioned in the Rules next following, or such of them as are applicable to the property sold. . . . .

* * * * *

(1) (d) on payment or tender of the amount due in respect of the price to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place."

There is no question that these provisions are apposite but they do not in my view in any way contradict or run counter to the propositions to which I have made reference in the earlier part of this judgment. It is only on payment or tender of the amount due by the buyer that the seller is to execute the document. The whole question in this case is whether such payment or tender by the buyer has been at a proper time and place. In determining that question, the Court has to consider whether the lapse of time from the date of the contract to the date of payment is properly explained or not and whether the dealy that has taken place is excusable, or not.

[9] Similarly, the provisions contained in Ss. 51 and 52, Contract Act do not in any way affect the application of the principles. Section 51 simply provides that a promisor is not bound to perform his part of the contract unless the reciprocal promisee is ready and willing to perform the same. I shall deal with another part of the objection raised by the respondents as to the frame of the suit and the existence of the cause of action on the date the suit was filed. Section 52, Contract Act also provides for the order in which the reciprocal promises by the respective parties are to be performed. This section also does not in any way affect the application of the principles stated already.

[10] Lastly, it is contended on behalf of the respondents that the plaintiff had not, even on the date that the suit was filed, been ready or had actually deposited Rs. 28 which under the contract he was required to pay within a month of the filing of the compromise. The learned Munsif points out, and I think rightly, that although the deposit had not been made on the date that the suit had been filed, there are sufficient indications in the plaint to show the desire and readiness of the plaintiff on that day to fulfil his part of the contract. The cause of action is to be determined with reference to the pleadings and not the subsequent finding which may be reached by the Court. That there was a cause of action on which the suit had been filed by the plaintiff is beyond question. The deposit which had actually been made by the plaintiff was on 8th January 1946, two months before the suit had been disposed of and within three years of the filing of the compromise in November 1943. Even if the suit had been filed on 8th January 1946, or be deemed to have been filed on this latter date, such a suit will still be within time and there can be no objection to the prayer as made in the plaint being allowed if otherwise the plaintiff is within time, or if the relief has not otherwise become barred. That the plaintiff had a cause of action on the date the suit was filed cannot, therefore, be controverted.

[11] The plaintiff is entitled to relief provided it can be shown that the possession which he had exercised over a substantial portion of the property in suit was under the contract. This fact has not been enquired into, as I have already stated.

[12] The result, therefore, is that the appeal is allowed, the judgment and decree of the Court of appeal below are set aside and the case is remitted to that Court for a decision on the point as to what was the nature and character of the possession which had been exercised by the plaintiff in respect of Dag No. 564 and particularly whether that possession was a possession under the contract and such that the vendor must know or be taken to know that the plaintiff claimed to be in possession under the contract. If the answer be in the affirmative, the plaintiff is entitled to a decree in the present suit. If it is found against the plaintiff the suit will have to be dismissed. As this specific point had not been raised or considered in the form in which it has been done in this Court, both the parties will be entitled to lead evidence on this point only. Costs of this Court will abide the result.

V.S.B. *Case remanded.*

A. I. R. (37) 1950 Calcutta 529 *[C. N. 199.]*

G. N. DAS AND DAS GUPTA JJ.

Panchanan Chakravarti — *Defendant—Petitioner* v. *Harisatya Bhattacharyya and another* —*Plaintiffs* — *Opposite Party.*

Civil Rule No. 845 of 1949, D/ 13-12-1949. against order of Addl. Munsif, Howrah. D/- 28-2-1949.

(a) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act, (XXXVIII [38] of 1948), Ss 18 and 12 (1) (b) —Benefit under S. 18—Date of commencement of Act.

The deposit of arrears due within one month from 1st December 1948, cannot be considered to be compliance with the provisions of S. 12 (1) (b), requiring a deposit of arrears within a month from the date of the commencement of the Act, if and when, for getting the benefit of S. 18 the Court has to make the assumption that the Act was in force on the date before 1st December 1948, on which the decree was passed. Once the assumption is made, as has to be made before any benefit under S 18 of the Act can be given, that the Act was in force on the previous date on which the decree was passed, it is necessarily to be assumed that for the purpose of considering S. 12 (1) (b) of the Act that the Act commenced at least on the date on which the decree was passed and consequently before the requirements of S 12 (1) (b) of the deposit could be satisfied the deposits had to be made within a month from this assumed date of commencement of the Act, in other words, within one month from the date of the decree. [Para 4]

The question whether there has been a proper compliance with the requirements of S 12 (1)(b) of the Act which could have stood in the way of the Court passing a decree for ejectment if the assumption had been made that the Act was in force on the date the decree was actually passed cannot, however, arise if there are in fact, no arrears outstanding on the date of the decree. [Para 5]

The mere fact that all rents due had been deposited would not however prevent these amounts being in arrears. If they have been deposited in accordance with law or if, even if not deposited in accordance with law, such amount has been appropriated by the landlord, then and then only, it has to be held that no amount was in arrears. [Paras 7 & 9]

(b) Interpretation of Statutes — Retrospective operation.

All Acts have ordinarily only prospective operation and they can have retrospective operation only when there is special provision for that. [Para 6]

Annotation: ('50 Com.) Civil P. C., Pre. N. 3.

Ranjit Kumar Banerjee and Jnanendra Mohan De—for Petitioner.

Hemendra Chandra Sen and Dwijendra Nath Das — for Opposite Party.

Das Gupta J.—The question in this case is whether the petitioner is entitled to have the benefit of S. 18, West Bengal Premises Rent Control Act, 1948, for the purpose of rescission or variation of a decree for ejectment passed against him in Title Suit No. 125 of 1948 in the Court of the Additional Munsif, Howrah. The petitioner was a tenant under the opposite party with respect to a portion of holding No. 6, Kailash Basu 4th Bye Lane, Ramkrishnapur, at a monthly rental of Rs. 15-8-0 only. The suit for ejectment was instituted on 20th September 1947 on the allegation that the tenancy had been terminated by a notice to quit served in accordance with law. There was also a claim for Rs. 10 8 0 said to be the outstanding due on account of rent and a claim for mesne profits. It was said that the tenant had defaulted in payment of rent prior to the date of suit and so was not entitled to get the benefit of the Calcutta Rent Ordinance, 1946, which was then in force. The Court accepted the story of default, found that the tenancy had been properly terminated and gave the plaintiff a decree for ejectment of the defendant petitioner. The decree was passed on 7th September 1948. On 22nd December 1948, the petitioner filed an application before the Court praying for a rescission of the decree for ejectment. It was stated therein that during the pendency of the suit the petitioner had been regularly depositing the due rent every month in the Rent Controller's Court in accordance with the provisions of law and that in fact, rent due up to the month of October 1948 had been deposited in the Rent Controller's Court. It was further stated that the rent for the month of November 1948 and for the month of December up to the date of petition together with costs had also been put in by him on that date, namely 22nd December 1948 He claimed that this was a sufficient compliance with the provisions of S. 12 (1)(b), West Bengal Premises Rent Control Act and so in view of the provisions of S. 18 of the Act he was liable to have the decree rescinded.

[2] In the objection which was filed by the present opposite party it was merely stated that the petitioner was not entitled to have the decree rescinded; but nothing was said about the petitioner's statement in the petition as regards the deposit of rent in accordance with law in the Rent Controller's Court up to the month of October 1948.

[3] The learned Munsiff dismissed this application on two grounds. His first ground was that the deposit had not been made in accordance with law inasmuch as it had been made in Court which is not provided for in the Act. His second ground was that in any case there could not be any application of S. 18 of the Act to the facts of this case inasmuch as

"the post-Act deposit cannot have any retrospective effect so as to relate back and undo the pre-Act defaulting status and cure this initial vice of default which has in fact been adjudged by the Court and consequent on which the decree in question had to be passed."

[4] The difficulties which arise in the application of S. 18, West Bengal Premises Rent Control Act 1948 have been considered in several cases by this Court. Vide *Federation Bank*

of India Ltd. v. *Hanutmal Boid*, A. F. O. O. No. 36 of 1949: (54 C. W N. 604), *Sm. Nagendra Bala Hore* v. *Dakshina Kali Mata*, Civil Revn. No. 277 of 1949: (A. I. R. (37) 1950 Cal. 503) *Sachindra Biswas* v. *Phanindra Nath Bagchi*, Civil Revn. No. 708 of 1949 and *Bepin Behary Dey* v. *Girindra Kumar Kar*, Civil Revn. No. 1066 of 1949. In all these cases it was held that the deposit of arrears due, within one month from 1st December 1948, cannot be considered to be compliance with the provisions of S. 12 (1) (b) requiring a deposit of arrears within a month from the date of the commencement of the Act if and when, for getting the benefit of S. 18 the Court has to make the assumption that the Act was in force on the date before 1st December 1948 on which the decree was passed. It was pointed out that once the assumption is made, as has to be made before any benefit under S. 18 of the Act can be given, that the Act was in force on the previous date on which the decree was passed, it is necessarily to be assumed that for the purpose of considering S. 12 (1) (b) of the Act, that the Act commenced at least on the date on which the decree was passed and consequently before the requirements of S. 12 (1) (b) of deposit could be satisfied the deposits had to be made within a month from this assumed date of commencement of the Act, in other words, within one month from the date of the decree. In all the above cases arrears were admittedly outstanding and they were put in not within a month from the date of the decree but within a month from 1st December 1948. The argument that for the purpose of seeing whether the requirements of S. 12 (1) (b) had been complied with, the date of the commencement of the Act should be taken to be 1st December 1948, though at the same time the Court would have to assume that the Act was in operation on the date on which the decree was actually passed, was negatived.

[5] I feel myself bound by the decisions and I respectfully agree with them. The question whether there has been a proper compliance with the requirements of S. 12 (1) (b) of the Act which could have stood in the way of the Court passing a decree for ejectment if the assumption had been made that the Act was in force on the date the decree was actually passed cannot however arise if there are, in fact, no arrears outstanding on the date of the decree. If there are no such arrears, the difficulty in the way of the tenant that he cannot be entitled to the benefit of S. 11 unless he has deposited arrears within a certain time does not arise. In the present case if the statement made by the petitioner in the application under S. 18 of the Act is correct, then obviously there were no arrears on 7th September 1948 when the decree was passed. It may be mentioned here that on the date the suit was filed there was clearly no amount in arrears. The plaintiff himself stated in the plaint that the rent for August 1947 and from the 1st to 19th September 1948 had not been paid, but admitted that out of that amount Rs. 15-8-0 had been deposited and he claimed Rs. 10-8-0 only as the amount in arrears. It was contended by Mr. Sen before us that in fact the amount in deposit had not been withdrawn by his client. I fail to see how, when by his statement the plaintiff gives credit to the tenant for the sum of Rs. 15-8-0 said to have been deposited in the Rent Controller's Court, it can still be said that this amount was in arrears. He had clearly appropriated this amount and the only amount which according to him remained due was the amount of Rs. 10-8-0. But as that was for the part of the month of September 1947 and the rent for that month would not become an arrear until 15th October 1947 in the absence of any contract to the contrary which has not been established in this case, I have no hesitation in coming to the conclusion that on the date the suit was instituted no amount was in arrears.

[6] The question for consideration here however is not whether any amount was in arrears at the date the suit was filed but whether any amount was in arrears "before the commencement of the Act", that is, before 7th September 1948 which for the purpose of S. 18 should, in my opinion, be assumed in this case to be the date of the commencement of the Act. All Acts have ordinarily only prospective operation and they can have retrospective operation only when there is special provision for that. The result of the provisions of S. 18 would be that in considering an application under S. 18 the Court would have to consider that the Act was in force on the date the decree was passed which in the present case is on 7th September 1949. There is no justification for carrying the Act further back in the present case and consequently the Act must be considered to have commenced on 7th September 1948.

[7] As already stated the petitioner's case is that all rents up to October 1948 had been paid by him by deposit in the Rent Controller's Court. The mere fact that they had been deposited would not however prevent these amounts being in arrears. If they have been deposited in accordance with law or, even if not deposited in accordance with law, such amount has been appropriated by the landlord, then and

then only, it has to be held that no amount was in arrears.

[8] The matter was not approached in the Court below from this point of view. What was considered there was whether the amounts for November and December 1948 had been deposited in accordance with law. It was not understood that what the Court had to consider in the circumstances of this case under S. 18 was whether on 7th september 1948 there were any arrears and whether those arrears had been deposited in accordance with law, and that the Court was not concerned with the question of the arrears for October or November or December 1948 in deciding whether relief under S. 18 could be given.

[9] As I have stated, it must be held that no amount was in arrears on the date the suit was filed. Before a proper decision can be made of the application under S. 18 it is therefore necessary to ascertain whether there were any arrears on 7th September 1948 with regard to the rent for the period—September 1947 to July 1948. If the rent for these months had been deposited in accordance with law then in force, that is the Calcutta Rent Ordinance, 1946, this would not be in arrears. Again, if even though they were not deposited in accordance with law the landlord had appropriated any portion of the rent deposited, such rent as had been appropriated must be held to be not in arrears.

[10] It is necessary therefore that this case should be remanded to the Court below for a decision in accordance with law after giving both parties an opportunity to adduce evidence whether any rent for the period—September 1947 to July 1948—was in arrears on 7th September 1948. If no such amount was in arrears the decree for ejectment should be rescinded on such terms as regards payment of rent for the subsequent period as the Court may think fit. If any such amount was in arrears the application under S. 18 should be rejected, as there is no case made that any such amount if in arrears, have been paid within a month from 7th September 1948. I would therefore set aside the order passed by the learned Subordinate Judge and remand the case for disposal in accordance with the above direction.

[11] The Rule is disposed of in these terms. There will be no order as to costs.

[12] G. N. Das J.—I agree.

V.B.B. *Case remanded.*

A. I. R. (37) 1950 Calcutta 531 *[C. N. 200.]*

SEN AND K. C. CHUNDER JJ.

Jatindra Nath Patra and others — Petitioners v. Bhutnath Patra and another — Opposite Party.

Civil Rules No. 1705 and 1706 of 1949, D/-22-6-1950, to set aside order of D. J., Midnapore, D/-29-6-1949.

(a) Debt laws—Bengal Agricultural Debtors Act (VII [7] of 1936), S. 40 —Appeal against order of Board — Who can file.

Where in an application under S. 37A, the landlord contends that she has transferred the property to one *A*, who is not a party to the proceeding, before 20th December 1939 but the Board finds that no such transfer was effected before that date, *A* has no *locus standi* to prefer an appeal against the decision of the Board. [Para 3]

(b) Debt laws—Bengal Agricultural Debtors Act (VII [7] of 1936), S. 37 (i) (b) and (iii)—Application under S. 37A — Conditions to be complied with — Any other person — Meaning.

An application under S. 37A is entertainable if any of the conditions contained in S. 37A (1) (b) (i) to (iii) is complied with.

In order to comply with the condition in S. 37A (1) (b) (iii) it is not enough that the sale is held before the commencement of the Act of 1940. The applicant must also show that the case was of a debt for arrears of rent in respect of which he was liable jointly with some other persons. The expression 'any other person' clearly means some person other than the applicant. Where therefore the petitioners clearly state that they are not liable jointly for any debt with any other person, the condition in S. 37A (1) (b) (iii) is not complied with and the application is not maintainable. [Para 6]

Sambhu Nath Banerjee (Sr.) — for Petitioners.
Sarat Chandra Janah (in 1705) and Arun Kumar Janah (in 1706) — for Opposite Party.

Sen J. — These two rules arise out of proceedings before the Debt Settlement Board. The first Rule 1705 of 1949 arises out of an order passed in revision under S. 40A, Bengal Agricultural Debtors Act by the learned District Judge.

[2] The facts are these: The petitioners were applicants under S. 37A, Bengal Agricultural Debtors Act. They impleaded one Chitramoyee Devi as the landlord. She pleaded that she had transferred the property to one Bhutnath Patra before 20th December 1939, and that therefore no relief could be obtained by the petitioners. The Board held that there was no transfer before that date. Bhutnath Patra appealed although he was not a party to the proceedings and the Appellate Officer dismissed the appeal. Against that order Bhutnath Patra moved the District Judge and the appeal was allowed.

[3] It is contended on behalf of the petitioners that Bhutnath Patra had no *locus standi* to prefer the appeal and therefore the order allowing Bhutnath's appeal should be set aside. We are of opinion that there is no answer to this contention and the order passed by the District Judge in so far it allowed Bhutnath Patra's appeal must be set aside. The rule is accord-

ingly made absolute. There will be no order for costs.

[4] The second Rule 1706 of 1949 arises out of the same proceedings before the Debt Settlement Board. The contention of the landlord was that the petition was not maintainable by reason of the fact that the provision of S. 37A (1) (b) (i), Bengal Agricultural Debtors (Amendment) Act 1940 was not complied with. Section 37A (1) (b) (i) is in the following terms:

"37A. (1) When any immovable property of any person has been sold after the twelfth day of August 1935, in execution of a decree of a civil Court or a certificate under the Bengal Public Demands Recovery Act, 1913, relating to a debt other than a certificate for the recovery of any amount payable under an award, such person or his heir, executor or administrator may, notwithstanding anything contained in this Act or in any other law for the time being in force or in agreement, apply for relief under this Section, if the following conditions are fulfilled, namely, (b) if the sale was held —

(i) before an appointment was made under sub-s. (2) of S. 3 in relation to the Board established for the local area within which such person ordinarily resided at the time of the sale."

[5] It was pointed out that the sale was not held before the appointment mentioned in S. 37A (1) (b) (i). The answer of the tenant was that although the sale was not so held nevertheless the application was maintainable inasmuch as it complied with the provision of S. 37A (1) (b) (iii) that is to say, in as much as the sale was held before the commencement of the Bengal Agricultural Debtors (Amendment) Act, 1940. It was argued that if any of the conditions contained in S. 37A (1) (b) (i) to (iii) was complied with the applications would be entertainable.

[6] This contention has not found favour with the Courts below. We agree that if any of the conditions contained in S. 37A (1) (b) (i)-(iii) are complied with the applications would be entertainable but we are of opinion that the condition laid down in S. 37A (1) (b) (iii) has not been complied with. It is true that the sale was held before the commencement of Bengal Agricultural Debtors (Amendment) Act, 1940, but that is not enough. The applicant under S. 37A in order to get the benefit of S. 37A (1) (b) (iii), must show that the case was of a debt for arrears of rent in respect of which the applicant was liable jointly with some other persons. The words of S. 37A (1) (b) (iii), Bengal Agricultural Debtors (Amendment) Act, 1940, are as follows:

"* * * *

(iii) Before the commencement of the Bengal Agricultural Debtors (Amendment) Act, 1940, in the case of a debt for arrears of rent in respect of which such person was liable jointly with any other person."

In the present case the petitioners have made a joint petition that they are not liable jointly for any debt with any other person. The words 'any other person' clearly mean some person other than the petitioner or petitioners. In these circumstances we are of the opinion that the application is not maintainable.

[7] The Rule is accordingly discharged with costs.

[8] **K. C. Chunder J.**—I agree.

D.R.R. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 532 *[C. N. 201.]*

R. P. MUKERJEE J.

Binapani Devi — Plaintiff— Appellant **v.** *Surendra Nath Haldar and another—Defendants—Respondents.*

A. F. A. D. Nos. 2086 and 2087 of 1945, D/- 19-8-1949, against decree of Sub-J., 1st Court, Hooghly, D/- 8-8-1945.

Tenancy Laws—West Bengal Non-agricultural Tenancy Act (XX [20] of 1949), S. 88 — Ejectment suit—Stay of delivery of possession under previous Tenancy Act—Appeal — Effect of S. 88—Tenancy Laws — West Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (IX [9] of 1940), S. 3.

Where the lower Courts in a suit for ejectment held that the defendant could not be ejected as ejectment was barred under S. 3 of the Act of 1940 and directed that execution of the decree for delivery of possession would be stayed during the pendency of the Act of 1940 and after the plaintiff filed an appeal to the High Court, the Act of 1940 was superseded by the Act of 1949:

Held **that the judgment and decree passed by the lower Courts must be set aside and case sent back to the lower Court of appeal to consider whether the provisions of the new Act were applicable and, if so, whether the plaintiff was entitled to a decree for ejectment.** [Para 7]

Heramba Chandra Guha and Narendra Nath Banerjee—for Appellant.

Apurba Charan Mukherjee—for Respondents.

Judgment.—This appeal is on behalf of the plaintiff and arises out of Title Suit No. 20 of 1944. The plaintiff had brought the suit on the plea that the defendant had taken settlement of the tank in suit for three years from *Agrahayan* 1346 B. S. to *Jaista* 1349 B. S. after executing a *kabuliyat*. After the expiry of the lease the defendant had continued in possession, though the plaintiff had not assented to such possession. The defendant, according to the plaintiff is a trespasser and the prayer is for an ejectment from the demised property. The defence raised various points but the one material for the purpose of the present appeal is that the tenant had paid rent up to 1350 B.S. and that there had been a further agreement by the landlord accepting fresh tenancy after the expiry of the lease in *Jaistha*, 1349 B. S.

[2] Both the Courts below have dismissed the suit. Hence this appeal on behalf of the plaintiff. The learned Subordinate Judge has on a consideration of the evidence—oral and documentary—arrived at a finding of fact that

Exs. B.20 and B.21 being *dakhilas* issued by and on behalf of the plaintiff were genuine and that the plaintiff by acceptance of rent up to 1350 B.S., as evidenced by those *dakhilas*, permitted the defendant to hold over. This decision is by itself sufficient to dispose of the suit as framed. It is not the case on behalf of the plaintiff that she had given notice terminating the tenancy when the tenant was holding over after the expiry of the lease in 1349 B.S. In this view the suit has to be dismissed and the appeal also dismissed.

[3] The learned Subordinate Judge has gone into other questions as well which are not necessary for the disposal of the suit. What the nature of the tenancy is after the expiry of the lease in *Jaista*, 1349 B.S. need not be examined in the present suit. It is also not necessary to consider what is the legal effect of the lease evidenced by Ex. E in the case. These are questions which may arise hereafter when steps are taken, if any, to terminate the tenancy which the defendant has got by holding over and the findings arrived at, except on the question that there was acceptance of rent by the plaintiff up to 1350 B.S., are therefore set aside as being unnecessary.

[4] The appeal is accordingly dismissed.

[5] There will be no order for costs.

[6] *S. A. No. 2087/45*: This appeal is on behalf of the plaintiff and arises out of Title Suit No. 21 of 1944. The plaintiff's case is that the defendant had taken settlement of the suit land under a lease which expired in *Asar*, 1348 B.S. and that even after the expiry of the lease when the defendant continued to be in possession, he is a trespasser and is liable to be ejected therefrom. The defence raised certain questions as to the real person with whom the lease had been executed but the real point raised and which is pertinent in the appeal now before me was that after the expiry of the period of the lease in *Asar*, 1348 B.S. the plaintiff had agreed to grant a *mourashi* right and that in pursuance of that agreement he had been holding over and certain payments were also made. A further plea was raised as under the provisions of the Bengal Non-Agricultural Tenancy Act which was then in force. The Courts below held that the prayer for ejectment, though otherwise valid, the defendant could not be ejected as ejectment was barred under S. 8, Bengal Non-agricultural Tenancy Act which was then in force. Direction was given that execution of the decree for delivery of possession would be stayed during the pendency of the Bengal Non-agricultural Tenancy (Temporary Provisions) Act if the rent due together with costs were deposited in Court within 30 days from the date of the decree. The deposit was made within the time fixed by the Court. On appeal by the plaintiff before the learned Subordinate Judge the order for stay as made by the trial Court was maintained and the appeal was dismissed. Hence this appeal by the plaintiff.

[7] During the pendency of the appeal in this Court the Bengal Non-agricultural Tenancy (Temporary Provisions) Act has been superseded by the West Bengal Non-agricultural Tenancy Act (Act XX [20] of 1949). Although the order for stay as issued by the Courts below was to be effective during the period the Non-agricultural Tenancy Act was in force, we have to consider now whether the plaintiff's prayer for ejectment is maintainable under the provisions of the West Bengal Non-agricultural Tenancy Act. Under S. 88, West Bengal Non-agricultural Tenancy Act, the provisions of this Act would be attracted in all suits, appeals and proceedings in respect of non-agricultural tenancies which were pending at the date of the commencement of the Act. This Act came into force on 15th May 1949. The judgment and decree passed by the lower appellate Court must therefore be set aside and the appeal sent back for re-hearing according to law. It will be for the learned Subordinate Judge to consider whether the provisions of the new Act are applicable and if so, whether the plaintiff is entitled to a decree for ejectment as prayed for. All the points raised in the Court of appeal below will also be considered again during the re-haring of the appeal.

[8] The appeal is accordingly allowed and the case sent back to the Court of appeal below for rehearing according to the directions given above.

[9] Costs incurred by the parties in this Court will abide the result.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 533 *[C. N. 202.]*

R. P. MOOKERJEE J.

Muktipada Dawn—Defendant No. 9 — Appellant v. *Aklema Khatun, Plaintiff and others—Respondents.*

A. F. A. D. No. 203 of 1946, D/- 11-5-1950, against decree of Sub J., Burdwan, D/- 14-6-1945.

(a) Evidence Act (1872), S. 35 — Certificate of guardianship whether is admissible in evidence to prove minority of person—Guardians and Wards Act (1890), S. 7.

A certificate of guardianship issued by the Court in a guardianship proceeding is not admissible in evidence under S. 35, Evidence Act to prove the minority of a person. Such certificate is neither a book nor a register nor a record kept by any officer in accordance with any law. It is a certificate, as it professes to be, and is a

document issued to a person, giving that person and only to him a particular kind of authority. [Para 7]

Annotation : ('46-Man.) Evidence Act, S. 35, N. 18.

(b) Evidence Act (1872), Ss 41 and 65 (e)—Certified copies of orders passed in guardianship proceedings — Admissibility in evidence to prove minority – Guardians and Wards Act (1890), S. 7.

Certified copies of the orders passed by the Court in the guardianship proceedings cannot be treated as a judgment *in rem* as in the case of a grant made under the Succession Act. Even though an order in such proceedings is not a judgment *in rem* or *inter partes* it may be admissible only to prove that such an order had in fact been made but not to prove its contents The certified copies of the orders are not, therefore, available even as being judgments to prove the age of the minor. [Para 8]

Annotation : ('46-Man.) Evidence Act, S. 41, N. 2; S. 65, N. 6.

(c) Evidence Act (1872), S. 32 (5)— Guardianship proceedings—Application by guardian— Recital of date of birth of minor in – When can be admitted in evidence.

The recital of the date of birth of the minor in the application for appointment of a guardian is not by itself admissible in evidence upon mere production of the document but may be rendered admissible after proving the statement made in application by examining the person who made that statement where such person is living, especially whether he had any special knowledge of the date of birth of the minor. [Para 10]

Annotation : ('46-Man.) Evidence Act, S. 32, N. 29.

Purushottam Chatterjee and Hemanta Kumar Dutt—for Appellant.

Bhola Nath Roy and Ramendra Mohan Mazumdar for Deputy Registrar—for Respondents.

Judgment.— This is an appeal on behalf of defendant 9 and arises out of a suit brought by the plaintiff for recovery of possession after declaration of her title to the properties in suit. There is a further prayer that it may be declared that a certain decree and the proceedings in execution thereof are not binding against her on the ground that though she had not attained majority before the relevant time she was described in those proceedings as *sui juris*.

[2] The undisputed facts may be shortly stated. Some of the defendants and predecessors in interest of some others had brought a suit (T. S. No. 87 of 1940) against the plaintiff and the pro-forma defendants claiming partition of the properties described in Schedule Ka to the plaint. The suit was decreed *ex parte* on 10th September 1940 and in execution of the decree for costs defendants 1 to 8 had put up to sale the property described in Schedule Kha to the plaint, which was alleged to have been in the exclusive possession of the plaintiff. It is further stated that the property in suit was purchased by defendant 1 in the benami of defendant 9. It is contended that the plaintiff was a minor both when the decree in T. S. No. 87 of 1940 was passed as also when the decree was put into execution. The plaintiff had originally brought T. S. No. 19 of 1942 on grounds similar to those as in the present suit but she having failed to take necessary steps in time the plaint was rejected by the Court. The present suit was filed thereafter. The plaintiff claims that she is not bound by the decree passed in T. S. No. 87 of 1940 and the sale in execution of the said decree does not affect her title to the property. The defence is that defendant 9 was a *bona fide* purchaser for value, the plaintiff had attained majority before the passing of the decree in T. S. No. 87 of 1940, and that the plaintiff is not entitled to any relief in the present suit.

[3] The learned Munsif found in favour of the defendant and held that the plaintiff was not a minor when the decree in question had been passed. The suit was accordingly dismissed. On appeal by the plaintiff the learned Subordinate Judge has held that the plaintiff was a minor when the decree in T. S. No. 87 of 1940 was passed. The decree was a nullity and the plaintiff's title to the Kha schedule properties have not been affected by the subsequent sale in execution of the said decree. Defendant 9 has come up on appeal to this Court. The only point urged on behalf of the appellant is that the decision by the Court of appeal below on the question of the minority of the plaintiff is based upon inadmissible evidence.

[4] To prove that the plaintiff was a minor at the relevant time she did not examine herself or her mother Her husband had been examined and reliance was placed upon the three following documents: (1) A certified copy of the order sheet, recording the appointment of a guardian of the plaintiff, in the Act VIII case wherein it is recorded that the plaintiff was 5 years old in 1928, (Ex.-1A); (2) a certified copy of another order in the same Act VIII case recording that the plaintiff would attain majority on 18th September 1941 (Ex. 1B); and (3) the petition filed in course of the guardianship proceedings by Abdul Barik Midya on 8th June 1926 for being appointed guardian of the person and property of plaintiff (Ex.-3 in the case).

[5] The question whether the above papers, marked as exhibits, are admissible in evidence to prove the age of the plaintiff must be determined with reference solely to the provisions of the Evidence Act. *Lekraj Koer* v. *Mahipal Singh*, 7 I. A. 63 : (5 Cal 744 P. C.), *Emperor* v. *Panchu Das* 47 Cal. 671 : (A. I. R (7) 1920 Cal. 500 : 21 Cr. L. J. 849 F. B)

[6] Items 1 and 2 (Exs. 1A and 1B) are certified copies of the order sheet of the guardianship proceedings. If either of these two papers be admissible in evidence to prove the age of the plaintiff it would show conclusively the date upto which the plaintiff had continued to be a minor.

[7] A certificate of guardianship issued by the Court has been held not to be admissible in evidence under S. 35, Evidence Act to prove the minority of a person. Such certificate is neither a book nor a register nor a record kept by any officer in accordance with any law. It is a certificate, as it professes to be, and is a document issued to a person, giving that person and only to him a particular kind of authority. Petheram C. J held in *Satish Chunder* v. *Mohendro Lal*, 17 Cal 849, that the certificate cannot be regarded as evidence of minority under S. 35, Evidence Act Edge C. J. followed this decision in *Gunjra Kuar* v. *Ablock Pandey*, 18 ALL. 478 : (1896 A. W. N. 158). The same view has been expressed in later cases also by Rampini and Mookerjee JJ. in *Hemchandra* v. *Bhaba Prosad*, 2 C. L. J. 69n and by Mookerjee and Chotzner JJ. in *Hara Kumar* v. *Jogendra Krishna*, 38 C. L. J. 186 (A. I. R. (11) 1924 Cal. 526).

[8] It has next to be considered whether, even though the certificate may not be admissible under S. 35 the certified copies of the orders passed by the Court in the guardianship proceedings are admissible under some or other provisions of the Act. The orders passed in the guardianship proceedings cannot be treated as a judgment *in rem* as in the case of a grant made under the Succession Act: *Hemangini Debi* v. *Saratsundari*, 34 C. L. J. 457 : (A. I. R. (8) 1921 Cal. 292). Even though an order is not a judgment *in rem* or *inter partes* it may be admissible only to prove that such an order had in fact been made but not to prove its contents. *Ram Parkash* v. *Anand Das*, 43 I. A. 73 : (A. I. R. (3) 1916 P. C 256), *Ram Ranjan* v. *Ram Narain*, 22 I. A. 60 . (22 Cal. 533 P. C.), *Dinomoni* v. *Brojomohini*, 29 I. A. 24 : (29 Cal. 187 P. C.). The certified copies of the orders are not, therefore, available even as being judgments to prove the age of the plaintiff.

[9] In *Kishorilal* v. *Adhar Chandra*, 76 C. L. J. 61 : (A. I. R. (29) 1942 Cal. 438), reliance was placed on *Sadique Ali Khan* v. *Joy Kishori*, 47 C. L. J. 628 : (A. I. R. (15) 1928 P. C. 152), a decision of the Judicial Committee in support of the contention that an application for appointment of a guardian made by the father as well as the certificate of guardianship granted by the Judge had been admitted in evidence and relied upon. B. K. Mukherjea J., observed (at p. 65):

"It is not clear from the report as to whether the father who applied for guardianship was alive or dead at the time when the suit was brought and we also do not know whether he was also examined as a witness in the case. The only thing that appears from the judgment is that these papers were used as evidence without any objection by either side. We cannot certainly rely upon this decision as an authority for the proposition that the application in the guardianship proceeding or an order passed on the same as admissible in all circumstances to prove the age of minority and in our opinion, the decisions in *Harakumar De* v. *Jogendra Krishna*, 38 C. L. J. 186 : (A. I. R. (11) 1924 Cal. 526) and *Prohlad Chandra* v. *Ram Saran*, 38 C. L. J. 213 : (A. I. R. (11) 1924 Cal. 420) are quite correct."

The Privy Council decision above mentioned was an appeal from a decree of the Court of the Judicial Commissioners of Oudh dated 27th May 1925. The judgment appealed from is reported as *Joy Kishori* v. *Ali Ahmad Khan*, A. I. R. (12) 1925 Oudh 487 : (89 I. C. 108). From the statement of facts appearing in this report it will be noticed that Kassim Ali Khan, the father and Raisunnessa, the mother, of the minor mortgagors were both of them, dead. The application filed by the father for being appointed guardian of the minors will clearly, under the circumstances, be admissible. There were other pieces of evidence also in the case in support of the contention that the mortgagors were at the relevant time minors. It is true that neither was any objection raised before nor was the question of the admissibility of the guardianship certificate considered by the Judicial Committee. This decision cannot as already observed by B. K. Mukherjea J. be considered to be an authority for the proposition that such documents are admissible under all circumstances.

[10] The last item (Ex. 3) has now to be considered. The original record of the guardianship case had been called for and the petition filed by Abdul Barik Mondal was marked as an exhibit, it having been proved by the plaintiff's husband without any objection. Abdul Barik, who made the statement in the petition, has not been examined in this case. The statement appearing in this petition about the date of birth is in substance a statement by a person who made the application. The recital of the date of birth in the application for appointment of a guardian is not by itself admissible in evidence upon mere production of the document but may be rendered admissible under certain circumstances: *Krishna Mangul Saha* v. *Akbar Jumma Khan*, 9 C. L. R. 213, *Dhanmull* v. *Ramchunder*, 24 Cal. 265 : (1 C. W. N. 270), *Ram Chandra* v. *Jogeswar*, 20 Cal. 758, *Monindra* v. *Ram Krishna*, 19 C. W. N. 646 : (A. I. R. (3) 1916 Cal. 529), *Mohammad Syedol Ariffin* v. *Yeoh*, 43 I. A. 256 : (A. I. R. (3) 1916 P. C. 242). If, however, the conditions recited in S 32 (5), Evidence Act, are satisfied, that is, a person who had made this statement had special means or knowledge of the relationship and he is now dead or cannot be found such statement in the petition will be admissible. Further, the statement made in the application may be used under S. 155, Evidence Act, to impeach the

credit of the person who made the statement while he is being examined as a witness in the case. *Prohlad* v. *Ramsaran*, 38 C. L J. 213 : (A. I. R. (11) 1924 Cal. 420). The statement in the application may also as being the former statement as to a fact be admissible under S. 157, Evidence Act to corroborate the later testimony of the witness; *Harchand* v. *Dewan Singh*, 1929 A L. J 615 : A. I R. (16) 1929 ALL. 550., Abdul Barik who had filed the petition had not been examined though he was still alive. It, however, appears from the evidence that Abdul Barik is not now on good terms with the plaintiff. As he has not been examined the source of his knowledge about the age of the plaintiff and also whether he was a proper witness to prove her age could not be investigated.

[11] As already observed the petition Ex. 3 was marked without any objection and the plaintiff was under a misapprehension that no further evidence was necessary in view of the clear statement contained in those documents. The original of the guardianship p oceedings had been sent for and after comparison the certified copies were made exhibits without any objection from either side. The question is whether the parties should be given an opportunity for adducing evidence for letting in the statement contained in Ex. 3. I think the proper way of disposing of this case would be to set aside the judgment of the lower appellate Court and to send the case back in order that the appeal may be re-heard. The plaintiff will be given an opportunity to prove the statement made in the petition Ex. 3 as a statement made by Abdul Barik and also whether the latter had any special knowledge of the date of birth of the plaintiff. The defendant will be at liberty to adduce any evidence in rebuttal thereof.

[12] It is not for me to express any opinion at this stage as to evidentiary value of the recital, as to the age of the plaintiff in the guardianship application. There are other pieces of evidence in the case which also will have to be considered along with the additional evidence which will be recorded by the Court below. The case is to be disposed of after taking into consideration the entire evidence in the record both before and after remand. The Court of appeal below will come to a decision as to whether in fact the plaintiff was or was not a minor on the material date. The result, therefore, is that the appeal is allowed and the case remitted to the lower appellate Court for disposal according to the directions given above. There will be no order for costs in this Court. Further costs will be in the discretion of the said Court.

V.S.B. *Case remanded.*

A. I. R. (37) 1950 Calcutta 536 *[C. N. 203.]*

G. N. **DAS** AND **GUHA** JJ.

Jahnabi Prosad Banerjee and another—*Petitioners* v. *Basudeb Paul and others*—*Opposite Party.*

Civil Rule No. 1056 of 1948, D/- 5-9-1949, against order of 1st Addl. Sub-J., Alipore, 24-Parganas, D/- 30-4-1948.

Municipalities — Bengal Municipal Act (XLV [45] of 1932), as amended by Act (XI [11] of 1936), Ss. 39-B and 43—Election Court — Order of — No power in High Court to interfere in revision—Civil P. C. (1908), S. 115 — Government of India Act (1935), S. 224 (2)—Letters Patent (Cal.), Cl. 13.

After enactment of the Government of India Act, 1935, the High Court has no power to revise the decision of the District Judge decreeing a suit for a declaration that the rejection of the plaintiff's nomination paper by the election authorities is illegal and *ultra vires* and that the result of certain election has been materially affected thereby and that the said election should be set aside, in view of the provisions of Ss. 39-B and 43, Bengal Municipal Act. (History of power of revision of High Court over subordinate Courts discussed.) [Paras 54, 64, 66, 67, 70, 71]

Annotation: ('50-Com.) Civil P. C., S. 115 N 6; ('46-Man.) Government of India Act (1935) S. 224 N. 1; ('46-Man.) Letters Patent (Cal.), Cl. 13 N. 1.

Paresh Nath Mookerjee and Arun Kumar Dutt —for Petitioner.

Apurbadhan Mukherjee — for Opposite Party.

Chandra Sekhar Sen, Jajneswar Mazumdar and Hem Chandra Dhar — for Province of West Bengal.

G N Das J.—This rule was obtained by the defendants againt the decision of Mr. Subodh Chandra Mukherjee, learned Subordinate Judge, 1st Additional Court, Alipur, District 24 Parganas; whereby he decreed the suit filed by the plaintiff for setting aside the election of Ward No. V of Naihati Municipality.

[2] The relevant facts are that Basudeo Paul Opposite Party No. 1 filed his nomination paper as a candidate from Ward V for the impending election of the Naihati Municipality. The nomination paper was rejected by the Chairman of the Municipality; an appeal to the District Magistrate was dismissed. The election then took place and petitioner No. 1 was declared elected from the general seat in Ward V and Petitioner No. 2 was declared elected from the reserved seat. The opposite party No. 1 then brought the present suit being Title Suit No. 32 of 1946 in the Court of the District Judge, Alipur for a declaration that the rejection of his nomination paper by the Election Authorities of the Naihati Municipality is illegal and *ultra vires* and that the result of the election has been materially affected thereby and that the said election is fit to be set aside.

[3] The suit was contested by petitioner No. 1 and opposite party No. 4, the Chairman of the Commissioners of the Naihati Municipality.

[4] The suit was heard by the learned Subordinate Judge, 1st Additional Court and was decreed.

[5] Against the said decree, the petitioners moved this Court under S. 115, Civil P. C. 1908, v [5] of 1908, (hereinafter called the Code) and obtained the present rule.

[6] Mr. Apurbadhan Mukherji learned advocate for the Opposite Party No. 1 raised a preliminary objection that this Court has no power to revise the decision complained of in view of the provisions of S. 39B (inserted by S. 13, Bengal Municipal (Amendment) Act XI [11] of 1936) and S. 43, Bengal Municipal Act XV [15] B. C. of 1932. Reliance was placed on the decisions in *Bon Behary* v. *Mukhan Lal*, I. L. R. (1938) 2 Cal. 69 : (42 C. W. N. 282 : A I. R. (25) 1938 Cal. 768) and *Radhanath Saha* v. *Hari Mohan Saha*, 42 C. W. N. 647 : (A. I. R. (25) 1938 Cal. 465).

[7] Mr. Pareshnath Mukherjee, learned advocate appearing for the petitioners conceded that the decisions did lay down the proposition that the powers of this Court to interfere with the decision of the District Judge have been taken away by Ss. 39B and 43 of the Act; but contended that even though the original Act of 1932 and the amending Act of 1936 were passed with the previous sanction of the Governor-General under sub-s. (3) of S. 80A, Government of India Act, then in force, the sections are *ultra vires* of the Provincial Legislature on the following grounds : (1) Because the said sections affected the jurisdiction conferred on this Court under S. 115, Civil P. C., 1908 and S. 106, Government of India Act, 1915 and S. 223, Government of India Act, 1935; (2) because the sections affected the jurisdiction of this Court conferred by Cl. (13), Letters Patent.

[8] It was submitted that the points so raised were not urged in the cases referred to and required our consideration.

[9] It was submitted that a substantial question of interpretation of the Government of India Act, 1935 arose in the case. We, accordingly, directed a notice to be served on the Advocate-General, Bengal in accordance with the provisions of O. 27A of the Code which was added by Act XXIII [23] of 1942.

[10] Mr. Sen, the learned Senior Government Pleader has appearred in pursuance of the notice. We are indebted to him as also to the learned advocates appearing in the case for contributing their help to a somewhat difficult investigation and thus to enable us to resolve the problems falling to be determined in this case.

[11] The first ground has been amplified by Mr. Pareshnath Mukherjee in the following manner: (a) The old Courts of Sudder Dewany Adalat and Supreme Court had jurisdiction to revise decisions of Provincial Courts; such jurisdiction was preserved by S. 9, High Courts Act 1861 (24 and 25 Vict. Cap. 104) hereinafter called the Charter Act and was later vested in the High Court, the successor of the Supreme Court and the Sudder Dewani Adalat. The High Court also became vested with powers of revision by S. 15 of the Charter Act and by certain statutes of the Indian Legislature. Such powers were confirmed and reiterated by Ss. 106 and 107, Government of India Act, 1915 and by Ss. 223 and 224 Government of India Act, 1935. Section 43, Bengal Municipal Act, 1932 or S 39B of the said Act are both Acts of the Provincial Legislature and even though assent of the Governor General had been obtained under S 80A (3), Government of India Act, 1915, as amended in 1919, the said sections would be *ultra vires* of the Provincial Legislature; by reason of S. 80A (4), Government of India Act, because the said Ss. 39B and 43 affected the powers of revision of the High Court to interfere with the orders of the Election Court which is a Court subordinate to the High Court.

[12] We have, therefore, to consider how and when the High Court or its predecessor Courts acquired revisional powers.

[13] This involves in the first place an inquiry into the setting up of Courts of Justice in British India.

[14] So far as the East India Company's settlement was concerned, a Mayor's Court was established in 1726. The Court administered English Law and had a limited local jurisdiction.

[15] In 1765, the Company obtained a grant of the Dewany of the then provinces of Bengal, Bihar and Orissa. This necessitated the administration of Civil and Revenue Justice by the Company. In 1772 Provincial Courts were set up for the purpose. These were manned by European officers who decided causes with the help of Kazis, Maulvies, Muftis and Pandits. Appeals lay from these Courts to the Sudder Dewany Adalat which was composed of the Governor-General and members of his Council till 1801 when Civilian Judges came to be appointed.

[16] We are not concerned with the administration of criminal justice, which may be gathered from the preamble to Regulation IX [9] of 1793; appeal from the decisions of subordinate Criminal Courts lay to the Sudder Nizamat Adalat.

[17] In 1773, the Regulating Act (13 George III Cap. 63) authorised the setting up of a Supreme Court as a Court of Record, Oyer and Terminer,

in place of the Mayor's Court which was to be abolished.

[18] On 26th March 1774, the Charter of the Supreme Court was issued by King George III. In consequence of certain disputes between the Judges and the Executive an Act of Settlement (21 George III Cap. 70) was passed in 1781 This was the position at the end of the eighteenth century. It is not necessary to trace the later development of the provincial Courts which is set forth in chaps. VIII and IX of Cowell's History and Constitution of Courts and Legislative Authority in India, Edn. 6.

[19] In 1857 the Sepoys' Mutiny broke out. The suppression of the Mutiny synchronised with the Royal Proclamation by Her Most Exalted and Gracious Majesty Queen Victoria. In 1858, the Government of India Act (21 and 22 Vict. Cap. 106) was enacted, whereby all powers of the East India Company over the territories then in the possession of the Company ceased to be vested in the Company and became vested in the British Crown.

[20] The first Code of Civil Procedure was passed in the year 1859, being Act VIII [8] of 1859. The Act did not confer on the Courts any power of revision. Section 4 provided that

"the judgments of the Civil Courts shall not be subject to revision, otherwise than by those Courts, under the rules contained in this Act, applicable to reviews of judgment, and by the constituted Courts of appellate jurisdiction."

[21] On 6th August 1861, the High Courts Act (24 and 25 Vict., Cap. 104) known as the Charter Act was passed. This Act envisaged the establishment of High Courts under a Royal Charter. The requisite Letters Patent was issued on 14th May 1862, and the High Court of Judicature at Fort William in Bengal was set up in the same year, superseding the old Sudder Courts and the Supreme Court.

[22] The amended Letters Patent dated 28th December 1865 repealed the former Letters Patent of 1862 and re-established the said High Court. By virtue of S 106, Government of India Act, 1915 and S. 223 Government of India Act 1935, these Letters Patent are still in force.

[23] Before we proceed to consider the effect of the Charter Act and of the Letters Patent, let us summarise in brief, the salient laws which were applicable to the Sudder Court and the Provincial Courts before the year 1862.

[24] In the Presidency Town of Calcutta the Supreme Court was governed by its own practice, rules and orders and the provisions of Act XVII [17] of 1852 and Act VI [6] of 1864.

[25] Outside the Presidency Towns, the Provincial Courts were guided by the Acts and Regulations which may be found in the schedule to Act X [10] of 1861, and the Civil Procedure Code, Act VIII [8] of 1859.

[26] The above resume shews that before 1861, the Courts in the province had neither any statutory power of revision, nor any inherent powers of revision which are the creation of separate and distinct legislation.

[27] Mr. Pareshnath Mukerji contended that the high prerogative writs of Mandamus, Certiorari, Quo Warranto which used to be issued by Supreme Courts are really instances of the exercise of revisional powers. He relied on the following passage in *Annie Besant* v. *Advocate-General of Madras*, 46 I. A. 176 at p. 190: (A.I.R (6) 1919 P. C. 31 : 20 Cr. L. J. 593).

"But their Lordships are not disposed to think that the provisions of S. 435, Criminal P. C. and S. 115, Civil P. C. of 1908 are exhaustive. Their Lordships can imagine cases though rare ones which may not fall under either of the sections For such cases their Lordships do not think that the powers of the High Courts which inherited the ordinary or extraordinary jurisdiction of the Supreme Courts to issue writs of certiorari can be said to have been taken away."

[28] At p. 191, however, their Lordships observe :

"However that might be according to English law, where there is no revision procedure as in India, their Lordships see no reason for narrowing the express words of the Indian Act."

[29] It is difficult to draw any certain conclusion from the passage relied on.

[30] In Blackstone's commentaries p. 110, the peculiar business of the Court of the King's Bench is stated to be

"to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial and ministerial powers with which the Crown or Legislature has invested them, and this not only by restraining their excesses but also by quickening their negligence and obviating their denial of justice."

[31] In *Shiva Nathaji* v. *Joma Kashinath*, 7 Bom. 341 F. B., West J. at pages 359-360 observed :

"A superintending and visitatorial jurisdiction has been exercised from ancient times by the Queen's Bench and the Court of Chancery. The powers of the former Courts have been executed through the writs of certiorari of mandamus, and prohibition."

[32] It may be suggested that the Supreme Court which inherited the powers of the Courts of Kings Bench, got the aforesaid revisional powers

[33] In *Hamid Hassain* v *Banwarilal*, 51 C. W. N. 716 at p 723, : (A. I. R. (34) 1947 P. C. 90). the power of the Supreme Court was held to be restricted to the original jurisdiction of the High Court, to be exercised over persons who reside or hold office within the said jurisdiction.

[34] In Field's 'Regulations of the Bengal Code' S. 203 at page 145, the learned author says that "the Sudder Dewani Adalat as consti-

tuted in 1793 exercised no original civil jurisdiction, being a Court of appeal and superintendence."

[35] But so far as the Sudder Court is concerned, we do not find any recorded instance of exercise of such powers.

[36] Walsh in his treatise on 'Revision and Extraordinary Jurisdiction' Ch. 1 S. 1 says that 'the revisional jurisdiction of the High Courts in India over Courts subordinate to itself, or over cases decided in subordinate Courts, may be said to have had its origin in the similar jurisdiction exercised by the High Courts in England under the King's prerogative, and administered generally on the Crown side."

[37] It is true that every Court of superior jurisdiction possesses inherent powers for preventing injustice in certain cases; but there is no authority for the proposition that in the exercise of such inherent powers, Court can extend its appellate jurisdiction or increase its revisional authority over other Courts.

[38] In *Pashupati Bharati* v. *Secretary of State*, A. I. R. (25) 1938 F. C. 1 at p. 3 : (I.L.R. (1939) Kar. F. C 1), the following significant passage occurs :

"Outside the statutory provisions no High Court has any inherent powers of revision over the subordinate Courts within its jurisdiction, such for example as the Court of King's Bench in England has for centuries exercised over Courts inferior to itself; and if there have been during recent years tentative efforts on the part of one or two High Courts to assert such powers, they have now been decisively negatived by sub-s. (2) of S. 224 of the Act of 1935."

[39] We have, therefore, to trace the statutory provisions on the point.

[40] On 28th August 1861, Act XXIII [23] of 1861 was enacted. Section 35 of the Act for the first time expressly conferred on the Sudder Court powers of revision in cases where a subordinate Court in cases coming before it on appeal, exercised a jurisdiction not vested in it by law, provided no appeal lay from its decision.

[41] Section 15 of the Charter Act conferred on the High Courts to be established under the Act, powers of superintendence over all Courts subject to its appellate jurisdiction.

[42] When the High Court of Calcutta was established, it inherited the aforesaid power of Sudder Court and Supreme Court and the power of revision conferred on the Sudder Court by S. 35 of Act XXIII [23] of 1861 and S. 15 of the Charter Act, by virtue of S. 9 of the latter Act which reads as follows;

"The High Court shall have and exercise all such criminal, civil, admiralty, vice-admiraly, testamentary and intestate original and appellate jurisdiction and all such powers and authority for and in relation to administration of justice in the Presidency for which it is established as Her Majesty, by such Letters Patent may grant and direct, ... and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in the Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the Act, at the time of the abolition of such last mentioned Courts."

[44] That an unathorised assumption of jurisdiction by a Court could be revised by the High Court under S. 15 of the Charter Act, was decided by the Privy Council in *Nilmoney Singh Deo* v. *Taranath Mukherji*, 9 I. A. 174 : (9 Cal. 295 P. C.). The Calcutta High Court has construed the said section as authorising this Court to correct also irregular or improper exercise of jurisdiction, *Sardhari* v. *Hukum Chand*, 41 Cal. 876 : (A. I. R. (1) 1914 Cal. 607), *Gobinda Mohan Das* v. *Kunjabehary Das*, 14 C. W. N. 147 : (4 I. C. 364). But the powers so conferred are to be resorted to in cases of an unusual character, to prevent gross injustice being perpetrated.

[45] Section 622 of Act X [10] of 1877 gave express powers to the High Court to revise decisions of subordinate Courts in cases of unwarranted failure to exercise jurisdiction, or erroneous assumption of jurisdiction by those Courts i. e., in cases similar to those now covered by S. 115 (1) cls. (a), (b) of the Code.

[46] Section 42 of Act XII [12] of 1879 further enlarged the revisional powers of the High Court by extending the same to cases where the subordinate Court "acted in the exercise of its jurisdiction illegally or with material irregularity." The position therefore was that in 1879 the revisional powers of the High Court were brought into a line with the powers now exercised by the High Court under S 115 of the Code.

[47] Section 622, Civil P. C., 1882 (Act XIV [14] of 1882) merely embodied the said powers of revision conferred by S. 622 of Act X [10] of 1877 and S. 92 of Act XII [12] of 1879. Section 622 was re-enacted, on repeal of the said Act XIV [14] of 1882 as S. 115, Civil P. C., 1908 (Act V [5] of 1908).

[48] The Government of India Act, 1915, consolidated the enactments relating to the Government of India Act and the Charter Act and repealed all the preceding Indian Council Acts.

[49] Section 106 (1), of the Act, provided that "the several High Courts are Courts of record, and have such jurisdiction, original and appellate including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers, and authority over or in relation to administration of justice, ... as are vested by the Letters Patent, and subject to the provisions of any such Letters Patent, all such jurisdiction, powers and authority as are vested in these Courts respectively at the commencement of this Act."

[50] Section 107 then provided that:
"each of the High Courts has superintendence over all Courts for the time being, subject to its appellate

jurisdiction, and may do any of the following things, that is to say:

(a) to (e) omitted."

[51] It is well settled that the right of superintendence conferred on the High Courts by S. 107 included not only superintendence on the administrative points but also superintendence on the judicial side and that the section empowered the High Court to correct any error in a decision of a Court subject to its appellate jurisdiction, even in cases where S. 115, Civil P. C., may not apply, in order to prevent injustice from being done to the parties: *Balkrishna Hari* v. *Emperor*, 57 Bom. 93: (A. I. R. (20) 1933 Bom 1: 34 Cr. L. J. 199 S. B.) *Firm Ganeshdas Shankar Lal* v. *Firm Ashanand Radhe Sham*, A.I R (20 1930 Lah. 259: (144 I. C. 515), *Lalta Devi* v. *Balkishan Chopra*, A. I. R. (20) 1933 Lah. 327: (146 I. C. 258), *Bhimnath* v. *Jagan Nath*, A.I.R. (12) 1925 Pat. 674 : (89 I. C. 814). *In the matter of Kadhori*, 42 ALL. 26: (A. I. R. (6) 1919 ALL. 46: 20 Cr. L. J. 615).

[52] We have to consider the question whether the Election Court is subject to the appellate jurisdiction of the High Court. In *Nara Narayan* v. *Aghore Chandra*, 39 C. W. N. 971, it was held by Henderson and Khundkar JJ. that the District Judge, performing the duties under the Municipal Act did not shed his character as a Court and his order was subject to the superintendence of the High Court under s. 107, Government of India Act, 1935. The point whether the Provincial Legislature could take away the power of superintendence vested in the High Court under S. 107. Government of India Act, 1915 was conceded. No opinion was expressed on the question whether the Provincial Legislature with the sanction of the Governor-General could exclude the revisional powers of the High Court under S. 115 of the Code. Henderson J. was of the opinion that the Election Court was not subject to the appellate jurisdiction of the High Court but concurred with Khundkar J. in holding that the power of superintendence of the High Court under S. 107, Government of India Act was exercisable because the District Judge as an Election Court functioned not as a *persona designata* but as a Court, subject to the superintendence by the High Court.

[53] Three classes of cases may arise in considering the question whether a tribunal is subject to the appellate jurisdiction of the High Court. It is sufficient to deal with some of these cases. If the subordinate Court is one from which an appeal lies to the High Court, though in certain specified cases, then the Court is subject to the appellate jurisdiction of the High Court, and that is sufficient to attract the power of superintendence conferred on the High Court; even though no direct appeal lies to the High Court; *Balkrishna Hari* v. *Emperor*, 57 Bom. 93: (A.I.R. (20) 1933 Bom. 1: 34 Cr.L.J. 199 S. B.). The position was held to be the same if the link between the subordinate Court and the High Court was established through another tribunal from whose decision an appeal lies to the High Court in some cases. *Re Allen Bros & Co.* v. *Bando & Co.*, 26 C. W. N. 845: (A. I. R. (10) 1923 Cal. 169). The power of superintendence has also been exercised

"in cases which are not subject to appeal but the superintendence is over the Court and its exercise is not confined to cases, where a right of appeal lies to the High Court" per Dawson Miller C. J. in *Sheonandan Prasad Singh* v. *Emperor*, 3 Pat. L. J. 581 at p. 587: (A. I. R. (5) 1918 Pat. 103 F. B.).

[54] The position, therefore, is that in 1932 when the Bengal Municipal Act was passed the High Court would have had power to interfere with a decision of the District Judge exercising special jurisdiction in election disputes under the Act, either under S. 115, Civil P C., 1908 or S. 107, Government of India Act, 1915.

[55] The question whether S. 39B which made the decision or order of the Judge under S. 38, 39 or 39A *final* took away the powers of revision under S. 115 of the Code has given rise to a divergence of judicial opinion. An affirmative answer was given in *Bonbehary* v. *Makhan Lal*, I. L. R. (1938) 2 Cal. 69: 42 C. W. N. 282: (A.I.R. (25) 1938 Cal. 768), *Radhanath* v. *Harimohan*, 42 C. W. N. 647 : (A. I. R. (25) 1938 Cal. 465). A negative answer was given in *Phanindra Bhusan* v. *Sanat Kumar*, 40 C. W N. 124: (A. I. R. (22) 1935 Cal. 773) the word 'final' being construed only to mean "not subject to appeal."

[56] It was not disputed before us that S. 42, Bengal Municipal Act 1932 did in fact purport to take away the powers of revision of this Court. The question is whether the Provincial legislature which passed the Bengal Municipal Act 1932 could do so, even with the sanction of the Governor General under S. 80A (3), Government of India Act, 1915.

[57] The powers of the Provincial Legislature in 1932 are to be found in S. 80A, Government of India Act, which was inserted by Part I of Sch. II, Government of India Act 1919 (9 & 10 Geo. V, Cap. 101). The relevant portion of S. 80A is as follows:

(1) The local Legislature of any province has power, subject to the provisions of this Act, to make laws for the peace and good government of the territories for the time being constituting that province.

(2) The local Legislature of any province may, subject to the provisions of the sub section next following, repeal or alter as to that province any law made either before or after the commencement of the Act by any authority in British India other than the local legislature.

(3) The local Legislature of any province may not without the previous sanction of the Governor General make or take into consideration any law

(a) to (d)—omitted,

(e) regulating any central subject, or

(f) regulating any provincial subject which has been declared by rules under this Act to be either in whole or in part subject to legislation by the Indian Legislature in respect of any matter to which such declaration applies, or

(g) omitted,

(h) altering or repealing the provisions of any law which having been made before the commencement of the Government of India Act, 1919, by any authority in British India other than that local legislature, is declared by rules under this Act to be a law which cannot be repealed or altered by the local legislature without previous sanction, or

(i) and proviso omitted,

(4) The local legislature of any province has no power to make any law affecting any Act of Parliament.

[58] Section 45A, Government of India Act, 1915. which was also inserted by Part I of Sch. II, Government of India Act 1919 reads as follows:

(1) Provision may be made by rules under this Act :

(a) For the classification of subjects, in relation to the functions of Government in central and provincial subjects, for the purpose of distinguishing the functions of local Governments and local legislature, from the function of the Governor-General in Council and the Indian Legislature.

(b) (c) (d) & (2) (3)—omitted.

(4) The expressions 'central subjects' and 'provincial subjects' as used in this Act mean subjects so classified under the rules, ...

[59] The rules referred to in S. 80A (3), (f) (h) and framed under Ss. 45A and 129A are known as Devolution Rules. The material Devolution Rules may be now referred to.

Rule (3) classification of subjects as Central or Provincial as per lists set out in Schedule I.

Schedule I, Part I—Central subjects

* * * * *

(41) Legislation in regard to any provincial subject; in so far as such subject is in Part II of this Schedule stated to be subject to legislation by the Indian Legislature and any power relating to such subject reserved by legislation to the Governor-General-in-Council,

* * * * *

Part II—Provincial subjects,

(1) Local Self-Government, etc.

* * * * *

(17) Administration of Justice including constitution, power, maintenance, and organisation of Courts of Civil and Criminal jurisdiction within the Province, subject to legislation by the Indian Legislature as regards High Courts, Chief Court and Courts of the Judicial Commissioners and any Courts of Criminal jurisdiction

* * * * *

[60] As the Devolution Rules were passed in accordance with S. 129A, their validity is not open to question. Section 80A is so worded as to lead to the conclusion that the general powers of legislation within a province conferred on the local legislature by sub-s. (1) is subject to the restrictions in sub-s. (2) which in its turn is subject to sub-s. (3) and finally by sub-s. (4). Section 80A (3) cls. (e), (f) and (g) use the word "regulate" while cl. (h) uses the word "repeal". The word "regulate" is, therefore, used in the restricted sense of "control by legislation", *see* *Punyendra Narain* v. *Jogendra Narain*. 64 C. L. J. 212 : (A. I. R. (23) 1936 Cal. 593). Rule 80A (3) (f) (h), and Item 41 Part I Sch. A and Item 17, Part II, Sch. A (which are complementary to each other) when applied to a provincial subject (e. g. Municipality) mean that the local legislature is authorised to legislate in regard to jurisdiction of Courts set up by it even though it may affect the jurisdiction, power and authority of the High Court not vested in it by a previous Act of Parliament.

[61] This is substantially the view taken by Lort Williams, Nasim Ali and R. C. Mitter JJ., in *Nar Sing Das* v. *Chogemull*, 43 C. W. N. 613: (A. I. R. (26) 1939 Cal. 435 F B), respectively at pages 623, 627, 634-635.

[62] The learned Senior Government Pleader contended that the effect of S. 84, Government of India Act 1915 was not considered by the Special Bench and submitted that S. 84 (1) (a) and (2) had the effect of validating a provincial legislation even if it affected a parliamentary statute. In my opinion, this does not follow from the sub-section referred to. These sub-sections merely refer to encroachments made upon a central subject or a reserved subject or on the royal prerogative as distinct from an Act of Parliament.

[63] It follows from the above discussion that S. 115 of the Code which is an Act of the Indian Legislature, could have been infringed upon by the Provincial legislature viz., Ss. 39B and 43, Bengal Municipal Act. The latter Act could not, however, affect the power of the High Court under S. 107, Government of India Act. This power could be exercised in spite of Ss. 39B and 43, Bengal Municipal Act. We have next to consider whether the effect of the above conclusion is to render Ss. 39B and 43 *ultra vires* and wholly void or to make them void to the extent of the repugnancy. That the latter is the true effect of the repugnancy follows from the following provision in S. 84, Government of India Act 1915 which was inserted by S 2 (2), Government of India Amendment Act 1916 (6 & 7 Geo. V Cap. 37).

"A law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repugnancy but not otherwise, be void."

[64] The whole of the Governmant of India Act, 1915 (including S. 107) was repealed by S. 321, Government of India Act, 1935. The latter Act, however, contains a similar section viz. S. 224. It differs from the old S. 107 in some respects. The power to transfer suits and ap-

peals to the High Court as contained in S. 107 (b) has been deleted and a new sub-section viz. S. 224 (2) has been added. The new sub-section reads:

"Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision."

The marginal note to S. 224 is "administrative functions of High Courts." This has been substituted for "powers of High Court with respect to Subordinate Courts" which occurred in the old S. 107. These changes shew that the section is confined to the administrative functions of High Courts and does not give the High Courts any right of judicial interference.

[65] This view is supported by the decisions *In re Adiraju Somanna*, A. I. R. (25) 1938 Mad. 634 : (I. L R. (1938) Mad. 988), *Amar Singh* v. *Secretary of State*, A. I. R (25) 1938 Lah. 442 : (178 I. C. 292), *Dattatraya* v *Registrar Co-operative Society, C. P. & Berar, Nagpur*, A. I. R. (28) 1941 Nag. 282 : (I. L. R. (1941) Nag. 397), *Bhutnath* v. *Dasarathi Das*, A. I. R (28) 1941 Pat. 544 : (42 Cr. L. J. 546), *Muljee Sicka & Co.* v. *Municipal Commissioner, Bombay*, A. I. R. (26) 1939 Bom. 471: (187 I. C. 8), *Pashupati Bhartiv. Secretary of State*, A. I. R. (25) 1938 F. C. 1 at p. 3 (I. L. R. (1939) Kar. F.C. 1).

[66] In a recent decision, *Kavasji Pestonji* v. *Rustomji Sorabji*, A. I. R. (36) 1949 Bom. 42: (50 Bom. L. R. 450), Chagla C. J. and Tendolkar J. held that the prohibition under sub-s. (2) of S. 224 only refers to those judgments of an inferior Court which are not otherwise subject to appeal or revision to the High Court, and that the High Court has still the power of judicial interference in respect of judgments not otherwise subject to appeal or revision. With great respect to the learned Judges, I am of opinion that the above view is based on a misinterpretation of sub-s. (2). Sub-section (2) was intended to provide against a possible argument that the High Court's power to exercise its power of superintendence in appeal or revision conferred otherwise than under the old S. 107, had been taken away by the new S. 224. In my opinion the Legislature did not, by a negative provision in S. 224 (2), intend to confer a general power of judicial superintendence in cases not otherwise subject to appeal or revision. The effect of S. 224 of the Act is to take away that power of judicial interference with decisions of Subordinate Courts which was vested in the High Courts under S. 107, Government of India Act, 1915.

[67] From what I have said already, after the enactment of the Government of India Act, 1935, the only powers of revision which were vested in the High Courts, were to be found in S. 224 of the Act of 1935 and S. 115 of the Code. See *Pashupati Bharati* v. *Secretary of State*, A. I. R (25) 1938 F. C. 1 at p. 3 : (I. L. R. (1939) Kar. F. C. 1). I have alredy held that S. 224 of the Act of 1935 did not confer on the High Court power of revision in judicial matters In regard to such matters, S. 115 of the Code was thus the only provision which gave the High Court powers of revision. The repugnancy, therefore did not exist at the time when the petition for revision, was filed in this Court in 1948. Section 43 Bengal Municipal Act, 1932 is, therefore, of full validity now and bars the powers of this Court to interfere with the order complained of, under S 115, Civil P. C., 1908.

[68] Mr. Pareshnath Mukherji sought to wriggle out of the position by submitting that S. 223, Government of India Act, 1935, has preserved the old powers of the High Court conferred by S. 9, Charter Act and S. 107, Government of India Act, 1915. This argument is not sustainable because the powers so conferred were taken away as a result of the repeal of the said sections respectively by the Government of India Act, 1915, and the Government of India Act, 1935. This is also supported by the decision of the Federal Court in *Pashupati Bharati* v. *Secretary of State*, A. I. R. (25) 1938 F. C. 1 at p. 3 : (I. L. R. (1939) Kar. F C. 1) already referred to.

[69] The second branch of the contention of Mr. Pareshnath Mukherji is that Ss. 39B and 43, Bengal Municipal Act, 1932 are *ultra vires* because they affect Cl. 13 of the Letters Patent. Clause 13 runs as follows:

"And we do further order, that the said High Court of Judicature at Fort William in Bengal shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence when the said High Court shall think proper to do so, either on the agreement of the parties to that effect or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court."

[70] It was contended that S. 43, Bengal Municipal Act constituted the District Judge as an exclusive forum to decide election disputes under the Act and thereby took away the then power of the High Court under the said clause to remove the proceedings to its extraordinary original jurisdiction. It is doubtful whether the proceedings before the District Judge can be regarded as suits within Cl. 13 but even if we assume that the proceedings before the District Judge are suits within that clause, S. 43, Bengal Municipal Act, 1932 would be void only to the extent of the repugnancy, for reasons I have already given Section 43 would still operate to bar the revisional powers of this Court.

[71] For the foregoing reasons I am of opinion that the High Court has no power to interfere in revision with the order complained of. The preliminary objection, therefore, succeeds. In the above view, I express no opinion on the merits of the case. The rule is accordingly discharged with costs. Hearing fee 3 gold mohurs to the opposite party No. 1. As no substantial question of law as to the interpretation of the Government of India Act, 1935, or of the Indian Independence Act, 1947 or if any Order in Council under either Act is involved, a certificate under S. 205 (1) Government of India Act is refused.

[72] **Guha J.**—I agree.

V.B.B. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 543 *[C. N. 204.]*

HARRIES C. J. AND J. P. MITTER J.

Amrita Lal Chatterjee—*Accused*—*Petitioner* v. *The State,*

Criminal Revn. No. 455 of 1950, D/- 7-7-1950.

Public Safety—West Bengal Security Act (XIX [19] of 1950), S. 21 (1) and (4)—Order under S. 21 (1)—Satisfaction of authority—Nature.

No order can be made under S. 21 (1 unless there is satisfaction of authority that the person is actually doing or is about to do or is likely to do an act falling within S. 2 (9). It is not enough to say that the authority was satisfied that an order of externment is necessary with a view to preventing a person from doing a subversive act. Unless there is first a satisfaction upon the point that the person is doing or is about to do or is likely to do a subversive act an order made with a view to preventing a person from doing a subversive act is not one made under S. 21 (1) and there can be no conviction under S. 21 (4) for disobeying that order. [Paras 8, 9]

Sudhansu Sekhar Mukherjee and Jagadindra Nath Bhattacharjee—for Petitioner.

Harries C. J. — This is a petition for revision of an order made by a learned Presidency Magistrate convicting the petitioner under S. 21 (4), West Bengal Security Act, 1950 and sentencing him to simple imprisonment for one month and five days.

[2] The petitioner was served with an externment order under S. 21 (1) (a), West Bengal Security Act, 1950 forbidding him to remain within the town of Calcutta. The order was served on him on 5th April 1950 and he was given 24 hours' time to leave the Calcutta area. According to the prosecution the petitioner was found at his residence at 5/1 Kashinath Bose Lane, Calcutta on 7th April 1950 and accordingly it was alleged that he had contravened the order externing him from the city of Calcutta. The order appears to have been signed by the Commissioner of Police and the service of the order was duly proved. The evidence that the petitioner was in Calcutta on 7th April 1950 was accepted and it has not been challenged.

[3] The petitioner filed a written statement in which he stated that he was a firm believer in Gandhian ideals and had striven for communal unity throughout his life and that it was unthinkable that he should take part in any subversive activity. He did admit that he had criticised strongly the inefficiency and corruption of the Relief and Rehabilitation Department of the Government. He further stated that the externment order was arbitrary and *mala fide* and that as a Satyagrahi he owed it to himself not to submit to the order. In short the petitioner admitted that he had refused to comply with the order.

[4] The question arises whether or not the petitioner's failure to leave Calcutta within 24 hours of the date of this order constituted an offence. The charge was that he had committed an offence under S. 21 (4), West Bengal Security Act and that sub-section is in these terms :

"If any person contravenes any order made under this section he shall be punishable with imprisonment for a term which may extend to three years, or with fine or with both."

[5] It will be seen that what is made an offence is a contravention of any order made under the section. If the order contravened is not made under S. 21 then there can be no conviction under S. 21 (4).

[6] Section 21 (1), West Bengal Security Act reads as follows :

"The State Government, if satisfied with respect to any particular person that he is doing or is about to do or is likely to do any subversive act, may, with a view to preventing him from doing such act, make an order—

(a) directing that, except in so far as he may be permitted by the provisions of the order, or by such authority or person as may be specified therein, he shall not be in any such area or place in West Bengal as may be specified in the order.

* * * *"

[7] The order made by the Commissioner of Police is said to have been made under this sub-section. But in my view the order served upon the petitioner cannot be said to be an order made under S. 21 (1) (a), West Bengal Security Act. The order dated 5th April 1950 reads as follows :

"Whereas having considered the materials against the person known as Sri Amrita Lal Chatterji son of Sri Kunja Behari of village Solok, P. S. Wazirpur, district Barisal and of 5/1 Kasinath Bose Lane, Calcutta, I am satisfied that with a view to preventing the said person from doing any subversive act, it is necessary to make the following order :

* * * *

That the said person shall not remain in any place lying in the jurisdiction of the town of Calcutta as defined in S. 3, Calcutta Police Act, 1866 (Bengal Act IV [4] of 1866) and also its suburbs as defined.....and if he is in any such area at the time of the service of this order, he shall leave the area within 24 hours of the service of the order.

Failure to comply with this order without any lawful excuse would render him liable to prosecution."

[8] Section 21 (1), West Bengal Security Act, 1950 empowers the Government or any person authorised on behalf of Government to make an externment order externing any particular person if the authority making the order is satisfied that such person is doing or is about to do or is likely to do any subversive act. "Subversive act" is defined earlier in the Act in S. 2 (9). Before an order can be made, therefore there must be satisfaction that the person is actually doing or is about to do or is likely to do an act falling within S. 2 (9) of the Act. Unless there is satisfaction on this matter no order can be made. All that the order of 5th April 1950 states is that the authority making the order was satisfied that with a view to preventing the petitioner from doing any subversive act it was necessary to extern him. The order does not state that the authority was satisfied that the petitioner was doing a subsersive act or was about to do a subversive act. Further it does not even say that it was likely that the petitioner would do a subversive act. As I have said, unless there was satisfaction on these matters no order could have been made, and it is not enough to say that the authority was satisfied that an order was necessary with a view to preventing a person from doing a subversive act. There must first be a satisfaction upon the point that the person is doing or is about to do or is likely to do a subversive act. Unless there is satisfaction on that matter an order made with a view to preventing a person from doing a subversive act is not within the section. Unless that was so externment orders could have been served on the most innocent people by merely stating that there was satisfaction that with a view to preventing that person from doing a subversive act it was necessary to extern him. Before an externment order can be made not only must the authority be satisfied that a person should be prevented from doing a subervsive act, but the authority must be satisfied that such person was doing or was about to do or likely to do such an act. If a person is not doing or about or likely to do an act then there is no need to extern him with a view to preventing him from doing an act. It is only persons who are doing or are about to do or are likely to do an act that need be prevented from doing such an act. It appears to me that before an order can come within S. 21 (1) (a), the authority's satisfaction that the person against whom the order is made is doing or is about to do or is likely to do an act must be stated. Without a recital of that satisfaction the order is not in my view in accordance with the Act.

[9] As the order is not an order made under S. 21 (1) (a) the petitioner could not be convicted for not obeying that order under sub. s. (4) of that section. As I have already pointed out before there can be a conviction it must be shown that the order is one made under the Act.

[10] A point was raised before the learned Presidency Magistrate on S. 36 (1) of the Act which provides that no order made in exercise of any power conferred by or under this Act shall be called in question in any Court.

[11] It is unnecessary to consider the exact purport and effect of this sub-section because I have held that the order made in this case was not made in exercise of any power conferred by or under the Act and, therefore, S. 36 (1) can have no application whatever be the true meaning of that section. As the point does not arise I prefer at this stage to express no opinion upon the validity or the meaning of this sub-section. Further I prefer to express no opinion at present on the validity or otherwise of the other sections of this Act.

[12] For the reasons which I have given I am satisfied that the petitioner was not guilty of any offence and, therefore, his conviction must be set aside. The petition is, therefore, allowed, the conviction and sentence are set aside and the petitioner is acquitted. The petitioner need not surrender to his bail and his bail bond is discharged.

[13] The Rule is accordingly made absolute.

[14] **Mitter J.**—I agree.

D.R.R. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 544 *[C. N. 205.]*

ROXBURGH J.

Prafulla Kumar Dutta — *Petitioner* v. *Guiram Tat*—*Opposite Party.*

Civil Rule No. 163 of 1950, D/- 17-5-1950, against order of Addl. Munsif, Howrah, D/- 13-12-1949.

Houses and Rents—Calcutta House Rent Control Order (1943 as amended in 1945), S. 9A—If a suit is brought on several grounds and one of the grounds is "a ground" which requires the permission of the Controller, then the whole suit cannot be entertained : A. I. R. (37) 1950 Cal. 213, *Held wrongly decided.* [Para 7]

Nripendra Nath Dutta Roy—for Petitioner.

Hiran Kumar Roy—for Opposite Party.

Order. — This Rule arises out of a suit for ejectment filed on 7th May 1946. It was thus filed under the Calcutta House Rent Control Order, before the Calcutta Rent Ordinance came into force, and after the amendment by which S. 9A was inserted in that order on 19th May 1944, and also after the amendment by the insertion of S. 9B was made on 28th August 1945. The grounds for ejectment were (1) default; (ii) waste to the

premises (under S. 9-B and (iii)) khas possession (under S. 90).

[2] The learned Munsif held that the suit is maintainable. The tenant defendant has obtained this Rule against his order.

[3] Sections 9A and 9B are in substantially identical terms, the former being enacted to require permission of the Controller for institution of suits based on ground under S. 9 (1) (c) (*bona fide* requirements) and the latter requiring similar permission in the case of suits based on the ground of default. No permission by the Controller had been obtained.

[4] We may quote S. 9A (1):

"No suit or proceeding by a landlord against a tenant in possession of a house for eviction of such tenant therefrom in which any of the grounds specified in cl. (c) of the proviso to sub-para. (1) of Para. 9 has been taken as a ground for such eviction shall be entertained by any Court, or, where any such suit or proceeding by a landlord is pending in any Court, on 22nd May 1944, no decree or order for the recovery of possession of the house in respect of which such suit or proceeding is pending shall be made by such Court on any of the grounds specified in the said cl. (c) unless the landlord has been permitted by the Controller by an order in writing under sub-para. (3) to institute such suit or proceeding or to prosecute the suit or proceeding so pending, as the case may be, and has produced before such Court proof that such permission has been granted."

[5] The important words are

"in which any of the grounds specified in cl. (c) of the proviso to sub-para (1) of para 9 has been taken as a ground for such eviction shall be entertained by any Court. . . . ."

Section 9B contains very similar words with suitable adjustments to refer to the case of default.

[6] In this case then, the suit was one in which both the grounds in cl. (c) of the proviso to sub-para. (1) of Para. 9 were taken as "a ground for eviction" and the ground of default was also taken as 'ground for such eviction.' On the plain reading of the section, the suit could not be entertained.

[7] It is true, there was yet a third ground and it is urged that the section should be interpreted merely to mean that the suit might proceed on that third ground for which no permission was necessary. In the case of *Jyotindra Nath* v. *Sm. Tara Dassi Ghose*, (A. I. R. (37) 1950 Cal. 213), where the facts were similar to those in the present case, I accepted this latter contention. But I am clearly of opinion that on that occasion there was an error, and I overlooked the precise and clear wording of S. 9A. My sympathies are with the plaintiff who has wasted years in this litigation, but I find, on considering the exact wording of the section, that quite impossible it is to say that another interpretation can be given to the words used than that if a suit is brought on several grounds and one of the grounds is "a ground" which requires the permission of the Controller, then the whole suit cannot be entertained. Had the provisions of the section been followed in the first place, all the troubles of the plaintiff would have been avoided. But the mere fact that this was not done cannot make us now give an interpretation to the section which it cannot possibly bear.

[8] In the case cited I agreed with the view expressed in the case of *Tarini Gupta* v. *Manmatha Nath*, 53 C.W.N. 855: (A.I.R. (36) 1949 Cal. 674). The fact that the case, as it were, survived and was contested and dealt with under first the Ordinance and then later the Act of 1948 cannot get over the initial defect that at the time it was filed it could not be entertained. Subsequent enactments could not have the effect of curing this initial defect. That view I still think is correct.

[9] The result is that the Rule must be made absolute and the plaint in the suit will be returned under O. 7, R. 11, Civil P. C. I make no order as to costs.

V.B.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 545 *[C. N. 206.]*

HARRIES C. J. AND MITTER J.

Ramlal Rajghoria and another—*Petitioners* v. *Secretary, Govt. of West Bengal* — *Opposite Party.*

Misc. Case No. 356 of 1950, D/-20-7-1950.

Contempt of Courts Act (1926), S. 1 — Contempt of Court, what amounts to.

Where after the trying Magistrate had rejected an application under S. 495, Criminal P. C. and directed prosecution to be continued by Court Inspector, the Judicial Secretary of the State Government, instead of instructing the Court Inspector to apply under S. 494 for leave to withdraw from the prosecution, wrote a letter to the Addl. District Magistrate telling him to order the Court Inspector to retire and to inform the trying Magistrate accordingly, the letter tends to interfere with the due course of justice and amounts to contempt of Court. [Paras 14, 15]

Annotation: ('46-Man.) Contempt of Courts Act, S. 1, N. 3.

A. K. Basu, J. K. Mukherjee and Bireswar Chatterjee—for Petitioners.

Sir S. M. Bose, N. K. Sen and B. C. Nag — for Opposite Party.

Harries C. J. — Notice was given to the opposite party who is the Judicial Secretary and Legal Remembrancer of the Government of the State of West Bengal to show cause why he should not be found guilty of contempt of Court and punished. This Court had been moved to issue such a Rule on the ground that the Judicial Secretary and Legal Remembrancer in his official capacity had written a letter dated 7th July 1950, to the Additional District Magistrate of 24 Parganas which, it was said, was a deliberate attempt to interfere with the due course of justice. The learned Advocate-General has ap-

peared on behalf of the opposite party and Mr. A. K. Basu has appeared on behalf of the petitioners who moved the Court.

[2] The petitioners Ramlal Rajghoria and Gorak Singh have been charged with the offence of murder. It is said that they murdered one Subodh Kumar Sarkar. It seems that there was a prolonged enquiry into the causes of the death of this man, Subodh Kumar Sarkar and at first the authorities declined to take cognizance of a complaint made by the deceased man's widow. Later, apparently cognizance was taken and the matter came before the Sub-Divisional Officer, Alipore, in his judicial capacity to conduct the preliminary enquiry.

[3] It seems that the complainant, the widow of the deceased man, was apprehensive that the usual prosecuting authorities would not prosecute this case with vigour and an application was made on her behalf to the Court under S. 495, Criminal P. C., for permission for the prosecution to be carried on by herself through an advocate. The learned Sub-Divisional Officer considered this application on its merits and rejected it. He directed that the prosecution should be continued by the Court Inspector, who is of course the person who normally carries on prosecution in respect of serious offence on behalf of the State.

[4] It appears that the complainant, the widow of the deceased man, was dissatisfied with this order and submitted a representation to Government. I should have thought that the Government would have realised that they could take no action because there was a judicial order made by the Sub-Divisional Officer and until that order was varied or reversed by a superior criminal Court the order would have to be carried out. The Judicial Secretary and Legal Remembrancer however took action as a result of this representation made by the widow and on 7th July he wrote the following letter to Shri Manindra Kumar Sen, Additional District Magistrate, Alipore, who was of course the immediate superior of the Sub-Divisional Officer who was conducting the judicial enquiry in respect of this murder charge. The letter which the Judicial Secretary wrote is the subject-matter of this petition and it will be convenient to set out the letter in its entirety. It reads as follows :

"Dear Sj. Sen,

In the texmaco Firing Case against the Manager Ramlal Rajghoria and the Durwan Gorakh Singh pending before the S.D.O., Alipore, the complainant has submitted a representation against the order of the S. D. O. directing a public prosecutor or a Court Inspector to take charge of the case. As the Government are not at present interested in the prosecution and the prosecution is being carried at the instance of a private party, Government desire that no Public Prosecutor or Court Inspector should appear at this stage and that if one has already appeared under the order of the S.D.O. he should be directed to retire. I am directed to request you that the S.D.O. and the Public Prosecutor or Court Inspector, if any appearing in the case, may be informed accordingly."

[5] On the original letter which is now before the Court the following endorsements appear; "Show S.D.O. (s) at once for compliance. C. I. to note also." This endorsement is initialled by the Additional District Magistrate and dated 7th July 1950. There is also an endorsement signed by the Sub-Divisional Officer, dated 7th July. That is in these terms; "Seen. Show Court Inspector at once and bring it back to me." There is a further endorsement : "Seen" which is signed by the Court Inspector.

[6] In the petition upon which this Rule was issued, it was suggested that this letter amounted to a contempt of Court because it interfered or tended to interfere with the due course of or the administration of justice. It was suggested that by this letter the Sub-Divisional Officer was instructed by the opposite party to take a course contrary to that ordered by him earlier in a judgment which he had delivered.

[7] As I have said the letter was not addressed to the Sub-Divisional Officer who was hearing the case, but to the Additional District Magistrate. The Judicial Secretary could of course express his views to the Additional District Magistrate without committing contempt of Court, but unfortunately the Additional District Magistrate to whom the letter was addressed was directed to inform the Sub-Divisional Officer of the views of Government and the only reason for asking the Additional District Magistrate to inform the Sub-Divisional Officer was to warn him that Government were not prosecuting and that the Court Inspector should therefore not be asked to conduct the prosecution and be permitted to withdraw or retire.

[8] Prosecution for serious offences are normally carried on by officers of the State, but the Magistrate conducting an enquiry may grant permission to some other party to conduct the prosecution. The matter is dealt with in S. 495, Criminal P. C. which is in these terms:

"(1) Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police below the rank to be prescribed by the State Government in this behalf, but no person, other than the Advocate General, Standing Counsel, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the State Government in this behalf, shall be entitled to do so without such permission.

(2) Any such officer shall have the like power of withdrawing from the prosecution as is provided by S. 494, and the provisions of that section shall apply to any withdrawal by such officer.

(3) Any person conducting the prosecution may do so personally or by a pleader.

(4) Any officer of police shall not be permitted to conduct the prosecution if he has taken any part in the

investigation into the offence with respect to which the accused is being prosecuted."

[9] As I have said earlier, the deceased man's widow upon whose complaint the enquiry proceedings were based applied under this section for permission to conduct the prosecution. The Sub-Divisional Magistrate considered that application on its merits and for reasons, which I need not now discuss, rejected the application. He further directed the Court Inspector who is normally placed in charge of prosecutions to appear on behalf of the prosecution and to conduct the case. It was an order made by the Sub-Divisional Officer in his judicial capacity and that being so, it was an order that could only be challenged by proceeding by way of revision. In fact a petition for revision of this order has already been filed in this Court.

[10] It seems quite clear that this order directing the Court Inspector to conduct the prosecution was not viewed with favour by the Government and therefore the Judicial Secretary wrote the letter complained of.

[11] There can be no doubt that the State Government have control over their officers who prosecute offences and the Judicial Secretary could undoubtedly have instructed the Court Inspector to apply to withdraw from these proceedings. He could not direct the Court Inspector to withdraw because of the provisions of S. 494, Criminal P. C. That section is in these terms :

"Any public prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and upon such withdrawal,

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences."

[12] It will be remembered that sub-s (2) of S. 495 makes the provisions of S. 494 applicable to cases falling within S. 495. The Court Inspector was directed by the Sub-Divisional Magistrate under S. 495 to appear for and conduct the prosecution. That being so, he could only retire from the case by obtaining the consent or leave of the Court under S. 494 of the Code.

[13] The Judicial Secretary could, as I have said, have instructed the Court Inspector to apply for leave to withdraw or retire. But what he did was to tell the Additional District Magistrate to order the Court Inspector to retire and to inform the Sub-Divisional Officer accordingly. In other words, the Additional District Magistrate was told to inform the Sub-Divisional Officer that in the view of the State Government the Court Inspector should withdraw from the case. In effect it was an intimation to the Sub-Divisional Officer that he should permit the Court Inspector to withdraw as the State Government did not wish to be concerned in the prosecution or in the words of the Judicial Secretary the Government were not at that moment interested in the prosecution.

[14] In my view, this letter tended to interfere with the due course of justice and would undoubtedly have interfered with the due course of justice unless steps had been taken to obtain this Rule. The letter had been forwarded by the Additional District Magistrate to the Sub-Divisional Officer for compliance and I have not the slightest doubt that the Judicial Secretary intended that this letter should be forwarded immediately for compliance. In other words, the Judicial Secretary intended that the Sub-Divisional Officer should at the instance of Government permit the Court Inspector to withdraw or retire from the case and it would require a very strong Sub-Divisional Officer to act contrary to the suggestions in that letter. It would be extremely difficult for the Sub-Divisional Officer to refuse to allow the Court Inspector to withdraw from the case once he had seen this letter which was sent to the Additional District Magistrate and which undoubtedly the Sub-Divisional Officer was intended to see. To tell the Sub-Divisional Officer that he must allow the Court Inspector to withdraw or retire from the case is in my judgment a serious interference with the due course of justice. An application could have been made under S. 494, Criminal P. C., for permission to retire and the Sub-Divisional Officer would have had to consider such an application on its merits. Had such an application been made, as it would undoubtedly have been made by the Court Inspector, after this letter was written the Sub-Divisional Officer would have had no alternative but to accede to that request. Section 494, Criminal P. C., contemplates a Magistrate considering such an application on its merits. But an attempt was undoubtedly made in this case to influence the Sub-Divisional Officer before the application was made to him. In my judgment that is a serious contempt of Court as the letter undoubtedly tended seriously to interfere with the due course of justice. It was for the Sub-Divisional Officer and for the Sub-Divisional Officer only to decide whether he should permit the Court Inspector whom he had directed to appear to withdraw from the case. The matter was a judicial matter and any attempt to interfere with the learned Magistrate's independence and discretion is undoubtedly an interference with the due course of

justice. That being so, we must hold that addressing this letter with the intention that the recipient should show it to the Sub-Divisional Officer amounted to contempt of Court and, accordingly, I would hold the opposite party guilty of contempt of Court.

[15] The Judicial Secretary and Legal Remembrancer of the State Government has filed an affidavit in which he admits that the deceased man's widow had represented to him that the prosecution of the petitioners would not be conducted properly by the State. Having regard to that view, the Judicial Secretary says that he was of opinion that as the prosecution had been started by a private party it should have been left to that party to conduct the prosecution and the letter now complained of was written to give effect to that intention. In short, the Judicial Secretary frankly admits that he intended to influence the Sub-Divisional Officer to permit the widow to carry on this prosecution contrary to the Judicial order already made by the Sub-Divisional Officer. The Judicial Secretary then goes on to say that he thought the order of the Sub-Divisional Officer appointing a Public Prosecutor for the case was purely an executive order. But surely that is a grave mistake. The Sub-Divisional Officer had made that order not in his capacity as an executive Magistrate, but in his capacity as a judicial officer conducting a preliminary enquiry required by the Code in a murder case. Judicial Officers sitting in Court do not normally make executive orders. An order such as this, I think, was clearly an order made by the Magistrate in his judicial capacity and if the Judicial Secretary or the State Government had any complaint to make, they could have brought that order to the notice of this Court by way of revision.

[16] The Judicial Secretary then says that if this Court thinks the letter was not a proper one, he was prepared to withdraw it and express his regret for having written it. There is no apology in the affidavit, but the learned Advocate-General who has appeared on behalf of the opposite party has tendered an apology on his behalf. It is not a question whether or not the Judicial Secretary is prepared to withdraw this letter, if we think that it is a letter that should not have been written. The letter should never have been written and this is a case where, I think, a franker apology should have been made in the affidavit. However, a frank and full apology was made by the Advocate-General on behalf of the Judicial Secretary.

[17] I do not think that the Judicial Secretary intended to do anything more than to give effect to the representation which the deceased man's widow had made to him. I do not think that he ever intended to stifle this prosecution because if I had come to that conclusion I should have taken a very serious view of the matter and a far more serious view than I take of it now. What the Judicial Secretary intended was that the widow should be permitted to conduct the prosecution through an advocate as she felt that justice would not be done to the case if the prosecution remained in the hands of the officers of the State. I can well understand that point of view, but unfortunately the Judicial Secretary took a course which cannot be justified. As there was no motive to stifle this prosecution, we can take a far less serious view of the offence. Having regard to the attitude taken by the Judicial Secretary in frankly confessing that he was at fault, I think the ends of justice would be met by finding the opposite party guilty of contempt of Court and directing that he pay the costs of these proceedings, which we assess at Rs. 200.

[18] Let the affidavit filed in Court to day be kept on the record.

[19] **Mitter J.**—I agree.

D.H. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 548 *[C. N. 207.]*

HARRIES C. J. AND BANERJEE J.

S. M. Ghose — Appellant **v.** *National Sheet and Metal Works Ltd., and another—Respondents.*

A. F. O. O. No. 41 of 1949, D/- 7-6-1950.

(a) Workmen's Compensation Act (1923), S. 12 — Liability to indemnify—When arises.

The question of indemnifying the principal under sub-s. (2) of S. 12 arises only when the case falls within sub-s (1). Where the work done by the workman is not the work which ordinarily forms the whole or part of the work of the principal, the case is not governed by S. 12 (1) and right to claim indemnity does not arise: A. I. R. (16) 1929 Bom. 179, *Rel. on.* [Paras 15, 17]

Annotation: ('46-Man.) Workmen's Compensation Act, S. 12 N. 3.

(b) Workmen's Compensation Act (1923), S. 12 — Liability to indemnify—Onus of proof on contractor.

Where compensation is claimed by a workman against the principal instead of against the contractor, his immediate employer, it is not for the contractor to prove that the work which he contracted to do was not ordinarily the kind of work performed by the principal. The onus rests in the first place upon the workman to prove that the work done by the contractor under the contract was work which ordinarily formed the whole or part of the principal's business and on establishing that fact, a right of indemnity would arise. [Para 13]

Anno. Workmen's Comp. Act, S. 12 N. 3.

Jitendra Nath Ghose—for Appellant.

Phanindra Kumar Sanyal and Amiya Bikash Dutt—for Respondents.

Harries C. J.—This is an appeal by a contractor who was made liable to indemnify the

respondent No. 1 who had been made liable to pay compensation under the Workmen's Compensation Act.

[2] The matter arose in this way. One Ezad Baksh, a Painter Mistri, sustained injury as the result of an accidental fall from scaffolding, whilst he was painting a factory shed which formed part of the premises occupied by respondent No. 1 as their place of business. It appears that the workman's left knee was injured and an operation became necessary and some bones or pieces of bone were extracted. There was evidence that the incapacity which resulted from this accident amounted to fifty per cent.

[3] Ezad Baksh was employed as a painter by the appellant who was opposite party No. 2. That seems to be clear. He however did not claim compensation against his immediate employer, but claimed it against the National Sheet and Metal Works Ltd., opposite party No. 1 who had employed opposite party No. 2 as a contractor to do the painting work to their factory shed.

[4] It seems to have been conceded that the accident arose out of and in the course of the employment and therefore the applicant was entitled to compensation which was assessed at Rs. 1,470 and no point has been taken as to the correctness of this amount.

[5] The only question which was agitated in the Court below was whether or not the contractor, opposite party No. 2, was liable to indemnify opposite party No. 1, whose shed was being painted.

[6] The Commissioner for Workmen's Compensation held that the case came within S. 12 (2), Workmen's Compensation Act and that the appellant, opposite party No. 2, was liable to indemnify opposite party No. 1, the respondent National Sheet and Metal Works Ltd.

[7] The right of indemnity arises under sub-s. (2) of S. 12, if the case falls within sub-s. (1) of S. 12. That sub-section is in these terms:

"Where any person (hereinafter in this section referred to as the principal) in the course of or for the purposes of his trade or business contracts with any other person (hereinafter in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the trade of business of the principal, the principal shall be liable to pay to any Workman employed in the execution of the work any compensation which he would have been liable to pay if that Workman had been immediately employed by him and where compensation is claimed from the principal, this Act shall apply as if references to the principal were substituted for references to the employer except that the amount of compensation shall be calculated with reference to the wages of the Workman under the employer by whom he is immediately employed."

[8] It will be seen that this sub-section gives the workman in certain circumstances a right to recover compensation not from his immediate employer but from a person who had employed the workman's employer to carry out certain work. Normally, a workman can only recover compensation from his employer, but this sub-section is an exception and gives the workman a right to proceed against the person who has entered into a contract with the workman's immediate employer by which the latter was to do certain work. If the workman has a right to recover from the person who has employed the workman's employer to do certain work then sub-s. (2) comes into play and the person who is known as the principal who has employed the contractor can recover from the contractor by way of indemnity. The question of indemnifying however only arises if the case falls within sub-s. (1).

[9] To bring the case within sub-s. (1) it must be shown that the person known as the principal has in the course of or for the purposes of his trade or business contracted with another person for the execution by the contractor of certain work and further that the work which the contractor has undertaken to perform is work which is ordinarily part of the trade or business of the principal. In other words, the section contemplates a person sub-contracting for work which he himself normally does and which is part of his business. For example, if A engages a contractor B to paint his house and B enters into a contract with C by which the latter is to do the work for B, a workman of C who is injured can recover from B as the case clearly falls within the section because B had in the course and for the purpose of his business entered into a contract with C by which C was to perform work which ordinarily formed part of the work or trade or business carried on by B. However, if the subject-matter of the contract is not work ordinarily or normally carried on by the principal then S. 12 can have no application at all.

[10] An example of a case which does not fall within sub-s. (1) of S. 12 is the case of *Rabia* v. *Agent, G I. P. Rly.*, 53 Bom. 203 : (A. I. R. (16) 1929 Bom. 179). In that case the G. I. P. Railway entered into a contract with a company under which the latter was to construct a transmission line to carry electric power to various sub-stations on the railway. The deceased was employed by the contractors as a fitter whose work was to assist in the erection of steel towers to carry the overhead cable. These towers were not erected on the railway track, but on land adjacent thereto. While carrying materials from the Store near a Station to the site of the work he was knocked down by a train and killed. The mother as a

dependant of the deceased applied for compensation from the G. I. P. Railway under S. 12 of the Workmen's Compensation Act. The Commissioner referred the matter to the High Court under S. 27 of the Act. A Bench of the High Court held that the setting up of an overhead electric cable for the purpose of transmitting electrical power to the railway was not ordinarily part of the trade or business of the principal, namely, the G. I. P. Railway.

[11] It is to be observed that the G. I. P. Railway were actually engaged in carrying out this work and had employed contractors to effect that purpose. Nevertheless, the Court held that the G. I. P. Railway was not liable because the work which the contractors had contracted to do was not work which ordinarily was part of the trade or business of the railway. The Bench pointed out that the trade or business of the railway consists in carrying persons and goods and that erecting power stations or transmission lines is not ordinarily a part of their business and therefore where they had contracted with another to do that work, the workman working under the contractor could not recover compensation from the railway.

[12] The reason for such a provision obviously is that if a person substitutes another for himself to do that which is his own business he ought not to escape the liability which would have been imposed upon him if he had done it himself towards the workman employed in the business. On the other hand, where a person enters into a contract with another by which that other does work which ordinarily forms no part of the principal's business then there is no reason at all why the principal should be made liable for compensation for an accident received by a workman in the contractor's employment.

[13] In the present case, the workman offered no evidence at all as to the nature of the work of the National Sheet and Metal Works Ltd. It was not suggested that painting work ordinarily formed the whole or part of their business and indeed the name "National Sheet and Metal Works Ltd." does not suggest a company which was engaged ordinarily in painting work. Learned advocate for the appellant states that the National Sheet and Metal Works Ltd., make buckets and such like. But there is no evidence as to the precise nature of their employment. It must be remembered that the National Sheet and Metal Works Ltd. applied to the Court to add the appellant as a party and claimed the right of indemnity against the appellant. It was not for the appellant to prove that the work which he contracted to do was not ordinarily the kind of work performed by the National Sheet and Metal Works Ltd. The onus rested in the first place upon the workman to prove that the work done by the appellant under the contract was work which ordinarily formed the whole or part of the National Sheet and Metal Works Ltd's business. That fact having been established, a right of indemnity would arise. But it appears to me that the Court could not possibly hold in this case that S. 12 applied at all.

[14] The Commissioner in his judgment disposes of the point in a somewhat summary manner. He obverves in his judgment as follows :

"Opposite party No. 2 admits that he accepted a contract for painting the factory shed, but at a later stage his pleader files a petition to the effect that the contract was not in the course of or for the purpose of opposite party No. 1's trade or business as laid down in S. 12(1) of the Act."

The learned Commissioner then proceeds :

"This is not only a brain wave after five months of meditation, but a wrong interpretation as well. A factory shed is constructed certainly for the purposes of the owner's business. The contract was clearly as contemplated under S. 12 (1)."

[15] In order to come within S. 12 (1) the workman, as I have stated, must prove two things. Firstly, that the principal in the course of and for the purposes of his trade or business entered into a contract with the contractor and secondly, that the work, the subject-matter of the contract with the contractor, was work which ordinarily formed the whole or part of the trade or business of the principal. The learned Commissioner has only considered whether this contract was made in course of or for the purposes of the principal's trade or business. Quite obviously, it was because making arrangements for painting part of the factory premises is obviously an act in the course of the business of the factory owner. What the learned Commissioner failed to consider was whether the subject-matter of the contract, namely, painting a shed, could be described as ordinarily forming part of the principal's trade or business. There is no suggestion that painting a shed or anything else formed any part of the trade or business of the National Sheet and Metal Works Limited and that being so, the contract which they gave to the appellant to do painting work could not give the workman a right to recover compensation as against the National Sheet and Metal Works Limited. That being so, no question could arise of the right to claim an indemnity against the appellant.

[16] Unfortunately for the National Sheet and Metal Works Limited, they seem to have assumed that they were liable as principals and claimed an indemnity against the appellant. The Commissioner for Workmen's Compensation

finds that the National Sheet and Metal Works Limited were liable. He states:

"Where the compensation is claimed from the principal and the principal is liable under this section, he shall be entitled to be indemnified by the contractor. In this instance, the principal is opposite part No. 1. He is liable to pay Rs. 1470 with costs and pleader's fee to applicant. He is entitled to be indemnified by the contractor, opposite party No. 2."

[17] There it will be seen that there is an express finding that the respondents, the National Sheet and Metal Works Limited, were primarily liable and an order was made against the appellant to indemnify them to the extent of Rs. 1470. In my judgment no question of indemnity could ever arise in this case because the case did not fall within S. 12 (1), and therefore no order could be made against the appellant under sub-s. (2) of that section to indemnify any one.

[18] That being so, this appeal must be allowed and the order of the learned Commissioner directing the appellant to indemnify the National Sheet and Metal Works Ltd. is set aside.

[19] Learned Advocate for the National Sheet and Metal Works Limited contended that the Court below was wrong in holding that the National Sheet and Metal Works Limited were liable as principals to the workman. The Commissioner I think was clearly wrong in arriving at the finding he did. But unfortunately for the National Sheet and Metal Works Limited they had not challenged that finding. Indeed they accepted the position that they were liable throughout the proceedings and only claimed that they were entitled to an indemnity. It is quite impossible to interfere with the order for compensation made by the Commissioner against the respondents, the National Sheet and Metal Works Limited. As no appeal was preferred from that order we cannot interfere. However, as I have said the order making the appellant liable to indemnify the National Sheet and Metal Works Ltd. must be set aside as S. 12 has no application whatsoever to the case.

[20] The appeal of S. M. Ghose, the contractor, therefore succeeds and the order relating to indemnity is set aside. The appellant is entitled to the costs of the proceedings as against the respondent, the National Sheet and Metal Works Limited, in this Court and in the Court below. The hearing-fee in this Court is assessed at three gold mohurs.

[21] **Banerjee J.**—I agree.

D.R.R. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 551 *[C. N. 208.]*

HARRIES C. J. AND CHATTERJEE J.

Sutlej Cotton Mills Ltd. v. *Commissioner of Income-tax, West Bengal.*

Income-tax Reference, No. 16 of 1948, D/- 5-9-1949.

(a) Income-tax Act (1922), S. 42 (3) — Applicability to residents in British India.

Sub-section (3) of S. 42 is in the widest terms and there is nothing whatsoever in that sub-section to suggest that the operation is confined to non-residents. It merely deals with the case of a business of which all the operations are not carried out in British India and there is nothing to suggest that that business must be the business of a non-resident. Only sub-s. (2) is confined to non-residents but sub-ss. (1) and (3) are so framed that they cover both residents as well as non-residents: A. I. R. (33) 1946 Bom. 185, *Dissent*. [Para 22]

Anno. Income-tax Act, S. 42, N. 4, 5.

(b) Interpretation of Statutes— Marginal note is not part of statute. [Para 36]

Annotation: ('50-Com.) Civil P. C., Pre N. 11 Pt. 1.

(c) Interpretation of Statutes—Proviso—Effect of.

The effect of a proviso is to qualify something already enacted which but for the proviso would be within it. [Para 32]

Anno. Civil P. C., Pre. N. 14.

A. C. Sen and B. N. Das Gupta —for Applicant.

Dr. S. K. Gupta and J. C. Pal —for Respondent.

Harries C. J. — This is a Reference made by the Appellate Tribunal, Bombay Bench, under S. 66 (1), Income-tax Act stating a case upon the following question:

"Whether in the circumstances of the case and having regard to the fact that the applicant company is 'Resident in British India,' S. 42 has been validly invoked."

[2] The assessee was a limited liability company having its head office at Calcutta and a factory at Okara in British India where cloth was manufactured. The cloth so manufactured was sold by the assessee on a wholesale basis both within and without British India. During the year of account, the assessee had three selling offices in certain Indian States. The goods sold at these centres were sent out from the factory at a profit margin of 9 per cent. on cost.

[3] The Income-tax Officer dealing with the assessment for the relevant year came to the conclusion that on the facts which I have set out the provisions of S. 42, Income-tax Act, were applicable and he made an allocation of profits under S. 42 (3) on the basis that 50 per cent. of the profit made on sales effected in Indian States outside British India was attributable to the business operations carried on in British India. (It is to be observed that there is a serious misprint in line 24 at page 1 of the paper-book. "Sales effected in British India" should read, "Sales effected outside British India.")

[4] The assessee appealed to the Appellate Assistant Commissioner, but the appeal was dismissed and a further appeal was preferred to the Tribunal. Before the Tribunal it was argued

that S. 42 (3), Income-tax Act, had no application to the case as that section applied only to "non-residents." Further it was contended that if the section did apply the proportion of profits allocated to the manufacture in India was too great. The Appellate Tribunal, however dismissed the appeal holding that S. 42 (3) had been correctly applied by the Income-tax authorities. The Tribunal were asked to state a case on two points. First, whether S. 42, Income-tax Act, applied to residents or not, and secondly, that if it did what proportion should have been attributed to operations in India in this case.

[5] The Appellate Tribunal was of opinion that the proportion to be applied to operations in India was a pure question of fact and refused to state a case on that point. The Tribunal, however, was of opinion that the question whether S. 42, Income-tax Act, applied to residents, was an important question of law and therefore stated the question which I have set out.

[6] The only point this Court has to decide is whether S. 42, Income-tax Act, has any application to residents in India and was therefore properly applied in the present case.

[7] Section 42, sub-s. (1), is in these terms:

"All income, profits or gains accruing or arising whether directly or indirectly, through or from any business connection in British India, or through or from any property in British India, or through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind, shall be deemed to be income accruing or arising within British India, and where the person entitled to the income, profits or gains is not resident in British India, shall be chargeable to income-tax either in his name or in the name of his agent, and in the latter case such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax."

[8] Then follow three provisos. The first proviso deals with persons who are not resident in British India, and the second deals with cases where an agent is assessed. The third proviso deals with the amount recoverable.

[9] Sub-s (2) of S. 42 deals with a case where a person not resident or not ordinarily resident in British India carries on business with a person resident in British India.

[10] Sub-s. (3) of S. 42 is in these terms:

"In the case of a business of which all the operations are not carried out in British India, the profits and gains of the business deemed under this section to accrue or arise in British India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in British India."

[11] It was urged before the Income-tax authorities and the Appellate Tribunal that S. 42 could not possibly apply to residents of British India and in support of that contention the case of *Commissioner of Income-tax, Bombay* v. *Western India Life Insurance Co. Ltd.*, (1945) 13 I. T. R. 405 : (A. I. R. (33) 1946 Bom. 185) was relied upon. This was a decision of a Bench of the Bombay High Court consisting of Kania and Chagla JJ. as they then were. The facts of the case were as follows. The assessee, an insurance company, resident in British India, claimed that under the third proviso to S. 4 (1), Income tax Act, 1922, it was entitled to an exemption of Rs. 4,500 from its foreign income, being interest on securities with a bank in London not brought into British India. The income-tax authorities held that as the income could be described as deemed to accrue or arise to the assessee within British India by reason of S. 42, the income fell under S. 4 (1) (b) (i) and not under S. 4 (1) (b) (ii) and therefore proviso 3 to S. 4 (1) did not apply. The Bench however held that S. 42 did not apply to the case, that the income should be considered as falling under S. 4 (1) (b) (ii) and not under S. 4 (1) (b) (i) and that therefore the assessee was entitled to the deduction of Rs. 4,500 under proviso 3 to S. 4 (1).

[12] There can be no doubt that both the learned Judges dealt with the applicability of S. 42 and both came to the conclusion that S. 42 applied only to non-residents.

[13] This decision was upheld on appeal by their Lordships of the Privy Council in *Commissioner of Income-tax, Bombay* v. *Western India Life Insurance Co. Ltd.*, (1949) 17 I.T.R. 125 : (A. I. R. (36) 1949 P. C. 97). Dealing with this aspect of the case however Lord Oaksey who delivered the judgment of the Board observed at page 128:

"The question which now arises was not argued in the High Court, the judgments of the learned Judges being based upon the construction of S. 42 of the Act which they held only applied to non-residents and had no application to the present case in which the income in question had clearly accrued to the company outside British India. Their Lordships agree with the High Court that S. 42 has no application but express no opinion upon the question whether the section refers only to non-residents."

[14] Though their Lordships of the Privy Council expressed no opinion as to the correctness of the decision in the *Commissioner of Income tax* v. *Western India Life Insurance Co. Ltd.* (1945) 13 I. T. R. 405 : (A. I. R. (33) 1946 Bom. 185) as to the meaning and ambit of S. 42, nevertheless the matter was decided by the two learned Judges and their view is entitled to the greatest respect in this Court.

[15] On behalf of the income-tax authorities, Dr. Gupta has contended that this Bombay Bench decision does not lay down good law and he has put forward a number of reasons why we should not follow that decision.

[16] The marginal note of S. 42, Income-tax Act, still read "Non-residents" after the amendment in 1939 and some weight appears to have

been attached to that fact by the learned Judges of the Bombay High Court. However, a marginal note is no part of a statute and should not be used to explain the meaning of a section. In the case of *Nixon* v. *Attorney-General* (1930) 1 Ch. 566: (99 L. J. Ch. 259), Lord Hanworth M. R. at p 593 dealt with this matter in these words :

"One further point was taken upon this Act of 1859, with which it is necessary to deal. The marginal notes of S. 3 refer to 'existing rights' and of S. 12 to 'right.' It was contended that these catch words could be used to explain the meaning of sections against which they appear. For my part, I cannot allow this. As explained by Baggallay L. J. in *Attorney-General* v. *Great Eastern Ry. Co.*, (1879) 11 Ch. D. 449 at p. 461, marginal notes are not a part of an Act of Parliament. The Houses of Parliament have nothing to do with them and I agree with the learned Lord Justices in that case—Bramwell, James, and Baggallay—that the Courts cannot look at them. Their imperfections, spoken of by Bramwell L. J., are illustrated by the note to S. 9 of this Act."

[17] It appears to me therefore that the marginal note cannot assist the Court in arriving at the true meaning of this section. In any event, S. 12 of Act XXII [22] of 1947 provides that the marginal note to S. 42 should be deleted and the words "Income deemed to accrue or arise in British India" be substituted in place thereof.

[18] However, it is clear that originally part of this section did apply only to non-residents and the opening words of S. 42 before it was amended in 1939 were "In the case of any person residing out of British India." Had those words remained it would have been clear that sub-s. (1) had no application to residents. But by the amendment in 1939 the words "in the case of any person residing out of British India" were eliminated from the statute and new words were substituted. Sub-section (1) now opens with the words :

"All income, profits or gains accruing or arising whether directly or indirectly, through or from any business connection in British India etc."

In the opening part of the sub-section as amended there is now nothing to suggest that the sub-section was intended to apply only to non-residents. Further, it appears to me that in the latter portion of sub-s. (1) there are words which clearly show that the sub-section applies both to residents and non-residents. After dealing with what income, profits or gains shall be deemed to be income accruing or arising within British India, the sub-section then provides "and where the person entitled to the income, profits or gains is not resident in British India," the income, profits or gains shall be chargeable to income-tax in a certain manner.

[19] It appears to me that the inclusion of these words, which were added by the amending Act of 1939, makes it clear that the sub-section applies both to residents and non residents and it is applied to them in a different manner. Further, the first proviso I think makes it clear that the sub-section was applicable to both residents and non-residents, because the first proviso deals with the cases of persons entitled to income, profits or gains who were not resident in British India. A proviso to a sub-section or a section is, as a rule, in the nature of an exception and I cannot understand the necessity for the wording of this proviso if sub-s. (1) applied only to non-residents. If, on the other hand, sub-s. (1) of S. 42 applied to both residents and non-residents, then the form in which the first proviso is found was necessary where a distinction was to be drawn between the liability of the two classes.

[20] This argument was addressed to the Bombay High Court. But Kania J., was of the view that when sub-s. (1) is read as whole the reasonable construction to give to it was that it applied to non-residents only. Speaking for myself I find it difficult so to construe sub-s. (1) of S. 42. With very great respect to the learned Judge it appears to me that the sub-section as amended in 1939 clearly on the face of it applies to both residents and non-residents.

[21] The matter however does not rest there because sub-s. (2) only applies to persons not resident or not ordinarily resident in British India, but it is to be observed that the sub-section opens with those very words :

"Where a person not resident or not ordinarily resident in British India, carries on business with a person resident in British India, and it appears to the income-tax officer etc."

There it is clear that the sub section applies only to non-residents and if it was necessary so to make it clear in sub-s. (2) it appears to me that it was equally necessary to make it clear in sub-s. (1) if that sub-section was intended only to apply to non-residents. It seems to me that it was more necessary than ever to make the position clear with regard to sub-s. (1) because words which strictly limited the operation of that sub-section to non-residents had been deleted by the amendment and general words put in statute in the place of them.

[22] Sub-section (3) of S. 42 is in the widest terms and there is nothing whatsoever in that sub-section to suggest that its operation is confined to non-residents. Sub-section (3) merely deals with the case of a business of which all the operations are not carried out in British India and there is nothing to suggest that business must be the business of a non-resident. In fact to hold that sub s. (3) applied only to non-residents if the sub-section stood alone would be actually to do violence to the language of the

sub-section. However, the argument is, and that appears to have been the view of the Bombay High Court, that as sub-s (3) is part of a section which deals with non-residents only it must be construed as also dealing with non-residents and not with residents. However, in my view, only one sub-section of S. 42 is confined to non-residents and that is sub-s (2). Sub-sections (1) and (3) in my opinion are so framed that it must be held that they cover both residents and non residents.

[23] Dr. Gupta also pointed out that S. 14 (2) (c), Income-tax Act, made it clear that S. 42 did apply to residents as well as non-residents. Section 14 (2) (c), Income-tax Act, is as follows:

"(2) The tax shall not be payable by an assessee,

* * *

(c) in respect of any income, profits or gains accruing or arising to him within an Indian State, unless such income, profits or gains are received or deemed to be received in or are brought into British India in the previous year by or on behalf of the assessee or are assessable under S. 42."

[24] Dr. Gupta's argument is that S. 14 (2) (c) clearly covers residents and exempts such residents in respect of income, profits or gains accruing or arising to them within an Indian State unless the case falls within certain provisions and one of those provisions is that the income, profits or gains are assessable under S. 42.

[25] It appears to me that S. 14 (2) (c), Income-tax Act, could not have been drafted in the way it has if S. 42 (3) had no application to residents. It appears to me clear from S. 14 (2) (c) that the framers of the Act clearly intended S. 42 (3) to be applicable to residents as well as to non-residents.

[26] With the greatest respect to the learned Judges who decided the Bombay case, I find myself unable to follow that case and I am bound to hold that S. 42 (3) does apply to residents as well as non-residents and therefore it could be properly applied in this case in assessing the profits of the assessee. This was a case where all the operations of the assessee were not carried out in British India and therefore the profits and gains of the business assessable in British India could be calculated as on such profits and gains as were reasonably attributable to that part of the operations carried on in British India.

[27] That being so, the question submitted to the Court must be answered in the affirmative.

[28] The Commissioner of Income-tax is entitled to his costs of this reference. Certified for two counsel.

[29] **Chatterjee J.** — Learned advocate for the assessee, Mr. A. C. Sen, has asked us to follow the judgment of Kania and Chagla JJ. in *Commissioner of Income-tax, Bombay* v. *Western India Life Assurance Co. Ltd.*, (1945) 13 I.T.R. 405 : (A.I.R. (33) 1946 Bom. 185). The judgment is an authority for the proposition that S. 42 only applies to non-residents. With great respect I beg to differ.

[30] There are three grounds which compel me to differ from the view taken by the learned Judges of the Bombay High Court.

[31] The first point is the history of the section itself. Originally S. 42 referred only to persons residing out of British India, that is, to non-residents, but in 1939 the section was amended. It is significant that sub-s. (1) of S. 42 as it stands starts with the words :

"All income, profits or gains accruing or arising whether directly or indirectly, through or from any business connection in British India etc."

These are comprehensive words which are not confined to non-residents. Kania J. has taken the view that the latter part of that sub-section should be read along with the first part and it should be read as being limited to non-residents. But the latter part of the sub-section itself, namely, the words

"And where the person entitled to the income, profits or gains is not resident in British India"

seem to indicate that the former part of the section refers also to persons other than those who are non-residents.

[32] The next point is the first proviso to S. 42 (1) which was inserted in 1939. It starts with the words :

"Provided that where the person entitled to the income, profits or gains is not resident in British India".

These words imply that sub-s. (1) has a more extensive operation than the proviso itself. The effect of a proviso, according to the ordinary rules of construction, is to qualify something already enacted which but for the proviso would be within it: Craies on Statute Law, 4th Edn. p. 196. A proviso excepts out of the earlier part of a section something which but for it would have been within the enacting part: Halsbury's Laws of England, Hailsham Edition, vol. 31, p. 481; *The M. & S. M. Rly. Co. Ltd.* v. *Bezwada Municipality*, 1944-2 M. L. J. 25 : (A.I.R. (31) 1944 P. C. 71).

[33] The third point which I want to emphasize is the wording of S. 14 (2) (c). The last words in the said cl. (c) cannot be consistent with the view that S. 42 is inapplicable to a resident. The effect of S. 14 (2) (c) is that tax shall be payable in respect of income, profits or gains accruing or arising to an assessee within the Indian State when such income, profits or gains (a) are received in British India, or (b) are deemed to be received in British India, or (c)

are brought into British India, or (d) are assessable under S. 42. That clearly negatives the view that S. 42 which is in Chap. VB deals with exceptional cases, wholly outside the purview of Chap. III dealing with taxable income and providing for certain exemptions in S. 14.

[34] Mr. Sen concedes that S. 14 is applicable to a resident. Therefore, the only way that a harmonious construction can be put on this statute so as to make S. 14 consistent with S. 42 is to hold that S. 42 is not limited in its application to a non-resident. Otherwise reference to S. 42 would be wholly out of place in S. 14.

[35] With the greatest respect to Kania J., it seems that undue emphasis has been laid on the marginal note in S. 42, "Non-residents". His Lordship pointed out that it should be noted that while amending S. 42 the Legislature had still retained the marginal note "Non-resident" against that section and according to him S. 42 (c) should also be restricted to a non-resident. I should here refer to the judgment of the Judicial Committee in *Thakurain Balraj Kunwar* v. *Jagatpal Singh*, 31 I. A. 132: (26 ALL. 393 P. C.). Delivering the judgment of the Board, Lord Macnaughten observed as follows :

"It is well-settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament."

[36] In any event the marginal note, even if it can be regarded as having been inserted in an Act with the assent or authority of the legislature, cannot control or supersede the plain meaning of the words of a section and are of little aid in the construction of statute.

[37] Sub-s. (3) of S. 42 provides for the apportionment of the profits and gains of a business and the portion deemed to accrue or arise in British India is liable to tax. This sub-section would become inapplicable to residents, if we accept the contention put forward by the assessee. There is no other provision in the Act, so far as we can make out, providing for apportionment of profits in case of a resident whose operations are partly outside British India. I asked Mr. Sen, who has considerable experience in these matters, to point out if there is any provision in the Act under which that relief can be given in such a case to an assessee who is a resident. Mr. Sen could not point to any, and it seems that there is no section providing for such relief. In an appropriate case, S. 42 (3) may be invoked in the case of a resident and the revenue authorities were justified in applying S. 42 (3) in assessing the profits of the assessee in this case where part of its operations was carried on outside British India.

[38] In my opinion S. 42 (1) and S. 42 (3) apply to both residents and non-residents. Any other construction would lead to the anomalous results. It is to be observed that S. 4, Income-Tax Act, is expressly made "subject to the provisions of this Act" which include S. 42. It is to be noted, however, that the marginal note to S. 42 has been changed by Act, XXII [22] of 1947. By S. 12 of that Act for the marginal heading "Non-residents" the following has been substituted—"Income deemed to accrue or arise within British India". It was obviously done to alter the marginal note which was somewhat misleading.

[39] I agree with the learned Chief Justice that the question should be answered in the affirmative and that the respondent should be awarded the costs of this reference.

D.R.R. *Answer in affirmative.*

A. I. R. (37) 1950 Calcutta 555 *[C. N. 209.]*

R. P. MOOKERJEE J.

Hare Krishna Rana and others—*Plaintiffs*—*Appellants* v. *Sm. Jamini Sundari Dassi and others*—*Respondents.*

A. F. A. D. No. 1263 of 1945, D/-18-8-1949, against decree of Sub-J., 2nd Court, Zillah Midnapore, D/- 14-3-1945.

Limitation Act (1908), Art. 11A — Applicability — Dispossession subsequent to delivery of possession —Civil P. C. (1908), O. 21, R. 100.

Dispossession under O 21, R. 100 must be in course of the execution proceedings. Where the alleged dispossession was not in course of the execution proceedings but subsequent to the alleged delivery of possession in course of the execution case, Art 11A does not apply. A. I. R. (25) 1938 Cal. 192, *Dissent.* [Paras 8, 12]

Annotation : ('42-Com.) Lim. Act, Art. 11A, N. 8; ('44-Com.) Civil P. C., O. 21, R. 100, N. 3.

Apurba Charan Mukherjee and Paresh Nath Mukherjee — for Appellants.

S. C. Janah; Saroj Kumar Maity and Ramendra Mohan Majumdar for Deputy Registrar — for Respondents.

Judgment.—In this appeal on behalf of the plaintiffs, the particular question which arises for decision is whether under O. 21, R 100, Civil P. C., dispossession referred to therein must be in course of the execution proceedings or may be a subsequent event.

[2] The plaintiffs brought the present suit out of which this appeal arises for a declaration of their eight annas share in a particular sub-tenure held by them under the Patnidar. The plaintiffs' predecessor Gostha and pro forma defendant 5 Kedar after purchasing the eight annas share in the Patni sued Satish Adhikary who was then the owner of the sub-tenure in suit. That suit was decreed and in execution of this decree Gostha and Kedar became the auction-

purchasers, the sale having taken place on 15th February 1924, and possession was delivered on 24th May 1924. The plaintiffs claimed in the present proceedings as the heirs of Gostha. Kedar who was the owner of the remaining eight annas share of the sub-tenure had borrowed money from defendant 3 Narendra and the latter obtained a decree for the realisation of the said amount. Defendant 3 purchased the entire sub-tenure on 16th August 1935 on the allegation that the entire sub-tenure belonged to Kedar alone. Defendant 3 obtained delivery of possession under O. 21, R. 95, Civil P. C., on 19th May 1936. Six months later the plaintiffs' predecessor Gostha filed an application under O. 21, R. 100 of the Code in respect of this half share in the sub-tenure which belonged to him on the allegation that he had been dispossessed by defendant 3 on 6th November 1936, that is, long after the possession is alleged to have been delivered to defendant 3 in execution of the decree. That application was finally disposed of by the learned Subordinate Judge holding, (1) that on the allegation made by the petitioner that dispossession by the auction-purchaser was subsequent to the delivery of possession in execution of the decree, the provisions of O. 21, R. 100 of the Code were not attracted. Accordingly, the application was not maintainable; (2) that there was no reliable evidence to show that dispossession had taken place on 6th November 1936, as alleged by the petitioner and not on 19th May 1936, as evidenced by the writ of delivery of possession; and (3) that the petitioner had failed to show that he was in possession of any portion of the disputed properties on his own account. The application was accordingly dismissed. No suit as contemplated under O. 21, R. 103 of the Code was brought by Gosta or after him by his successor-in-interest within one year of 5th April 1937, that is, the date of disposal of the application purporting to have been under O. 21, R. 100 of the Code. The plaintiffs' case is that they are entitled to bring this separate suit as they did in December 1941, as the application, which had been filed purporting to be under O. 21, R. 100 of the Code, was held to be not maintainable. In the present plaint, however, the date of dispossession as given is 29th Magh 1345 B. S. corresponding to 12th February 1939 and neither 19th May 1936, the date of the delivery of possession under O. 21, R. 95 of the Code to the defendant, nor 6th November 1936, as had been alleged in the application filed by Gostha under O. 21, R 100 of the Code. The plaintiffs contend that the present suit is not only maintainable in law but is not barred by limitation, as they have come within 12 years of the date of their dispossession.

[3] Defendant 3, who was the purchaser in the money execution case in 1935 and had obtained delivery of possession in May 1936, conveyed the property to defendant 2. Defendant 1 is the wife of defendant 2. During the pendency of the suit, the zemindar Halwashiya had sued defendant 1 and the heirs of defendant 3 for rent of the sub-tenure without impleading the plaintiffs as parties and in execution of the decree the entire sub-tenure was purchased by defendant 4, Surendra on 18th August 1943. The plaintiffs alleged that they continued to be in possession until 12th February 1939, when the defendant dispossessed them.

[4] The principal defence is that the suit is barred by limitation. The learned Munsif overruled the objection raised by the defendant and decreed the plaintiffs' suit. On appeal the learned Subordinate Judge held otherwise and the suit was dismissed. Hence this second appeal on behalf of the plaintiffs.

[5] The first question which arises for decision is whether an application made by Gostha in 1936 having been dismissed and no suit having been brought within one year from the date of dismissal, the present suit is barred under Art. 11-A, Limitation Act. On behalf of the plaintiffs-appellants, it is contended that the application which purported to be under O. 21, R. 100 of the Code was not maintainable in law and, therefore, there is no scope for the application under the provisions contained in Art. 11-A, Limitation Act. The ground upon which the application under O. 21, R. 100 of the Code is sought to be avoided is that on Gostha's own showing the alleged dispossession was not in course of the execution proceedings but much later thereafter. Under R. 100 no application is maintainable unless dispossession takes place as a direct result of the execution proceedings.

[6] Mr. Janah appearing on behalf of the defendant, on the other hand, contends that under R. 100 there is no reference to dispossession being limited to one in course of the execution proceedings. The terms as contained in R. 100 are very general and the application of the rule ought not to be limited by practically introducing words which are not to be found there. If the provisions contained in R. 100 were to be interpreted as standing by themselves, there is room for argument, as contended for by the defendant. Rule 100, however, cannot stand by itself. Whether the suit is barred by limitation or not has to be decided on Art 11-A, Limitation Act. Article 11-A of the Act is in the following terms:

"By a person against whom an order has been made under the Code of Civil Procedure, 1908, upon an application by the holder of a decree for the possession

of immovable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery of possession thereof, or upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree-holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order."

[7] As observed by Chatterjee and Pearson JJ. in *Nirode Borani Dasi* v. *Manindra Narayan*, 26 C. W. N. 853: (A. I. R. (9) 1922 Cal. 229), and also in some other decisions, the provisions contained in R 100 of the Code have to be interpreted and taken along with the provisions contained in Art. 11-A, Limitation Act:

"But although the article does not refer to any section, the order must be an order under O 21, R. 103. That rule expressly refers to Rr. 98, 99 and 101 and these rules provide for investigation into a petition of objection. The right of suit is given by R 103 only when there is any order under R. 98, 99 or 101, and Art. 11-A merely provides for limitation applicable to such suits." (at p. 858).

[8] Without any reference to any decided case on the point if we are to decide the point in issue on the provisions contained in Art. 11-A, Limitation Act read with R. 100 of O. 21 of the Code, I do not think that there can be any doubt that dispossession referred to is one which takes place in course of the execution proceedings. The words "to the delivery of possession thereof" as appearing in Art. 11-A put the matter beyond the shadow of any doubt.

[9] Reference has, however, been made to a decision by Guha J. in the case of *Rajendra Kishore* v. *Asir Ulla*, 65 C L. J. 416 : (A. I. R. (25) 1938 Cal. 192), where there are observations which support the contention, as urged by the defendant. It appears that in the civil revision case, which was before this Court, Guha J. was satisfied that the Court ought not to interfere in that case even if the decision moved against were erroneous, as there was a more comprehensive remedy open to the petitioner to establish his title to the property as against the person in whose favour the order had been made in a summary proceeding arising out of execution of a decree. The learned Judge, however, had also considered the merits of the case, although the rule might have been discharged on the view as indicated above. The opinion expressed on the merits was mere *obiter*. It was held that what was contemplated under O. 21, R. 100 of the Code was a case of dispossession by a decree-holder of a person in possession other than the judgment-debtor and the only question the Court has to consider is whether the dispossession was by a decree-holder or auction-purchaser as such and not whether the dispossession took place during or after the disposal of any execution case started at the instance of the decree-holder or auction-purchaser. With great respect, I would differ from the view expressed by Guha J.

[10] In the case of *Satya Narain* v. *Jinsi Sah*, A. I. R. (16) 1929 Pat. 553 : (117 I. C. 634), a Division Bench of the Patna High Court came to the conclusion that

"Article 11-A would only apply if it is established that the plaintiffs are actually dispossessed of the property in course of the delivery of possession."

If there is no allegation that as a matter of fact the plaintiff has been dispossessed in the course of the delivery possession, the application must be thrown out on the ground that the same is not maintainable in law.

[10a] This view finds favour from the observations of Rankin C. J. so far as the particular case is concerned in the case of *Kiron Soshi Dasi* v *Official Assignee of Calcutta*, 36 C.W.N. 965: (A. I. R. (20) 1933 Cal. 246). At page 972 it is observed that

"The question in this suit is whether an application having been made to Mr. Justice Greaves on 12th April 1923, by Khanna saying that in spite of repeated demands Kiron Soshi was unwilling to give him possession the dismissal of that application meant that Khana had one year only within which to bring his suit. In my judgment, that is not so. Khanna's application was not an application within R. 97, the order was not an order within R. 99 and this suit is not within R. 103, there having been no execution proceeding or no order made by the Court at any time directing that Khanna should be put into possession of the property on the strength of the sale certificate. The application may have been dismissed for this very reason."

In the case now before me while dealing with the application filed by Gostha the learned Subordinate Judge had, as a matter of fact, come to the conclusion that that application was not maintainable in law, as the dispossession alleged was not in course of execution but subsequent to the alleged delivery of possession in course of the execution case. This is a much stronger one on the facts than the one which was before Rankin C. J. referred to above.

[11] Reference may in this connection be made to the case of *Bisweswar Banerjee* v. *Naba Kumar*, 70 C. L. J. 111 : (A. I. R. (27) 1940 Cal. 16) In that case the plaintiff had brought a suit for recovery of possession of the land beyond one year of the date of the order under R. 100 of O. 21 of the Code. The defendant pleaded that the suit was barred under Art. 11A, Limitation Act. Henderson J.'s view was that it was competent for the plaintiff to prove in this suit that there was no dispossession of the predecessor of the defendant and consequently there was no foundation for an order under O. 21, R. 100. If it held that there was no valid order under R. 100, Art. 11-A, Limitation Act will not apply and in this view the suit was held not to be barred by limitation. The decision as above was also made on the view that the finding, which

might have been arrived at in a proceeding under O. 21, R. 100, did not, in the circumstances as stated above, operate as *res judicata* in the subsequent suit. Reference was made to the case of *Muthiah Chetti* v. *Palaniappa Chetti*, 55 I. A. 256: A. I. R. (15) 1928 P. C. 139). Although the special facts which gave rise to the observations were different from those which appear in the present case, the general observation and the principle referred to by their Lordships of the Judicial Committee are apposite :

"The point to be considered is:—is the appellant a person against whom an order as just described has been made? The Board is of opinion that the answer is in the negative. By Art. 11, Limitation Act, already quoted, he must be a person against whom an order has been made under the Civil Procedure Code 'on a claim preferred to, or an objection made to the attachment of, property attached in execution.' The case thus comes to be narrowed down to whether it is a necessity of the order here specified that the property to which a claim is made, or to the attachment of which there is an objection, must be property which had been *de facto* attached.

It would seem to be so by the words, and by the very nature of the case, for the only property referred to is 'property attached in execution'. Unless there has been an attachment, there can be no order made on an objection lodged to it, nor can any claim be made to the property so attached; and without such an order, there is no *terminus a quo* for the running of limitation, and with this the limitation itself is non-existent. The first head of Art. 11, in the opinion of their Lordships, can on its words mean nothing else."

As observed by the Judicial Committee the special point in issue in that case was that although there had been an order for attachment, that order had not been given effect to. There was no dispossession therefore as there had been no attachment in execution. In the case of dispossession also, it must be in course of execution.

[12] On a reading of the provisions contained in R. 100 of O. 21 of the Code and Art. 11-A, Limitation Act the only conclusion to which one may arrive at is that dispossesion must be in course of execution. But I may as well indicate that the wider interpretation attempted to be put on R. 100 taken by itself by the learned advocate for the defendant cannot be supported if reference is made to the position occupied as also its context in which it appears. Order 21 of the Code deals with execution of decrees and orders. The rules appearing under this Order are sub-divided under different sub-headings. All the different sub-headings deal with one or different possible stages and the adverse circumstances which may occur in course of execution. After making provisions in Rr. 41 to 57 for attachment of property Rr. 58 to 63A of the Code are introduced to regulate investigation of claims and objections. The next three sub-headings deal either with sale jointly or with sale of movable or immovable properties. These cover Rr. 64 to 96. Rules 97 to 103 are the concluding rules of the Order under the sub-heading "Resistance to delivery of possession to decree-holder or purchaser." Bearing in mind that the proceedings contemplated under these rules are to be initiated in and to be dealt with by the executing Court, we may consider the implication of the different rules appearing under these sub-headings. Rules 97 to 99 unmistakably refer to resistance or obstruction in course of execution. If possession is delivered and there is subsequent dispossession, such subsequent happening would not be interpreted to invest the executing Court with jurisdiction to deal summarily with various questions of conflicting title as will ordinarily arise in such cases. The provisions contained in this order are for the expeditious disposal of the execution proceedings. They do not contemplate to provide for a particular procedure not arising out of execution proceedings but outside the same From this point of view also I hold that R. 100 cannot be interpreted to be attracted in cases where dispossession is alleged in course of execution but subsequent thereto.

[13] As indicated already, the learned Subordinate Judge, while dealing with the application by Gostha purporting to be under R. 100 of O. 21, himself pointed out that the application was not maintainable in law. In that view the application was dismissed although there are observations dealing with some of the points touching the merits of the case. If an application is held not to be an application maintainable under R. 100 of O. 21 of the Code, Art. 11-A, Limitation Act, will not be attracted. I therefore hold that the present suit is not barred by limitation.

[14] A decision on this point however does not dispose of the whole case. It is open to the parties to adduce evidence in the present case to prove when dispossession took place. If it is found that dispossession had, as a matter of fact, taken place in course of execution, that is, on 19th May 1936, when possession is alleged to have been delivered under O. 21, R. 95 of the Code, in spite of the fact that a contrary allegation is made by the plaintiff, the suit must be dismissed and after the decision of the claim case no suit as contemplated under S. 103 was brought within one year and it is not open to the Court at this stage to decide the question of title which ought to have been raised at that stage or within one year of such dispossession.

[15] If on the other hand, the final Court of fact comes to the conclusion that dispossession was not as alleged by the defendant but subsequent thereto either as alleged by the plaintiff

or on any other date subsequent to the delivery of possession which took place on 19th May 1936, the plaintiffs' suit has to be decreed, as the title of the plaintiffs has not been destroyed by lapse of time.

[16] There is no finding by the Court of appeal below as to the date on which the plaintiffs were dispossessed. This matter must therefore go back to the Court of appeal below for a decision on this question of fact. If it is found in favour of the defendant the suit is to be dismissed; on a contrary view the plaintiffs' suit will have to be decreed.

[17] The appeal is accordingly allowed and the case remanded to the Court of appeal below for a decision on the question of fact referred to above and for the final disposal of the suit according to the directions given above. The learned Subordinate Judge will proceed on the evidence already on the record. There will be no order for costs in this Court.

D.H. *Case remanded.*

A. I. R. (37) 1950 Calcutta 559 *[C. N. 210.]*

G. N. DAS AND LAHIRI JJ.

Adeline Maude Ellanor Catchick Nee Robertson and another—Plaintiffs — Appellants v. *Sunderlal Daga and others — Defendants — Respondents.*

A. F. O. D. No. 110 of 1945, D/- 18-8-1949, against decree of Sub-Judge, 2nd Addl. Court, 24 Perganas, D/- 29-11-1944.

(a) Succession Act (1925), S. 307—(Case under Succession Act (1865), S. 269, corresponding to S. 307)—Executor—Power to dispose of property—Duty of parties dealing with executors—Power to charge estate for necessary repairs — Burden of proof.

The alienee from an executor who is acting as such has a right to infer that the latter is acting fairly. The fact that the alienation does not purport to be made for administrative purposes does not affect his title. The alienee is not bound to see to the application of the money. The immunity is however lost when the alienee has notice, actual or constructive, of the title of other persons and of the fact that the executrix acting in breach of trust, or the alienation is made for purposes which the executor has no power to do in the course of administration. The power of the executor does not extend to authorise him to sell or pledge the testator's assets with a creditor of his own, so as to prevent the persons interested in the testator's will, from following them. [Para 35]

An executor represents the estate and has, in ordinary course of management, power to effect necessary repairs and to effect improvements which are reasonable and proper. For such purposes, he can charge the estate. [Para 41]

The burden rests upon the person impeaching the validity of the transaction to prove that the alienee had notice of the facts. [Para 47]

Where the executrix acting as such executes a deed of release, the consideration consisting of part of the dues on a promissory note, the deed of release is binding on the estate and passes title to the transferee. [Para 49]

Annotation : ('46-Man.) Succession Act, S. 307 N. 1, 3.

(b) Succession Act (1925), Ss. 332, 333, 335—Assent to legacy by executor.

The assent required by the Act may be given in fact or may be inferred, the inference being made where the executor has so acted as to involve as a matter of necessary inference, his having done so. The mere fact that an executor who is also a devisee, includes property of his own in the security or gives security for an originally unsecured advance is not sufficient to rebut the ordinary presumption that the money had been raised for administrative purposes. [Para 53]

Annotation: ('46-Man.) Succession Act, S. 332, N. 1; S. 333, N. 1; S. 335, N. 1.

Atul Ch. Gupta and Upendra Ch. Mallik —for Appellants.

Dr. Naresh Chandra Sen Gupta and Jnanendra Nath Bakshi —for Respondents.

G. N. Das J.—This is an appeal by the plaintiffs against a decision of Mr. B. Mookerjee, Additional Subordinate Judge, 2nd Court, Alipore, District 24 Parganas, dated 29th November 1944, dismissing their suit for possession and mesne profits.

[2] The plaintiffs' case is that the disputed property and other properties belonged to their father George Adolphus, Robertson. The latter was at all material times, living separate from his wife Olivia by whom he had several children. He had by one Mrs. Adeline Maude Bredee, a widow, two daughters viz., the plaintiffs.

[3] On 4th July 1892, Mr. Robertson executed a will. The will inter alia provided that Mrs. Bredee would be entitled to the disputed property for her life and the remainder would go to the plaintiffs. Mrs. Bredee and the testator's two brothers William Cecil Robertson and Edwin Robertson were appointed executors.

[4] On 12th January 1894, a son named George Nathaniel Robertson was born of Mrs. Bredee by the testator.

[5] On 11th June 1898, the testator executed a codicil modifying several dispositions made in the will. The effect was that as regards the disputed property, it was to devolve on Mrs. Bredee for her life and the remainder was to go to the plaintiffs and the said George Nathaniel Robertson in certain contingencies.

[6] Mr. William Cecil Robertson, one of the executors, having died, one Joseph Leslie was appointed an executor in his place.

[7] The testator died on 30th August 1898. Mr. Edwin Robertson did not join in the application for probate of the will and the codicil which was filed by Mrs. Bredee and Mr. Joseph Leslie on 13th September 1898 in the Original Side of this Court. Probate was granted on 13th November 1898.

[8] Joseph Leslie died on 27th May 1901. On 9th August 1901, Mrs. Bredee for self and as ex-

cutrix to the estate of George Adolphus Robertson, mortgaged the disputed property to one Narendranath Mookerjee to secure an advance of Rs. 6,000 with interest at 9 per cent. per annum with quarterly rests for the alleged purpose of paying off debts incurred for effecting thorough repairs and making substantial additions and alterations in the disputed property.

[9] On 3rd December 1901, Mrs. Bredee for self and as executrix raised a sum of Rs. 1,000 from the said Narendranath Mookerjee on a further charge of the disputed property, on similar conditions and for the same purpose. On 7th August 1903, Mrs. Bredee for self and as executrix released the equity of redemption in the said property in favour of the said Narendranath Mookerjee for a consideration of Rs. 3,168 only.

[10] On 8th April 1904, the said George Nathaniel Robertson died. On 22nd January 1934, the said Narendranath Mookerjee took a loan from the defendant on a mortgage by deposit of the title deeds of the disputed property and of other properties. The said Narendranath Mookerjee instituted a suit being Suit No. 169 of 1935 for redemption of the said mortgage in the Original Side of this Court.

[11] Pursuant to a preliminary and a final decree in the said suit, the disputed property and certain other properties were sold by the Registrar of this Court on 11th May 1938 and the defendant was declared the purchaser; the sale was confirmed and on 27th September 1938 a sale certificate was issued in favour of the defendant; the defendant took possession through Court and is in possession.

[12] Mrs. Bredee died on 13th September 1941; and in terms of the will and the codicil, the plaintiffs have become entitled to the disputed property.

[13] The plaintiffs further alleged that prior to 9th August 1901, the estate had been fully administered and that no money was required for purposes of administration at the date of the mortgage in favour of the said Narendranath Mookerji or at any later date; that at the material dates, Mrs. Bredee was in possession as legatee and not as executrix, and the said Narendranath Mookerjee had notice, actual or constructive, of these facts; that accordingly no title except that of Mrs. Bredee as legatee passed to the said Narendranath Mookerji and to the defendant.

[14] The plaintiffs prayed for recovery of possession, mesne profits and certain incidental reliefs.

[15] The defendant filed a written statement and pleaded inter alia that the estate of George Adolphus Robertson had not been fully administered at the material dates, and that Mrs. Bredee was at the time, in possession as executrix, that the mortgage, further charge, and release were bona fide documents, the moneys raised thereby were required for administrative purposes; that the executrix was not guilty of any breach of trust and the said Narendranath Mookerji had no notice, actual or constructive, of any fraud or breach of trust, that the title to the disputed property validly passed to the said Narendranath Mookerjee and subsequently to the plaintiff; that the heir of the said Narendranath Mookerji was necessary party; that the plaintiffs knew about their rights and did not assert the same at the date of the transactions and their claim is barred by estoppel, waiver and acquiescence.

[16] The following issues were framed for trial.

1. Is the suit maintainable ? 2. Is the suit bad for non-joinder of parties ? 3. Is the suit barred by estoppel, waiver and acquiescence ? 4. Is the suit properly valued for court-fee ? 5. Was the estate of the testator fully administered prior to August, 1901 ? Was Adeline Maude Bredee then in possession of the property as executrix, or a mere legatee ? 6. Did the said Adeline Maude Bredee mortgage and sell the property as executrix ? Was she entitled to do so ? Are such transactions binding on the legatees ? Are their interests affected thereby ? 7. Were the transactions for lawful consideration ? This issue was deleted by order dated 23rd November 1944. 7. Was Narendra aware of the said transaction as alleged in the plaint? 8. Was Narendra's title to the property absolute and complete? 9. Are plaintiffs legatees under the will and are they entitled to maintain this cause against the defendant? 10. What damage, if any, is plaintiff entitled to and what relief, if any, is plaintiff entitled to ?

[17] By order No. 34 dated 28th April 1943, issue No. 4, was decided in favour of the plaintiffs. The finding on the issue has not been contested on behalf of the respondents in this appeal.

[18] Issues Nos. (1), (2), (9) were decided in plaintiffs' favour. The findings on these issues have not also been challenged on behalf of the respondents in this appeal.

[19] The findings on issues (3), (5), (6), (7), (8), (10) were in favour of the respondents. In the result, the suit was dismissed with costs. The plaintiffs have preferred this appeal.

[20] Mr. Gupta for the plaintiffs-appellants pressed the following points: (1) That the administration of the estate of Robertson was complete before the date of the mortgage and of the later transactions and that at these dates Mrs. Bredee could not act as executrix but only as a legatee. (2) Assuming that the administration was not complete and Mrs. Bredee could act as executrix *virtue officii* she has no right to transfer more than her life estate for the purposes mentioned in the documents. (3) That the purposes recited in the documents were illusory.

[21] The findings of the learned Subordinate Judge that Narendra had no notice, actual or constructive, of any extravagance or waste on the part of Mrs. Bredee or that Narendra advanced money to her believing the recitals to be true were not disputed before us.

[22] It is not disputed that the effect of the will (Ex. 4) and the codicil Ex. 5, was (1) to bequeath the household furniture, gold and jewellery and other moveables in the Lillooh house and a sum of Rs. 100 to the testator's wife Olivia Laure Robertson and sum of Rs. 100 each to a son and 2 daughters born of her and a further sum of Rs. 1000 to another daughter born of her, should she remain a spinster up to the time of the testator' death but to be reduced to Rs. 600 in case she marries; (2) a life estate in 19 and 20 Canal Street to Mrs. Bredee with a remainder absolutely to his illegitimate children, viz., the plaintiffs and a son named George Nathaniel Robertson; (3) the rest and residue of the testator's estate, of what nature or kind soever, including lands and houses, (if any) company's papers, moneys in the testator's possession at the time of his death and moneys that shall or may be due and payable to him and all the household furniture; jewellery, moneys, and other moveable properties that shall or may be in the house in which Mr. Bredee may be residing, absolutely to her.

[23] On 13th November 1898, probate of the will and codicil was granted by this Court. The list of assets annexed to the petition for probate shows that the estate was valued at Rs. 37,458 as. 5 pies 6 only, and included large sums due to the testator at his death. No debts due by the testator were mentioned. Paragraph (5) of the plaint states that the testator had no debts. Paragraph (9) of the written statement does not specifically traverse the allegation. But in para. (6) there is a general denial of all allegations in the plaint which are not expressly admitted. There is no evidence that the testator had no debts. The list of assets filed shows that a large sum was due to the testator from various people. Paragraph (6) of the plaint and para. (10) of the written statement would shew that Rs. 6500 was received from the purchaser Mr. A. P. Houghton, and it is likely that the sum was received about 7th January 1899 when the conveyance was executed. There is no evidence whether the other sums due from the persons named in the petition for probate were realised and if so, when. No inventory or account which was required to be filed under S. 317, Succession Act, by the executrix, has been produced.

[24] The testamentary expenses would be a fairly large sum. The pecuniary legacies which would be payable under the will and the codicil might come up to Rs. 1900. The residuary estate was given to Mrs. Bredee. The executor Mr. Leslie and the executrix Mrs. Bredee were not, however, obliged to spend all the receipts towards meeting the testamentary expenses and the pecuniary legacies. Mrs. Bredee required moneys for maintaining herself and her infant children. In these circumstances, it is difficult to draw the inference that the estate was fully administered before the date of the mortgage and further charge.

[25] The observation of Kekewitch J. in re *Timmis*; *Nixon* v. *Smith* (1902) 1 Ch. 176: (71 L. J. Ch. 118) to the effect that "There was no apparent obstacle in winding up the estate in a reasonable time, and I must assume that the executors did their duty" has no application to the facts of the present case. In the case of *John Agabog Vertanus* v. *James Golder Robinson*, 54 I.A. 276: (A. I. R. (14) 1927 P. C. 151) on which reliance was placed by Mr. Gupta, the transactions which were in question took place long after the death of the testator and it was apparent that the administration must have been completed long ago.

[26] The first contention raised on behalf of the appellant must therefore be overruled.

[27] It follows that Mrs. Bredee could not be said to have no duty to perform as executrix and that she could act as such *virtute officii* at the relevant dates.

[28] The second contention proceeds on the above assumption. What is contended for, is that the purposes mentioned in the relevant documents were not administrative purposes, and a transfer for such purposes was in excess of the powers of the executrix and could not pass the title to the estate.

[29] The first document is the mortgage bond Ex. A dated 9th August 1901. It recites the purchase of 19 and 20 Canal Street by the testator on 12th September 1897, the title of Mrs. Bredee and of her illegitimate children including the plaintiffs to the disputed property, under the will and the codicil, the grant of probate by the High Court on 13th November 1898 and the sale of 20 Canal Street, and of part of 19 Canal Street to A. P. Houghton in January 1899 for the consideration mentioned, and the death of the co-executor Joseph Leslie on 27th May 1901 without leaving any funds for the administration of the estate. The deed then proceeds to state that the house and premises No. 19 Canal Street "was in a very bad state of repairs and was about to come down unless necessary repairs were given to it." And that the mortgagor as executrix incurred debts to a large extent for the purpose of thoroughly repairing the said premises and for making substantial additions and alterations

thereto." The deed then goes on to state that as the debts have become pressing, and there was no money in the hands of Mrs. Bredee the executrix, the latter applied as such executrix to the mortgagee "for a loan to her as such executrix of the sum of Rupees six thousand upon security of the said house and premises No. 19 Canal Street" and "the said mortgagor for herself and as personal representative" of the said deceased testator, granted, conveyed, transferred and assigned to the mortgagee, his heirs, representatives and assigns the said house and premises No. 19, Canal Street, on the terms and conditions mentioned, the due date of payment was fixed for 9th August 1903. The recital of consideration shews cash payment of the same.

[30] The deed of further charge, Ex. C, followed about 3 months later and is dated 3rd December 1901. It incorporates similar recitals and states that the loan taken under the deed of mortgage, Ex. B, proved insufficient to pay the debts incurred by Mrs. Bredee for the purposes recited in Ex. B. The consideration is recited to have been paid in cash.

[31] The deed of release of the equity of redemption by Mrs. Bredee, Ex. B, is dated 7th August 1903. It contains recitals similar to those in the mortgage deed Ex. A, the consideration is Rs. 10,937-0-5, being the sum total of Rs. 7769-0-5, due on the mortgage and further charge, Rs. 1668 being the amount of principal and interest due on a promissory note dated 28th April 1902 executed by Mrs. Bredee, and Rs. 1500 in cash.

[32] The learned Subordinate Judge held that the recitals in the deeds of mortgage and further charge had not been shown to be untrue. As regards the deed of release the learned Subordinate Judge was of opinion that the plaintiff had not shewn that the sum of Rs. 1000 borrowed on a pronote was not taken for purposes other than administration. The learned Subordinate Judge held that all these transactions were entered into in due course of administration of the estate and were binding on the plaintiffs and their interests were affected thereby.

[33] In order to deal with the contentions raised on behalf of the appellant, we have to consider the extent of the power of disposal enjoyed by an executor at the relevant dates. The law was at that date, contained in S. 269, Succession Act (X [10] of 1865). The section, practically corresponds to S. 307 of the present Succession Act, XXXIX [39] of 1925. In the present case, the will and codicil do not impose any restriction on the powers of the executors. The Act gives the executor powers at least as extensive as those enjoyed by executor in England before 1926: *Gitarani De* v. *Narendra Krishna De*, 60 Cal. 394:(A.I.R.(20) 1933 Cal. 429).

[34] The principle why executors are vested with such large powers was stated by Lord Thurlow in *Scott* v. *Tyler*, 2 Dick 725:

"It is of great consequence that no rule should be laid down here which may impede executors in their administration or render their disposition of the testator's effects unsafe or uncertain to the purchaser, his title is complete by sale and delivery what becomes of the price is of no concern to him."

[35] The alienee from an executor who is acting as such has a right to infer that the latter is acting fairly. The fact that the alienation does not purport to be made for administrative purposes does not affect his title. The alienee is not bound to see to the application of the money. The immunity is however lost when the alienee has notice, actual or constructive, of the title of other persons and of the fact that the executor is acting in breach of trust, or the alienation is made for purposes which the executor has no power to do in the course of the administration, *Watkins* v. *Cheek*, (1825) 2 Sim. & St. 199: (25 R. R 181). In Roper on Legacies (4th Edn.), p. 447, it is stated that the power of the executor does not extend to authorise him to sell or pledge the testator's assets with a creditor of his own, so as to prevent the persons interested in the testative will from following them, for the law seems to say, as declared by Lord Kenyon "Let the executors do their duty and let the authority cease when injustice begins."

[36] The extent of the executor's (alienee's?) duty to inquire came up for consideration in the case of *Sunil Kumar Kerr* v. *Sisir Kumar*, 67 I. A. 102: (A. I. R. (27) 1940 P. C. 80) where the facts were shortly these: one Thakurdas Kerr carried on business as book-sellers and publishers under the name and style of R. Cambray & Co. He executed a will appointing his two sons as executors and directing them to carry on the business. The executors proved the will after the testator's death. They later raised money on a mortgage. The mortgage bond did not shew that the money was in fact required for a new business to be started at Madras. The mortgagees sued upon the mortgage and obtained a final decree. Some of the sons of the executors brought a suit for construction of the will, for administration and for declaration that the mortgage decree was not binding on the estate as the mortgage was taken for starting a new business. The decree of dismissal of the suit was maintained by the Privy Council, their Lordships observing that the transferee was not bound to inquire beyond the will, on the ground that much of the usefulness of the statutory power conferred by S. 307 on executors would be nullified if an extended duty of inquiry was imposed on parties dealing with executors.

[37] Tested in the light of the above principles the question which arises with regard to the mortgage and the further charge is whether the expenses of repairs and improvements are administrative purposes for which executors can charge the estate.

[38] As already stated the transactions in question took place before the present Succession Act (XXXIX [39] of 1925) came into force and are governed by the Indian Succession Act X [10] of 1865. In the latter Act there was no section corresponding to S. 308 of Act XXXIX [39] of 1925 which defines the general powers of administration possessed by executors.

[39] The expenses incurred were for thorough repairs and substantial additions and alterations. The property was bequeathed to the executrix Mrs. Bredee for life with a remainder to the plaintiffs. Mr. Gupta first contends that in the absence of a covenant to repair contained in a will or a deed of transfer the liability to pay for the same rests as between the tenant for life and the remainderman in the former and the same rule applies to the case of improvements made by the life tenant. This may be conceded, *Rowley* v. *Ginnever*, (1897) 2 Ch. 503, *Re Balke's settled Estate*, (1923) 2 Ch. 128 : (92 L. J. Ch. 329).

[40] The further contention of Mr. Gupta that in administration of the estate, the executor has to follow the above rule and cannot burden the remainder in any circumstances, cannot however, be accepted.

[41] An executor represents the estate and has, in ordinary course of management, power to effect necessary repairs and to effect improvements which are reasonable and proper. For such purposes, he can charge the estate.

[42] In *Marquis of Bute* v. *Rydar*, (1884) 27 Ch. D. 196 where the trustees under the will of the plaintiff's father employed a large annual surplus of income to the payment of improvements it was observed that:

"If they, the trustees, had raised the money by sale or mortgage, they would have charged the corpus of the estate, that they were at libety to charge the estate cannot be disputed, but there is clear authority for holding that in no case can the exercise by the trustees of their discretion affect the rights of the parties inter se."

[43] The above case has been followed in *Ouchterlony* v. *Ouchterlony*, 11 Mad. 360.

[44] In Williams on Executors Edn. 12 Vol. I part III, Book I, p. 582, the law is thus stated:

"Personal representatives may for purposes of administration or during a minority of any beneficiary or the subsistence of any life estate or until the period of distribution arises, effect certain authorised improvements upon any land vested in them as such."

[45-46] In this state of the law, it is difficult to say that the alienee Narendra Nath Mukherji was not entitled to advance the money for the purposes recited.

[47] There is nothing on the record to shew that the alienee had any notice of the fact that the repairs or improvements were unnecessary or that the sums alleged to be required for the purpose were inflated. The burden rests upon the person impeaching the validity of the transaction to prove that the alienee had notice of the facts *Corser* v. *Cartwright*, (1875) 7 H. L. 731 : (45 L. J. Ch. 605). The plaintiffs have failed to discharge the burden in the present case. The mortgage and the deed of further charge are therefore binding on the plaintiff.

[48] Coming to the deed of release Ex. B, a part of the consideration consists of the dues on a promissory note. There is no evidence as to purpose of the loan. The alienee was entitled to assume that it was duly incurred. Both as regards this sum and the additional cash consideration, the alienee could trust the person whom the testator had trusted and appointed as executrix. There is nothing to suggest that at the time the alienee had any notice that the money was borrowed for improper purposes.

[49] If the moneys as aforesaid had not been the subject of the deed of release, different considerations might have arisen. In that case, the lender who could have only stood in the shoes of the executor and rely on the latter's indemnity, would be required to prove that the loan was taken for administrative purposes or benefited the estate; *Manindra Chandra* v. *Sudhir Krishna*, 59 Cal. 216 : (A. I. R. (19) 1932 Cal. 182). The position here is different, as the executrix acting as such executed a deed of release for consideration as recited in the deed of release. *Geetaranee* v. *Narendra Krishna De*, 60 Cal. 394 : (A. I. R. (20) 1933 Cal. 429).

[50] We accordingly hold that the deed of release is also binding on the estate and passed the title of the plaintiff.

[51] Mr. Gupta also contended, as a subsidiary point that the assent of the executors to the plaintiff's legacy must be presumed from the fact that in the deed of mortgage, the executrix purported also to mortgage her life-estate.

[52] Reference was made to Ss. 332, 333, 335, Succession Act, and it was urged that assent of the executors to the legacies should be inferred.

[53] This question was not specifically put in issue. In *Sunil Kumar* v. *Sisir Kumar*, 67 I. A. 102 : (A. I. R. (27) 1940 P. C. 30), their Lordships of the Judicial Committee were of opinion that the question of assent was one of fact, and did not allow the point to be raised at that stage. The assent required by the Act may be given in fact or may be inferred, the inference being made where the executor has so acted as to

involve as a matter of necessary inference, his having done so. The mere fact that an executor who is also a devisee, includes porperty of his own in the security or gives security for an originally unsecured advance is not sufficient to rebut the ordinary presumption that the money had been raised for administrative purposes. *Barrow* v. *Griffith*, (1864) 11 Jnr. (N. S.) 6 : (147 R. R. 783); *Miles* v. *Durnford*, (1852) 2 De. G. M. & G. 641 : (21 L. J. Ch. 667).

[54] It is, therefore, not permissible to conclude from the bare fact that the executrix purported also to convey his life estate, that the assent had been given to the plaintiff's legacies. This contention is also overruled.

[55] The third contention that the recitals are illusory remains to be discussed.

[56] In the plaint, the plaintiff alleged that Mrs. Bredee had a joint business in horses with one Inglis Harvey. The allegation was denied in the written statement. The alleged deed of partnership is not signed by Mrs. Bredee and is undated. The only evidence is that of plaintiff 1 who was at the time about 13 years old. The transaction took place about 40 years ago. Plaintiff 1 is an interested witness. Corrobora. tive evidence could have been produced but has not been produced. On the evidence of plaintiff 1, the business continued till 1939. Persons who carried on the business or who were customers or neighbours could have been examined. The quick march of events affords room for suspicion. But on the evidence as a whole, the conclusion does not follow that the moneys were borrowed for the alleged horse business. The plaintiffs and their mother were on the plaintiff's evidence on good terms. The payment of consideration on the disputed transactions was not challenged.

[57] The burden lay on the plaintiff to disprove the falsity of the recitals made in the old documents. In our opinion, the third contention must also be negatived. The result, therefore, is that the appeal fails and must be dismissed.

[58] In the facts and circumstances of the case, we direct that the parties do bear their own costs in this appeal.

[59] **Lahiri J.**—I agree.

V.B.B. *Appeal dismissed.*

A. I. R (37) 1950 Calcutta 564 *[C. N. 211.]*

ROXBURGH J.

Bajranglal Jhunjhunwalla — Petitioner v. *Sm. Solaki Marwarini and another—Opposite Party.*

Civil Rule No. 223 of 1950, D/- 19th July 1950, from orders of 2nd Court Munsif, Asansol, D/- 10th February 1950 and 11th February 1950 respectively.

Civil P. C. (1908), S. 148 — Extension of time for payment of costs in conditional orders.

Where the Munsiff in relation to a proceeding under O. 9, R. 9 passes the following order: "That the Misc. case be allowed on contest provisionally. The petitioners to pay Rs. 35 to the opposite party No. 1 by 10th February 1950, upon which the suit will be restored to file. In default, the Misc. case shall stand dismissed," the order in question is not a complete final order. The order is, as it were, in two parts with a condition, and so long as the actual order of dismissal has not operated (i. e., before the expiry of the time), the Court has still seisin of the case and has jurisdiction to extend the time under S. 148. [Paras 1 & 5]

Annotation : ('50 Com.) Civil P. C., S. 148, N. 5.

Jagdish Ch. Ghose — for Petitioner.

Prasun Ch. Ghose — for Opposite Party.

Order. — This is a rule against an order of the Munsiff of Asansol in relation to a proceeding under O. 9, R. 9, Civil P. C. On 30th January 1950, he passed the following order:

"That the miscellaneous case be allowed on contest provisionally. The petitioners to pay Rs. 35 to the opposite party No. 1 by 10th February 1950 upon which the suit will be restored to file. In default, the miscellaneous case shall stand dismissed."

[2] On 10th February the petitioner in the miscellaneous case asked for further time to deposit the amount of Rs. 35. This was refused, the order being, "the petitioner must pay the money to-day failing which the miscellaneous case stands dismissed. The petition is rejected." Later on, on the same day the petitioner filed another petition asking for one day's time only to deposit the money. The order is, "Heard pleader. The prayer is considered and time is allowed. 11th February 1950 for depositing the amount failing which the miscellaneous case shall stand dismissed," in other words, after hearing the parties the Munsiff finally granted one day's extra time. He had seisin of the case and, in fact, the parties were present and were heard on the question.

[3] The petitioner here relies on the decision of Edgley J. in the case of *Muhammad Asraf Ali* v. *Nabijan Bibi*, 43 C. W. N. 417 : (A. I. R. (26) 1939 Cal. 581) for a contention that the order of 30th January here was a final order and could not be altered by the learned Munsiff except by way of formal review. It is to be noted that in the case considered by Edgley J. the facts were that the application for extension of time was made after the time had expired. It is true that some of the reasonings of the learned Judge in support of his order would also cover a case such as the present were the application for extension of time was made before the expiry of the order.

[4] In my opinion, however, it is clear from the order of 30th January that it was in part of a provisional nature as the learned Munsiff himself expressed it. I do not think it can be said that he had entirely by his order divested

himself of the power given under S. 148, Civil P. C., to alter the form of his provisional order, that is to say, to extend the time. On 10th February he first passed the order saying that the amount must be paid within that day and then finally allowed a day, each time repeating that on failure of deposit the suit will stand dismissed.

[5] Once the period has expired and the order of dismissal has operated, then, clearly it can be said that whatever may be provided in S. 148, Civil P. C, after the suit has actually been dismissed the Court has no jurisdiction to alter the order of dismissal except by way of formal review. With great respect, I think it is going a little too far to say that orders in the form of the order passed by the Munsiff here on 30th January are complete final orders. The orders are, as it were, in two parts with a condition and, in my opinion, so long as the actual order of dismissal has not operated, the Court has still seisin of the case and has still jurisdiction to make use of the powers given under S. 148, to extend the time. No case has been cited before me in which it has been held that an application for extension of time made within time cannot be allowed.

[6] The result is that this rule is discharged. I make no order as to costs.

[7] I am asked to point out that the point raised in Para. 5 of the petition to this Court has not been agitated here and is still open.

V.B.B. *Rule discharged.*

A. I. R. (37) 1950 Calcutta 565 *[C. N. 212.]*

SEN AND CHUNDER JJ.

Jageswar Sow and others — Appellants v. *The King.*

Criminal Appeal No. 137 of 1949, D/- 11th January 1950.

Criminal P. C., (1898), Ss. 161, 162 and 418—Trial by jury—Record of statement jointly during investigation—Effect.

The police may not record any statement at all but if they chose to record any statement as important or necessary they are not to do so in a 'boiled form' but separately under each such witness so that the defence may use it in accordance with S. 162 of the Code. Where, therefore, the statements of the witnesses were recorded in a joint form and not separately and no copy of them could be supplied to defence under S. 162, the conviction was set aside. [Paras 2 and 3]

Annotation: ('50-Com.) Criminal P. C., S. 161, N. S. 162, N. 8; S. 418, N. 3.

S. S. Mukherjee — for Appellants.

J. M. Banerjee — for the Crown.

Chunder J. — This is an appeal against the conviction of the three appellants under S. 304, Part II read with S. 34, Penal Code, and a sentence of eight years' rigorous imprisonment and further of the appellant Balabhadra Sow under S. 323, Penal Code, with rigorous imprisonment for three months, the sentences to run concurrently in his case. The verdict of the jury was unanimous and was accepted by the Additional Sessions Judge of Midnapore.

[2] One Mahadeb Pal is said to have been attacked by the three appellants and others and such injuries were inflicted as subsequently resulted in his death. A first information report was made to the thana by a chowkidar which was entered in the general diary. Subsequently, another local man Janmanjay gave a further information and it appears that this was not rightly allowed to go in evidence in view of S. 162, Criminal P. C., as the police had already started investigation. It further appears that when the Sub-Inspector came to the locality none of the witnesses who are alleged to have been eye-witnesses made any statement to him regarding any of these persons and it further appears that subsequently an explanation was asked for and obtained from them by the Sub Inspector. It appears that following the usual practice of a most objectionable nature these statements were taken down in what is called the "boiled" form. There is absolutely no justification for this sort of statements being recorded together. It has been made clear by the amendment of S. 161, Criminal P. C., that the police may not record any statement at all but if they choose to record any statement as important or necessary they are not to do so in a boiled form but separately under each such witness so that the defence may use it in accordance with S. 162 of the Code. This has been repeatedly pointed out by this Court and is still being pointed out without, it appears, much effect. There is absolutely no justification for flouting the Legislature and the Courts by the police authorities. The evidence of the Sub-Inspector Santosh Kumar Munshi, Prosecution Witness No. 15, is that he has done this under instructions received from his superior officers. Nothing can be more astounding than this and one cannot but too severely condemn such instructions being given contrary to the letter and the spirit of the Code. It further appears that as these statements were said to have been in a boiled form and as it was considered that the defence would not be entitled to such statements, proper materials could not be placed before the Judge and the jury. In view of the order we are going to pass it will not be at all proper for us to express any opinion on the merits of the case and so we refrain from doing so.

[3] We think it is necessary in the interests of justice that this case should go back and copies of all the so called "boiled" statements of the witnesses should be supplied to the defence

from the Police Diary and the case should be retried under S. 304, Penal Code.

[4] The question of bail of the accused persons will be at the discretion of the Sessions Judge.

[5] The appeal is allowed. The conviction and the sentences are set aside and the case is sent back for retrial in the light of the observations made above.

[6] **Sen J.**—I agree.

D.R.R. *Appeal allowed.*

A. I. R. (37) 1950 Calcutta 566 *[C. N. 213.]*

DAS GUPTA AND GUHA JJ.

Sekandar Ali — Plaintiff — Petitioner v. *Joy Chand Seraogi and others — Defendants — Opposite Party.*

Civil Revn. No. 226 of 1947, D/ 1st September 1949, against order of Sub-J., Murshidabad, D/- 22nd January 1946.

(a) Civil P. C. (1908), O. 6, R. 17—Suit for possession against certain person — Amendment seeking some other person to be brought on record as being in possession.

Ordinarily, when a suit is brought against certain persons, for obtaining possession of certain lands said to be in possession of such persons and it is later found that another person is in possession of some of the properties, it is necessary and proper that such person should be brought on the record. It will, however, be unreasonable to grant such a prayer for bringing him on the record if at the time the prayer is made, the relief as against him is barred by limitation.

[Para 6]

Annotation : ('44 Com.) C. P. C., O. 6, R. 17, N. 10.

(b) Civil P. C. (1908), O. 6, R. 17— Suit under O. 21, R. 103, Civil P. C. — Prayer for redemption —Amendment — Civil P. C. (1908), O. 21, R. 103— Limitation Act (1908), Art. 11A.

It is not correct to say that because a suit has been brought by a party under the provisions of O. 21, R. 103, Civil P. C. nothing else except the relief which is mentioned in R. 103 can be included in such a suit. Thus a prayer for redemption and possession of the property mortgaged can be included in such a suit. Where such a suit as originally instituted is brought within one year from the date of the order under O. 21, R. 101, but the prayer for amendment, whereby a person, who after the institution of suit obtains possession of the property in suit, is sought to be brought on record is made at a time when the period of one year is already passed, the relief against such person is not barred by limitation and consequently, the amendment should be allowed.

[Paras 8 and 10]

Annotation: ('44-Com.) C. P. C., O. 6, R. 17, N. 19; O. 21, R. 103, N 1 and 5; ('42-Com.) Lim. Act, Art. 11-A, N. 10.

A. D. Mukherjee—for Petitioner.

Rabindra Nath Bhattacharjya—for Opposite Party.

Ramendra Mohan Majumdar—for the Deputy Registrar.

Order. — This rule is directed against an order of the learned Subordinate Judge of Murshidabad rejecting an application for amendment of a plaint. As originally filed on 28th August 1945, the plaint asked for a declaration of title to certain properties and for redemption of mortgage as regards certain other properties and for delivery of *khas* possession of all these properties. For an appreciation of the nature of the alteration sought to be made by the amendment which was prayed for but rejected, it is necessary to mention certain facts which led up to this present litigation.

[2] All the properties in suit belonged originally to two persons, Eakub and Ebrahim. On 20th March 1923 they executed a *karbarnama* charging the properties of schedule *kha* of the plaint which included four items out of the *ka* schedule properties, in favour of opposite party 1 and the predecessor of the opposite parties 2 to 5. On 28th June 1926, one of these persons viz., Ebrahim executed a mortgage bond in favour of the present petitioner's son in respect of six items of the *ka* properties which included two out of the four items mentioned in schedule *kha*. On 9th March 1931, Eakub executed another mortgage bond in favour of the petitioner in respect of four items of properties of which two were covered by the *karbarnama* bond in favour of the opposite parties. On 26th April 1933, the opposite party 1 and the predecessor of opposite parties 2 to 5 brought a suit to enforce the mortgage created by the *karbarnama* against the mortgagors without impleading the puisne mortgagees. They obtained a decree and in execution of the decree for sale purchased the properties covered by the *karbarnama*. The entire decretal dues were however not satisfied by the sale and they applied for and obtained a personal decree against the mortgagors and in execution of the same purchased on 4th July 1942 the properties not covered by the *karbarnama*. On this date, viz., 4th July 1942, there were pending before the Court two suits, one by the petitioner, the other by his son to enforce the mortgages given by Eakub and Ebrahim. Both the suits were brought in the year 1933. The final decrees were obtained on 21st April 1943. In execution of these final decrees the petitioner purchased the properties which had been mortgaged by the two mortgages of 28th June 1926 and 9th March 1931. The petitioner thereafter obtained possession of these properties which he had purchased, which included some of the properties of which the opposite parteis had obtained possession in execution of the mortgage decree obtained by them. The opposite party 1 filed an application under O. 21, R. 100, Civil P. C. alleging that he was in possession when on 25th August 1944, he was dispossessed by delivery of possession, and applied to be put into possession. This application succeeded and an order was passed on 27th March 1945, to the effect that the opposite

party must be put in possession of these properties.

[3] It was this success of the opposite party 1 which compelled the present petitioner to come to the Court and filed the suit, as already mentioned, on 28th August 1945. In that suit, as already mentioned, he, in addition to his prayer for declaration of his right, also made a prayer for redemption of the mortgage. In the meantime the original owners of the properties, Eakub and Ebrahim, filed applications under S. 37A, Bengal Agricultural Debtors Act, for setting aside the sale and for restoration of possession of the properties that were purchased by the opposite parties in execution of the original mortgage decree and the subsequent personal decree. This application succeeded and an order for restoration of possession in favour of Eakub and Ebrahim has been passed. It has been stated before us that the order in favour of Eakub and Ebrahim was later set aside by the District Judge acting under S. 40A, Bengal Agricultural Debtors Act, and that an application against the District Judge's order is now pending in this Court.

[4] The petitioner bases his claim to add Eakub and Ebrahim as defendants in his suit on this fact that they have been restored to possession. Obviously, his prayer for possession as against the opposite parties becomes infructuous if these opposite parties had in the meantime been relieved of their possession. It is in these circumstances that the petitioner made the application for amendment of the plaint. Therein he has stated these facts as regards restoration of possession in favour of Eakub and Ebrahim and has prayed that to avoid future trouble, these persons viz., Eakub and Ebrahim should also be added as defendants in the suit, and a prayer be added that the plaintiffs get *khas* possession of the land on eviction of the defendants from all the suit lands.

[5] There can be no doubt as regards the necessity from the plaintiffs' point of view of adding these persons who had obtained possession of some of the lands and asking for relief against them. The point which the Court has to consider in deciding whether to grant or reject an application for amendment of this nature is whether the nature of the suit is substantially changed by this amendment. The learned Subordinate Judge has held that the nature of the suit will certainly be changed if the prayer for amendment of the plaint be allowed. Unfortunately he has not given his reasons for this conclusion. He has also mentioned that the suit had become more than one year old at the time this application was moved and that he was not inclined to entertain the prayer at such a late stage. Accordingly he rejected the prayer for amendment.

[6] Ordinarily, when a suit is brought against certain persons, A, B and C for obtaining possession of certain lands said to be in possession of such persons and it is later found that another person D is in possession of some of the properties, it is necessary and proper that D should be brought on the record. It will however be unreasonable to grant such a prayer for bringing D on the record if at the time the prayer is made, the relief as against D is barred by limitation.

[7] Mr. Bhattacharjya on behalf of the opposite party contends that this being a suit under the provisions of O. 21, R. 103, Civil P. C., has to be brought within one year from the date of the order under R. 101. The suit, as originally instituted, was brought within this date. But the prayer for amendment is made at a time when the period of one year has already passed. His contention is that the plaintiff's relief as against Eakub and Ebrahim is barred by limitation.

[8] I do not think that it is correct to say that because a suit has been brought by a party under the provisions of O. 21, R. 103, Civil P. C. nothing else except the relief which is mentioned in R. 103 can be included in such a suit. In the present case, as already mentioned, a prayer for redemption has been asked for though clearly relief for redemption is not one of the matters referred to in R. 103. If Eakub and Ebrahim had been the persons in whose favour the order under O. 21, R. 100 had been passed, I would have agreed with the learned advocate for the opposite party that the suit as against them should also be brought within the period of one year. I am unable to see that the prayer as against them is of the nature contemplated in R. 103 of O. 21, Civil P. C., and consequently I cannot agree that the relief as against these persons is barred by limitation on account of the suit not being brought within one year after the order was passed in favour of certain other persons under R. 101 of O. 21, Civil P. C.

[9] Mr. Bhattacharjya contends that the very fact that the relief now sought for is not of the nature contemplated in R. 103, justifies a conclusion that the nature of the suit will be altered substantially if these persons are added as parties and relief sought against them. With this we are unable to agree. The relief which the plaintiff has sought is substantially for delivery of possession to him of certain lands on declaration of his title. The fact that some persons other than the original defendants are now found to be in possession of certain of the lands has necessitated the addition of such other persons

in the category of defendants and the seeking of relief for recovery of possession as against them. To refuse this amendment and to drive the plaintiff to have recourse to the Courts by a separate suit will be, in my opinion, to encourage unnecessary multiplication of suits against which the Courts have always set their faces.

[10] On consideration of all these circumstances we are of opinion that there will be no such substantial alteration of the nature of the suit by the amendment which will justify the Court in rejecting the prayer for amendment. Accordingly we set aside the order passed by the learned Subordinate Judge and order that the plaint be amended as sought for.

[11] The rule is accordingly made absolute but there will be no order as to costs.

V.R.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 568 *[C. N. 214.]*

R. P. MOOKERJEE AND K. C. CHUNDER JJ.

Ghewarchand Rampuria — Plaintiff-Petitioner v. *Shiva Jute Bailing Ltd.—Defendant—Opposite Party.*

Civil Rule No. 661 of 1949, D/- 18-11-1949, against order of Sm. C. C. J., Calcutta, D/- 31-1-1949.

(a) Arbitration Act (1940), Ss. 34 and 39 (1) (v)— Interference in appeal or revision.

No doubt the making of an order staying proceedings is a matter largely in the discretion of the Court, but when a strong case is made, not only has the Court of appeal or the Court sitting in revision jurisdiction to interfere but ought to do so. [Para 3]

Annotation : ('46-Man.) Arbitration Act, S. 34, N. 11, S. 39, N. 1.

(b) Arbitration Act (1940), S. 34 (1)— Action in relation to contract—Suit wholly based on tort—Stay, if can be granted.

An action is not to be considered to be in relation to and in connection with a contract merely because it is shown that if there had never been any contract there would not have been any cause of action. What the Court is to look into is what the substance of the plaint is but not how the claim is framed. If the cause of action on which the claim is based is an independent one which does not arise on the contract or is in relation to the contract, it is idle to suggest that merely because at some earlier stage there was contract and, not giving the history of the case, some reference has to be made to a previous contract, it cannot be said in every such case that it is in some way or other related to the contract. [Para 6]

Whether in a case the dispute arises out of the contract or is in relation to the contract or not must depend on the particular facts of each case. [Para 7]

Thus where the cause of action in a suit for damages for wrongful conversion of goods is based wholly upon tort and tort alone which has got no connection direct or indirect with the contract which provides for reference to arbitration of any dispute arising out of or in any way relating to the contract and the reference to the contract is only a link in the story to show how the goods came to be in the possession of the defendants and the claim is not based in any way or related to the contract itself, the suit cannot be stayed under S. 34. [Para 7]

Annotation : ('46-Man.) Arbitration Act, S. 34, N. 15.

Balai Chand Mukherjee—for Petitioner.
Bejoy Bhose—for Opposite Party.

R. P. Mookherjee J. — This is an application in revision against an order of the learned Judge, Presidency Small Cause Court, Calcutta, staying a suit under S. 34, Arbitration Act.

[2] The plaintiff's case as made in the plaint is that the defendant company had entered into a contract with the plaintiff on 28th February 1946, for the purchase of a certain quantity of jute at Rs. 16-14-0 per maund. Against the said contract the plaintiff had delivered some quantity of jute out of which the defendant company had rejected 28 bales on 14th May 1946 and called upon the plaintiff to remove the same from the defendant's custody. After the receipt of the aforesaid letter, the plaintiff repeatedly attempted to obtain delivery of the said 28 bales of jute but on some pretext or other the bales were not delivered. Ultimately, on 29th October 1946, the plaintiff wrote to the defendant company again requesting it to return the said bales. The defendant company had not delivered the bales. The plaintiff accordingly filed the present suit to recover from the defendant company the value of the said bales at the market rate of Rs. 34 per maund as ruling on or about 30th October 1946, when the defendant refused to deliver "as damages for wrongful conversion of the goods as per bill submitted to them." Before filing the written statement, the defendant made an application under S. 34, Arbitration Act, and relied upon the following provision as contained in the contract between the parties :

"Any dispute whatsoever arising out of or in any way relating to this contract or to its construction or fulfilment or payment between the parties hereto and whether arising before or after the date of expiration of this contract will be referred to the arbitration of two persons, one to be appointed by each party."

Before the learned Judge, it was contended on behalf of the plaintiff that the present claim was neither one arising out of or in any way relating to the contract but the learned Judge held that the dispute which gave rise to the suit was one entirely relating to the contract in which the arbitration clause appears. In this view, he allowed the defendant's prayer and stayed the suit *sine die*. It is against this order that the present rule has been obtained.

[3] On behalf of the defendant opposite party, it is contended that the order passed by the learned Judge is in the exercise of a discretion allowed under S. 34, Arbitration Act, and this Court ought not to interfere in the exercise of that discretion by the Court below. No doubt the making of an order staying proceedings is a matter

largely in the discretion of the Court.. but when a strong case is made not only has the Court of appeal or the Court sitting in revision jurisdiction to interfere but ought to do so. In the present case, only if it can be shown, as is contended by the plaintiff, that the dispute is not one which arises out of or is in any way related to the contract then it must be held that the learned Judge had no jurisdiction to stay the suit under S. 34, Arbitration Act. It is therefore necessary to ascertain whether the arbitration clause is really attracted on the pleadings of the present case.

[4] If we examine the facts of the present case, it will appear that when the quantity of jute was delivered, by the plaintiff to the defendant that act was in the performance of the terms of the contract. The rejection of a portion of the quantity so delivered as not being of the required quality was also without doubt in relation to the contract itself. After the plaintiff had been requested to take delivery of the rejected jute, that quantity of jute from that moment belonged to the plaintiff and the defendant had no right whatever to retain possession of that quantity of jute. If the defendant does not deliver the jute which he was bound to do after the jute had been rejected, the cause of action which arises is not based upon any provision in the contract at all but on the alleged act of the defendant in retaining possession of goods which the defendant had not right to do.

[5] The cause of action as laid in the plaint is stated to have arisen on 29th October 1946 when the defendant is alleged to have wrongfully refused to return the said bales. The cause of action is not laid on the rejection of the jute far less on the delivery which had been effected previously under the contract itself. No provisions contained in the contract are required to be interpreted or even referred to and the Court is not required, on the plaint as filed, to consider any of the terms contained in the contract.

[6] An action is not to be considered to be in relation to and in connection with a contract merely because it is shown that if there had never been any contract there would not have been any cause of action, there would never have been any wrongful refusal of returning the bales had not there been an earlier rejection of the bales under the contract. Vide observations by Pickford L. J. in *Monroe* v. *Bognor Urban District Council* (1915) 3 K. B. 167: (84 L. J. K. B. 1091) relied upon by this Court, in *Johurmull Parasram* v. *Louis Drefus and Co., Ltd*, 52 C. W. N. 137 : (A. I. R. (36) 1949 Cal. 179). What the Court is to look into is what the substance of the plaint is but not how the claim is framed. If the cause of action on which the claim is based is an independent one which does not arise on the contract or is in relation to the contract, it is idle to suggest that merely because at some earlier stage there was a contract and, not giving the history of the case, some reference has to be made to a previous contract, it cannot be said in every such case that it is in some way or other related to the contract. Reliance however was placed by the learned advocate on behalf of the opposite party on *Woolf* v. *Collis Removal Service*, (1948) 1 K. B. 11. As observed by Lord Asquith, the breach in this particular case on which the cause of action was based was principally one of neglect in the performance of the contract itself. Under the contract, a party was bound to take due care of the different items of furniture and if such articles had been removed to an undesirable place and no proper care had been taken during the period the goods were so stored there, it is the failure of the party to take due care of those articles which they were bound to do under the contract. In this view of the reading of the contract, the Court of appeal came to the conclusion that even though the suit was technically framed in tort there is a sufficiently close connection between the claim as made and the transaction as under the contract to bring the claim within the arbitration clause. It was further observed that claims which were entirely unrelated to the transaction covered by the contract would no doubt be excluded. The claim in that case was held to be one which came within the arbitration clause as having arisen though not directly but at least indirectly under the contract.

[7] Whether in a case the dispute arises out of the contract or is in relation to the contract or not must depend on the particular facts of each case. The facts of the case now before us however do not make it possible to attract the special reasons given by the Court of appeal in *Woolf* v. *Collis Removal Service*, (1948-1 K. B. 11) *(supra)*. The cause of action in this case is based wholly upon tort and tort alone which has got no connection direct or indirect with the contract itself. As indicated already, the reference to the contract is only a link in the story to show how the goods came to be in the possession of the defendants and the claim is not based in any way or related to the contract itself.

[8] This rule is accordingly made absolute with costs and the order for stay as directed by the Judge must be vacated.

[9] Let the records be sent down so that the proceedings may continue according to law.

[10] **Chunder J.**—I agree.

V.R.B. *Rule made absolute.*

A. I. R. (37) 1950 Calcutta 570 *[C. N. 215.]*

HARRIES C. J. AND CHATTERJEE J.

Jhajharia Brothers Ltd. — *Applicant* v. *Commissioner of Income-tax, West Bengal* —*Respondent*.

Income-tax Reference No. 2 of 1949, D/- 26th August 1949.

(a) Income tax Act (1922), S. 12A — Submission of declaration.

The submission of a declaration as specified in S. 12A is a condition precedent to the managing agents claiming that they are chargeable only on the share to which they are entitled under the particular agreement. [Para 8]

Annotation : ('46-Man) Income-tax Act, S. 12A N. 1.

(b) Income-tax Act (1922), Ss. 10 (2) (xv) and 12A —Payments out of commission to other parties —Payments constituting expenditure laid out for managing agency business —Conditions prescribed in S. 12A, if should be satisfied.

Section 10 is a general enactment with regard to all businesses. Section 12A makes certain specific enactment with regard to a special kind of business the managing agency of a company. Hence the special or particular enactment should be operative and should be considered as an exception to the general rule. Therefore, S. 10 (2) (xv) and S. 12A should be read together and the proper construction is that if the managing agents of a company claim that they should not be made liable to pay taxes on the total amount of the managing agency commission, then they must satisfy the conditions prescribed in S. 12A although it may be that the payments made to the other parties constituted expenditure actually laid out or made wholly for the purpose of the managing agency business or solely for the purpose of earning the managing agency commission. [Para 12]

Annotation : ('46-Man.) Income-tax Act, S. 10, N. 13 ; S. 12A N. 1.

(c) Interpretation of statutes —Avoiding repugnancy.

A statute should be read as a whole and that construction should be made of all the parts together, and not of one part or section only by itself. Each section should be brought into play and that construction should be put which does not make one section repugnant to another. [Para 13]

Annotation : ('44-Com') Civil P. C., Pre. N. 7 Pt. 4.

(d) Income-tax Act (1922), S. 12A — Object of section.

It is not always correct to say that a payment the making of which is conditional on profits being earned cannot properly be described as an expenditure incurred for the purpose of earning such profits. Section 12A was introduced in order to remove all doubts on this point. Further the section has been introduced to safeguard the revenues of the country and in order to avoid possible evasion of the tax by some kind of profit sharing arrangement. [Paras 16 and 18]

Annotation : ('46-Man.) Income-tax Act, S. 12A, N. 1.

G. P. Kar and Sunil Kumar Biswas — for Applicant.

Dr. S. K. Gupta and J. C. Pal—for Respondent.

Chatterjee J.—The question referred to this Court by the appellate tribunal is as follows :

"Whether in the facts and circumstances of the case the tribunal was right in holding that the non-compliance by the assessee with the provision of S. 12A disentitled him from claiming the deduction of Rs. 32,685 in question and is assessable under the provision of S. 10 of the same Act."

[2] The applicant is the managing agent of Radha Krishna Sugar Mills Ltd. Its income is mainly from the managing agency commission which it received from the mill. The Radha Krishna Sugar Mills Ltd., was floated by a number of persons: Radha Krishna Jajharia who was *karta* of a joint Hindu family, Gobardhandas the Shroff and Joy Doyal Kasaria. It is stated that there was an agreement between these parties to share the managing agency commission payable by the Radha Krishna Sugar Mills Ltd. Later on, both Joy Doyal and Gobardhandas assigned their respective shares of the managing agency commission to Bhartia & Co. and Rai Bahadur Mangturam Tapuria. During the year of account, payments were made to the parties in terms of the agreement and they amounted to Rs. 32,685 and the details are set out in the statement of case.

[3] The payments were no doubt made by the managing agents out of the commission which the company received from the mills and they were proved by vouchers. But no declaration showing the proportion in which the commission was shared under S. 12A, Income-tax Act, was filed before the Income-tax Officer. It is further stated that the parties concerned were approached by the applicant to make the required declaration, but they refused to do so on various grounds. What those grounds are it is not stated. However, no declaration was filed before the taxing authorities and the Income-tax Officer refused to apportion the payments amongst the parties for separate assessments.

[4] On appeal the Assistant Commissioner upheld the decision of the Income-tax Officer and the tribunal has also taken the same view. However, the Commissioner of Income-tax did not oppose a reference to this Court and that is why the question aforesaid was referred to us for our opinion.

[5] Section 12A, Income-tax Act, was introduced in the year 1939 after the judgment of the Judicial Committee in *Tata Hydro Electric Agencies, Ltd., Bombay* v. *Commissioner of Income-tax, Bombay Presidency & Aden*, 64 I. A. 215 : (1937) 5 I. T. R. 202 : (A. I. R. (24) 1937 P. C. 139). That S. 12A is in the following terms :

"Where a managing agent of a company is liable under an agreement made for adequate consideration to share managing agency comission with a third party or parties, the said agent and the said party or parties shall file a declaration showing the proportion in which such commission is shared between them, and on proof to the satisfaction of the Income-tax Officer of the facts contained in such declaration such agent and each such party

shall be chargeable only on the share to which such agent or party is entitled under the agreement.".

[6] Section 12A was introduced partly to counteract the decision of the Judicial Committee in *Tata Hydro Electric case*, 64 I. A. 215 : (A. I. R. (24) 1937 P. C. 139), and also to remove doubts with reference to the application of S. 10 (2) (xv), Income-tax Act. It is often difficult to determine whether a particular payment represented by a share of profits has been made in order to earn such profits or whether it was really a distribution of the profits. (Sundaram's Law of Income-tax' 6th Edn. p. 723).

[7] The wording of S. 12A shows that it is only applicable to the managing agents of companies. There are certain conditions clearly prescribed by that S. (1) there must be an agreement to share the commission with a third party or parties; (2) that agreement must be for adequate consideration; (3) the managing agent must file a declaration showing the details of such profit-sharing; and (4) the Income tax Officer must be satisfied as to the facts contained in that declaration.

[8] Having regard to the clear language of that section there is no escape from the conclusion that the submission of a declaration as specified in that section is a condition precedent to the managing agents claiming that they are chargeable only on the share to which they are entitled under the particular agreement.

[9] Learned counsel appearing for the assessees has drawn our attention to S. 10 (2) (xv), Income-tax Act. Section 10 deals with the profits or gains of business, profession or vocation and sub-s. (2) specifies certain allowances which have got to be taken into account in computing such profits or gains. Under sub-cl. (15) an allowance permissible in respect of

'any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation.

[10] Mr. Kar contends that if we take the submission of a declaration as a condition precedent to his clients getting relief under S. 12A he can still apart from that section get the identical relief by virtue of sub-cl. (15) of S. 10 (2).

[11] I must, however, point out that there is no finding of the tribunal that the expenditure in question was laid out or expended wholly or exclusively for the purpose of the managing agency business. In the absence of such finding it is impossible for us to entertain the point. But Mr. Kar contends that having regard to the finding by the tribunal that the payments were made by the managing agents out of the managing agency commission to the four persons named therein and that they were proved by vouchers, we ought to infer that his clients satisfied the conditions prescribed in sub-cl. (15). Difficulty often exists in deciding whether a particular payment or expenditure is allowable for the purpose of income-tax.

[12] In my view, S. 10 (2) (xv) and S. 12A should be read together and the proper construction is that if the managing agent of a company claim that they should not be made liable to pay taxes on the total amount of the managing agency commission, then they must satisfy the conditions prescribed in S. 12A, although it may be that the payments made to the other parties constituted expenditure actually laid out or made wholly for the purpose of the managing agency business or solely for the purpose of earning the managing agency commission. In my opinion the two sections can be reconciled. Section 10 is a general enactment with regard to all businesses. Section 12A makes certain specific enactment with regard to a special kind of business the managing agency of a company. Hence the special or particular enactment should be operative and should be considered as an exception to the general rule.

[13] In *Muthu Chettiar* v. *Meenakshisundaram Ayyar*, 47 C. L. J. 183 : (A. I. R. (15) 1928 P. C. 35) Lord Atkinson pointed out that every part of a document should be brought into action in order to collect from the whole one uniform and consistent sense. His Lordship cited a judgment of Lord Ellenborough wherein it was observed that the intention of the parties should be collected from the whole context of the instrument so as to make one entire and consistent construction of the whole document. The same principle is applicable to the construction of a statute. A statute should be read as a whole, and it is an established rule that construction should be made of all the parts together, and not of one part or section only by itself. Each section should be brought into play and that construction should be put which does not make one section repugnant to another.

[14] Mr. Kar has referred us to a number of cases including *Commissioner of Income-tax, Bombay* v. *Tata Sons Ltd.*, A. I. R. (26) 1939 Bom. 283 : (1939-7 I. T. R. 195 : 183 I. C. 780). In that case the assessees who were the managing agents of a company were entitled to receive a commission based on profits with a certain salary per year not depending upon profits. In a certain year the company was urgently in need of funds and therefore, they procured a loan from a third person in order to finance the company. An agreement in respect of the payment of that loan was entered into between the company, the assessee and the lender and it was provided that the assessee should give and assign to the lender a certain share in the com-

mission which the former might be entitled to receive from the company.

[15] The question arose as to whether in assessing the income of the assessee the amount of commission paid to the lender should be omitted. Beaumont C. J., and Rangnekar J. held that the agreement between the assessee, the company and the lender operated as an assignment of the share of the income which the assessee was entitled to receive from the company. Therefore, that part of the assessee's income which was assigned to the lender no longer formed part of the assessee's income and could not therefore be assessed as such. In any event, the payment of share of commission to the lender was, in a commercial sense, an expenditure incurred solely for the purpose of earning profits or gains in the conduct of the agency business and, therefore, it should be excluded in computing the assessee's income as the managing agent of the company. In his judgment, the learned Chief Justice referred to *Pondicherry Ry. Co. Ltd.* v. *Income-tax Commissioner*, 58 I. A. 239 : (A. I. R. (18) 1931 P. C. 165) as also the case of *Tata Hydro-Electric Agencies*, 64 I. A. 215 : (A. I. R. (24) 1937 P. C. 139) and the later case of the Judicial Committee, *India Radio and Cable Communications Co. Ltd.* v. *Commissioner of Income-tax, Bombay Presidency and Aden*, I. L. R. 1937 Bom. 591 : 1937-5 I.T.R. 270 : (A. I. R. (24) 1937 P. C. 189).

[16] The significant fact is that this case dealt with assessment of income tax during the period prior to 1939 when S. 12A was not on the statute book. Managing agents who are paid commission on the profits of a company often enter into agreements with third parties who lend them moneys or render some other services promising to give the latter a certain proportion of the commission. The Bombay High Court had held in the case of *Tata Hydro-Electric Agencies Ltd.* v. *Commissioner of Income-tax, Bombay*, 1935-4 I.T.R. 92 and in *Commr. of Income-tax, Bombay* v. *Macdonald & Co.*, 1934-3 I.T.R. 469 : (A.I.R. (22) 1935 Bom. 197) that the managing agents were not entitled to deduct in computing their income the share of the commission which was paid to the other parties on the ground that the sums paid to such third parties represented portions of the profits and were not really expenditure for earning profits. The Judicial Committee in the *Tata Hydro-Electric case*, 64 I.A. 215 : (A.I.R. (24) 1937 P.C. 139) pointed out that this principle was not applicable to such cases. In the *Tata case* the commission paid by the managing agents was held to be not a profit or gain but it was an item or factor in the computation of the assessee's profits or gains. It is not always correct to say that a payment the making of which is conditional on profits being earned cannot properly be described as an expenditure incurred for the purpose of earning such profits. See *The Indian Radio Case*, 1937-5 I.T R. 270 : (A.I.R. (24) 1937 P.C. 189). Section 12A was introduced in order to remove all doubts on this point and the section provides the means by which each of the recipients of the managing agency commission may be charged only on the share which he actually received and, if he fulfils the conditions mentioned in that section, he may claim separate assessment on his individual share.

[17] Learned counsel for the assessee has urged that even if he does not fulfil the conditions prescribed by S. 12A he can still ignore the same and come under S. 10 (2) (xv). To put that construction would be to make S. 12A illusory. That section applies to the managing agents of a company in every case where there is an agreement for sharing the managing agency commission. If such an agreement for sharing of commission brings the assessee under S. 10 (2) (xv) the statute now says that if an an assessee wants to be charged only for the amount he has actually received out of the total managing agency commission, then he must file a declaration and prove the facts stated in the declaration to the satisfaction of the taxing authorities.

[18] Dr. Gupta has drawn our attention to a printed form of declaration to be made under the provisions of S. 12A, Income-tax Act, 1922, in respect of managing agency commission. That seems to be in accord with what is prescribed in S. 12A and it has got to be signed by the managing agents as well by the person or persons sharing the managing agency commission. This section has been introduced to safeguard the revenues of the country and in order to avoid possible evasion of the tax by some kind of profit sharing arrangement. If the agreement is *bona fide*, there ought not to be any difficulty in getting such declaration signed by all the parties.

[19] Whether a particular agreement brings an assessee within cl. (15) of S. 10 (2) will depend upon the facts of each case. But if there is an agreement whereby the remuneration of a managing agent of a company is being shared by some other parties, then the managing agent should fulfil the conditions prescribed in S. 12A in order to get relief or deduction under the statute.

[20] Therefore the answer to the question formulated in the statement of case must be in the affirmative. The tribunal was right in holding that the non-compliance with the provisions

of S. 12A disentitled the assessee from claiming the deduction asked for.

[21] The Income-tax authorities are entitled to their costs of this reference. Certified for two counsel.

[22] **Harries C. J.**—I agree.

V.R.B. *Reference answered.*

A. I. R. (37) 1950 Calcutta 573 *[C. N. 216.]*

HARRIES C. J. AND BOSE J.

Superintendent and Legal Affairs, on behalf of the State of West Bengal — Appellant v. *Kunjalal Gadia—Respondent.*

Govt. Appeal No. 4 of 1950, D/- 25th July 1950.

(a) Bengal Foodgrains Control Order (1945), Cls. 2 (c), 3 (1) and 10 (1) — Powdered rice if foodgrain—Possession of, without permit or licence.

Powdered rice is not 'foodgrain' within the meaning of the word in Cl. 2 (c) of the Order, and, therefore, possession of large quantity of powdered rice without a permit or licence is not contrary to the Order and, therefore, not an offence under S. 7, Essential Supplies Act, 1946, unless it is established that the accused ground the rice into powder because his possession before the grinding would be possession of husked rice.

[Paras 2, 17 and 18]

(b) Bengal Foodgrains Control Order (1945), Cl. 2 (c) — 'By-product' if means only product.

The Court must presume that words used in a statute or an order made under a statute are used in their ordinary sense, and it is very rarely a Court will hold that a word in a statute is used as meaning something entirely different from its ordinary grammatical meaning. The word 'by-product' in Cl. 2 (c) cannot be construed as product only because by-product is a secondary product produced incidentally in the course of the production of some other commodity which is the primary object of the process or manufacture.

[Paras 13 and 16]

N. K. Sen—for Appellant.

S. S. Mukherji with Kishore Prosad Mookerji—for Respondent.

Harries C.J.—This is an appeal preferred by the Superintendent and Remembrancer of Legal Affairs on behalf of the State of West Bengal from an order of a learned Sessions Judge allowing an appeal from a learned Magistrate of the 1st Class who had convicted the respondent of an offence under S. 7, Essential Supplies Act, read with the Bengal Foodgrains Control Order, 1945. The appellants contend that the view of the learned Sessions Judge as to the meaning of the word 'foodgrain' in the Bengal Foodgrains Control Order, 1945, is erroneous and, therefore, the order of acquittal should be set aside.

[2] The facts of the case can be very shortly stated as follows : In the very early morning of 29th April 1949, the respondent and others were seen loading a lorry in the village of Borhat near the town of Burdwan. A constable interfered and eventually the produce which was being loaded on to the lorry was seized and it is said that a very large quantity of rice flour and broken rice was taken possession of by the authorities. The respondent and others were then prosecuted in the Court of a learned Magistrate for an offence of being in possession or storing 111 mds. 15 srs. of rice without a permit or license as required by the Bengal Foodgrains Control Order, 1945, and in particular Cl. 3 (1) and Cl. 10 (1) of that order. Being in possession of this large quantity of rice without a permit was held by the learned Magistrate to be contrary to the order and, therefore, an offence under S. 7, Essential Supplies Act, 1946, had been committed. The respondent was accordingly convicted under that section and sentenced to six months rigorous imprisonment. The rice seized was ordered to be forfeited or confiscated.

[3] The respondent preferred an appeal to the Court of the Sessions Judge who held that what was seized by the police was not 'rice' as that terms is used in the Bengal Foodgrains Control Order, 1945. That being so, the order in the opinion of the Sessions Judge did not apply and, therefore, no offence under S. 7, Essential Supplies Act, had been committed. The learned Sessions Judge, therefore, allowed the appeal, set aside the conviction and sentence and acquitted the respondent. It is from that order that the present appeal has been preferred.

[4] Mr. Sen, the Deputy Legal Remembrancer, on behalf of the State has contended that the view of the learned Sessions Judge was clearly erroneous. The learned Judge was of opinion that what the witnesses described as powdered rice was not foodgrain within the Bengal Foodgrains Control Order and therefore no permit was required for its possession. Mr. Sen has contended that powdered rice is clearly rice and therefore this large quantity could not be validly possessed without a permit.

[5] "Foodgrain" is defined in Cl. 2 (c), Bengal Foodgrains Control Order, 1945, in the following terms :

"Foodgrain means any of the commodities specified in Sch. 1 to this Order or any bye-product thereof, and includes any other commodity which the Provincial Government may from time to time declare, by notification in the Official Gazette, to be a commodity to which this order applies."

[6] Schedule 1 to the Order sets out six commodities which fall within the term "foodgrain" and they are :

"(1) Rice in the husk (paddy), (2) Rice husked, (3) Wheat and Wheat Products (including Atta, Maida, Suji, Rawa and Bran), (4) Rahar, (5) Masur, (6) Gram, any variety, including Mung."

[7] It will be seen that a distinction appears to have been drawn between rice and wheat.

Both wheat and wheat products are foodgrain, but only rice in the husk and rice husked are foodgrain. Rice products are not included in the term "foodgrain". That seems to have been deliberate.

[8] Mr. Sen has contended that what was seized in this lorry which was being loaded at the instance of the respondent was rice husked. But it is clear from the evidence that what was seized was rice which had been processed, that is, rice which had been powdered deliberately and not accidentally. The most important witness on this aspect of the case is Amulya Bhattacharji, who was an Assistant Sub Inspector of Police attached to the Burdwan police station. He describes what was seized as a truck load of powdered rice. 24 bags containing powdered rice looking like flour and 27 bags containing powdered rice looking like suji. His description makes it clear that all the produce which was seized was powdered rice, though some of it had been reduced to a finer powder than the remainder. The Sub-Inspector uses the terms "powdered rice," that is, rice which has been powdered and indeed it seems to have been conceded throughout these proceedings in the Courts below that the rice was rice which had been deliberately powdered and some of it reduced to a fine powder and the remainder to a rougher powder.

[9] The question arises whether this rice powder can be regarded as 'foodgrain' as that term is used in the Bengal Foodgrains Control Order. The suggestion is that it is husked rice, but clearly that is not so. What is said to be foodgrain is either unhusked or husked rice. Unhusked rice is of course paddy. Nobody can suggest that this powdered rice can be described as paddy. Husked rice is rice grain after the outer covering has been removed. The term 'husked rice' is used to mean the grains of rice from which the outer covering has been removed and the grain in many cases polished. The term 'husked rice' cannot in my view be appropriately used to describe a powder whether of a fine or of a rougher texture. Husked rice can only mean rice grain from which the outer covering or coverings have been removed.

[10] I think it could be truly said that powdered rice is a rice product because it is produced from rice by the simple process of grinding. The schedule, as I have said, includes in the term 'foodgrain' not only wheat but wheat products and the schedules shows that Atta and Suji are wheat products within the meaning of that Order. Atta and Suji are really grains of wheat ground and powdered down and if Atta and Suji cannot be regarded as wheat, but only as wheat products, it appears to me to follow that this powdered rice could not be regarded as husked rice but only as a rice product. Unfortunately however, rice products are not included in the word 'foodgrain' and as I have said earlier it would appear that the omission is deliberate. That being so, it is I think quite impossible to hold that what was seized was husked rice and therefore covered by the order.

[11] Mr. Sen then contended that if what was seized could not be described as husked rice it could be described as a by-product of rice. As I have said earlier the term 'foodgrain' as used in the Order means not only the commodities specified in Sch. 1, but any by-products of those commodities. Mr. Sen has contended that powdered rice can be rightly regarded as a by-product of husked rice.

[12] The word "by-product" is a common English word and is defined in Murray's English Dictionary as "a secondary product; a substance of more or less value obtained in the course of a specific process, though not its primary object." If what is obtained in a process is the primary object it is a product. If what is obtained is subsidiary to the commodity which is the primary object of the process, then what is obtained is a by-product. For example, coal tar is obtained in the manufacture of coal gas; the primary object of the activities of a gas works company is the production of coal gas for lighting and heating. But in producing the coal gas large quantities of coal tar are produced. It is produced incidentally to the manufacture of the main object of the enterprise; and that being so, it is known as a by-product. Similarly, in the manufacture of petrol from crude oil a number of other very useful commodities are produced. Their production is subsidiary to the main object of the process, namely, the production of petrol and that being so, they are rightly referred to as by-products.

[13] Can it be said that powdered rice, whether the powder be of a very fine or a rougher texture, is a by-product of husked rice? This powdered rice is not produced incidentally in the production or manufacture of something else. It is produced by grinding grains of husked rice. It could, I think, well be described as a product of rice, but it could not be described as a by-product; that is, as a secondary product produced in the course of the production of some other commodity which is the primary object of the process or manufacture. It seems to me quite clear that the word 'by-product' is quite inappropriate to describe what is only rice powdered or crushed and reduced into the form of fine or rougher flour.

[14] Mr. Sen has pointed out that 'by-product' is used in a very wide sense. On 1st February 1950, an amendment of the definition of the word 'foodgrain' in the Bengal Foodgrains Control Order, 1945, was notified in the gazette. The notification is in these terms :

"In cl. (c) of Para 2 of the said order after the words 'any by-product thereof' insert the words and brackets (excepting muri and chira)".

[15] The effect of this amendment was to exclude muri and chira from the meaning of the word "by-product" and Mr. Sen has rightly pointed out that neither muri nor chira complies with the definition of the word "by-product". Muri is nothing more than fried or baked rice and chira is rice crushed and fried. Neither muri nor chira is produced incidentally in the course of the production of some primary commodity. Muri and chira are made by frying or crushing and frying rice. They may well be products of rice or husked rice, but they can never be regarded as by-products. It seems to me quite clear that whoever drafted this amendment had not a clear idea of the dictionary meaning, and indeed, the ordinary accepted meaning of the word "by-product." Nobody ordinarily would describe muri and chira as by-products of rice; nevertheless in the amendment the suggestion is that they are. Mr. Sen has contended that as the draftsman of this amendment appeared to think that muri and chira were by-products of rice, we ought to hold that what was meant in cl. (c) of Para. 2, Bengal Foodgrains Control Order, 1945, was not a by-product but a product. In short, we ought to read the definition of 'foodgrain' as meaning "any of the commodities specified in Sch. 1 to this order or any products thereof."

[16] The Court must presume that words used in a statute or an order made under a statute are used in their ordinary sense, and it is very rarely a Court will hold that a word in a statute is used as meaning something entirely different from its ordinary grammatical meaning. We should be very loath to construe the word 'by-product' as meaning only 'product'. But it seems to me that the order itself makes it quite impossible for any Court to construe the word 'by-product' as meaning 'product' only. As I have said earlier, the commodities specified in Sch. 1 as being 'foodgrain' are not only rice but wheat and wheat products. It is therefore clear that wheat products are treated as something entirely different from by-products of wheat. If the word 'by-product' in cl. 2 (c) of the Order simply meant products, then the words "and wheat products (including Atta, Maida, Suji Rawa and Bran)" would have found no place in Sch. 1 of the order. The draftsman of the order clearly drew a sharp distinction between products and by-products and we cannot give the word 'by-product' in the order a different meaning because it appears to have been misunderstood by the draftsman of the amendment. In my view by-products are something quite different from products and whatever we regard powdered rice to be, we can never regard it as a by-product of rice. To be a by-product of rice it would have to be produced, incidentally to the manufacture of some other commodity, from rice, the manufacture of which other commodity was the primary object of the process. In my view this powdered rice cannot be regarded as a by-product of either husked or unhusked rice.

[17] As this powdered rice is neither unhusked or husked rice nor a by-product of either of them the commodity does not come within the definition of the word 'foodgrain' in Cl. 2 (c) of the Bengal Foodgrains Control Order, 1945, and therefore no permit for possession of the large quantity seized was necessary. The view of the learned Sessions Judge that no offence was committed was right and therefore the appeal must fail.

[18] It was suggested by my learned brother in argument that the respondent could be convicted if it was established that he ground the rice into powder because his possession before the grinding would be possession of husked rice; unfortunately, however, there is no evidence upon which we could hold that he produced the rice powder. There was evidence that there was some machinery on the respondents premises but no evidence that it was machinery for grinding rice. Further no one spoke to grinding operations by the respondent. That being so, we cannot hold that the respondent was in possession of husked rice before grinding.

[19] I appreciate that the view that we are bound to take is technical. There seems to be no reason at all why powdered rice which is food just as much as husked rice should not come within the order. However, the order creates criminal offences and before a man can be convicted it must be clearly shown that his conduct amounts to an offence under the statute or order under which he is prosecuted. As, by what would appear to be an error of drafting, the order was not drafted in such a manner as to cover powdered rice, the possession of the same cannot be an offence. That being so, the respondent could not be convicted. The remedy lies in an amendment of the definition of the word 'foodgrain' in Sch. 1, but with that we are not concerned.

[20] In the result this appeal is dismissed and the order of acquittal is confirmed. The powdered rice seized must be returned to the respondent forthwith.

[21] The respondent will be discharged from his bail and his bail bond is cancelled.

[22] **Bose J.**—I agree.

G.M.J. *Appeal dismissed.*

A. I. R. (37) 1950 Calcutta 576 *[C. N. 217.]*

G. N. DAS AND GUHA JJ.

Mohanlal Sewlal, a Firm — Petitioner v. *Prolodh Krishna Shome—Opposite Party.*

Civil Rule No. 257 of 1949, D/- 19-7-1949.

(a) Civil P. C. (1908), O. 3, R. 4 — Appointment of pleader in land acquisition proceedings — Subsequent reference arising therefrom — Services of pleader wherther come to end on disposal of the reference *(Quære.)* [Para 4]

Annotation: ('44 Com.) Civil P. C., O. 3, R. 4 N. 17.

(b) Civil P. C. (1908), O. 3, R. 4 — Appointment of another lawyer without discharging previous lawyer—Duty of Court.

Before the Court grants the leave to discharge a lawyer the Court is entitled to make suitable provisions for the payment of the sums due to the outgoing pleader in respect of the service rendered by him and in respect of the costs incurred by him on behalf of his client. It is not open to a client as a subterfuge to engage another lawyer without formally discharging the previous lawyer and without arranging for payment of the sums due to him. [Para 6]

Hence where a person in whose favour an award of compensation in land acquisition proceedings has been made, engages another lawyer for withdrawing the compensation money from the Court without terminating the services of his previous lawyer, the Court may allow the new lawyer to withdraw the same provided a sufficient portion thereof is retained in Court in order to cover the claim for costs which the previous lawyer may establish against the client. [Para 6]

Annotation: ('44-Com.) Civil P. C, O. 3, R. 4, N. 16.

Chandra Sekhar Sen and Kamjit Mukherji — for Petitioner.

Panchanon Ghosh; Sudhanshu Kumar Sen and Ranajit Ghosh — for Opposite Party.

Order.—This Rule was obtained by the petitioner against an order of the President of the Tribunal refusing the application of the petitioner for withdrawal of the money lying before him through another advocate. The facts as they appear on record are very unfortunate.

[2] Mr. Shome was engaged by the petitioner as an advocate in connection with an acquisition case pending before the Collector. A certain sum was awarded by the Collector and a reference was filed through Mr. Shome. The reference succeeded in part. Thereafter it appears disputes arose between Mr. Shome and the petitioner as regards the payment of the sums due to Mr. Shome as his fees for the work done by him in the acquisition case and in the reference case. The petitioner engaged another lawyer to withdraw the compensation money awarded to him which was lying before the President of the Tribunal. Mr. Shome made an application for payment to him of the sums which he claimed on account of his fees and costs. This application was rejected by the President of the Tribunal by his order dated 7th January 1949. Mr. Shome has not moved this Court in revision against the order of the President of the Tribunal refusing his prayer for payment of the sums due to him out of the money lying with the President. The petitioner, as we have said, has moved this Court in revision.

[3] Mr. Sen, appearing for the petitioner, raises two points: in the first place, he contends that the service of Mr. Shome came to an end with the disposal of the reference case and as such he is no longer the advocate entitled to appear on behalf of the petitioner.

[4] It is not necessary to express any final opinion on this point. It seems to us that *prima facie* Mr. Shome did not cease to be the advocate entitled to act on behalf of the petitioner the moment the reference case was disposed of.

[5] The second contention raised by Mr. Sen is that even if Mr. Shome is still the advocate entitled to appear on behalf of the petitioner, there is no bar to the petitioner engaging another lawyer for withdrawing the money lying before the President of the Tribunal.

[6] Mr. Ghosh, appearing on behalf of the opposite party, has referred us to two decisions, one in the case of *Radhika Debi* v. *Ramasray Prosad*, 9 Pat. 865 : (A. I. R (18) 1931 Pat. 137), and the other in *Pankaj Kumar* v. *Sudhir Kumar*, 37 C. W. N. 998: (A. I. R. (21) 1934 Cal. 58). It is true that before the Court grants the leave to discharge a lawyer under O. 3, R. 4, Civil P. C., the Court is entitled to make suitable provisions for the payment of the sums due to the outgoing pleader in respect of the service rendered by him and in respect of the costs incurred by him on behalf of his client. We also agree with Mr. Ghosh that as a subterfuge the petitioner cannot engage another lawyer without formally discharging the previous lawyer and without arranging for payment of the sums due to him. The sum alleged to be due to Mr. Shome on his bill submitted to the petitioner amounts to Rs. 1,324. Mr. Ghosh further states that certain additional costs have been incurred by Mr. Ghosh for contesting certain proceedings consequent on the application for withdrawal of the money through another lawyer. The propriety of the bill, or of the additional expenses so incurred is a matter which has to be decided in appropriate proceedings. We think the rights of Mr. Shome will be amply safeguarded if we direct that out of the compensation money lying with the president, a sum of Rs. 1,700 be retained in Court till the disposal of the legal proceeding which the opposite party may be advised to take to recover the sums due to him from the

petitioner. These proceedings should be filed within three months from date. If no such proceedings are filed, the sum of Rs. 1700 will also be paid out to the petitioner. The balance of the compensation money which is lying with the President may be allowed to be withdrawn by the lawyer which the petitioner has already engaged, or some other lawyer which the petitioner may choose to engage, provided he has the required authority to withdraw such money.

[7] The rule is disposed of on the aforesaid terms.

[8] There will be no order as to costs.

K.S. *Order accordingly.*

A. I. R. (37) 1950 Calcutta 577 *[C. N. 218.]*

BANERJEE J.

Judhisthir Chandra Adak and another—Petitioners v. *P. R. Mukherjee and another—Opposite Party.*

Ordinary Original Civil Jurisdiction Matter No. 31 of 1949, D/- 4-11-1949.

(a) Industrial Disputes Act (XIV [14] of 1947), S. 19 (3) and (4)—Award—Modification of—Power of Tribunal — Modification giving retrospective nullification—Validity.

An award under the Industrial Disputes Act, 1947, passed on 25-5-1948 and in force for one year, declared *inter alia* that a certain rate of dearness allowance would come into force from January 1947. By a subsequent award dated 20-5-1949 the previous award was modified by declaring this term inoperative. In an application to set aside the latter award it was contended that the modification did not affect the interests of the workers as the original award had ceased to be effective after 25-5-1949 :

Held that the contention was not right as it overlooked the fact that though the award of 15-8-1948, had become ineffective by the passing of time, the rights flowing therefrom had not been wiped out. The award directed payment of certain dearness allowance which, if not paid, created a debt in favour of the workmen, and it was a binding debt, which could be enforced by a civil suit and that the penalty clause in the Act did not bar such a suit.

That the second award was invalid as the Tribunal proposed not only to modify a part of the award but to give it a retrospective nullification, which was beyond the jurisdiction of the Tribunal conferred on it by S. 19 (3) Proviso. [Paras 9 and 12]

(b) Industrial Disputes Act (XIV [14] of 1947), S. 15 (4)—Award—Meaning.

The award referred to in the proviso to S. 15 (4) is the entire award as the presence of the word "the" indicates, the award which was declared to be binding on the parties. [Para 10]

B. C. Mitter and P. K. Sanyal — for Petitioners: A C. Sircar, Jr. Standing Counsel with B. Bose; Niren De and B. Choudhury—for Opposite Party.

Order.—This is an application for a writ of certiorari to bring up an award made by an Industrial Tribunal on 20-5-1949, to this Court for having it quashed.

[2] There are various prayers in the petition which it is not necessary to state.

[3] There was a long standing dispute between respondent 2 and its workmen which was referred for adjudication to respondent 1 under the Industrial Disputes Act, who made an award on 15-5-1948. The Government by its order dated 25-5-1948, declared it to be binding on the parties for one year from the date of the order.

[4] By the award, the Tribunal directed, *inter alia*, that the workmen should be paid dearness allowance at a certain rate and that "the new scale of dearness allowance would come into force from January 1947 . . ."

[5] By a subsequent order dated 10-10-1948, the local Government in exercise of the powers conferred on it by the proviso of S. 19 (3) referred the award to respondent 1 who was constituted a Tribunal, for a decision in respect of matters referred to in the proviso.

[6] The order is as follows :

"Government of West Bengal
Commerce, Labour & Industries Department
Labour.
No. 2762 Lab. dated 10-8-1949.

ORDER

Whereas an industrial dispute arose between Messrs. Atlas Works Ltd., of 119-A Ripon St., Calcutta and their workmen represented by the Bengal General Engineering and Metal Factory Workers Union, 14 Motisil St., Calcutta and on a reference of the said dispute to a Tribunal, an award was made thereon by the said Tribunal which was published in the Calcutta Gazette dated 3-6-1948 under Order No. 1680 Lab., dated 25-5-1948.

And whereas on a representation made by the said Messrs. Atlas Works Ltd., of 119-A Ripon Street, Calcutta, the Provincial Government considers that there have been material changes in the circumstances on which the said award was based.

And whereas it is expedient that the said award should be referred to a Tribunal constituted under the Industrial Disputes Act, 1947.

Now, therefore, in exercise of the power conferred by the proviso to sub-s. (3) of 19 of the said Act, the Governor is pleased to appoint Sri P. R. Mukerjee, Additional District Judge, to be the Tribunal for decision in respect of matters referred to in the said proviso."

[7] The Tribunal so constituted framed certain issues.

[8] It was contended on behalf of the Union which represented the workmen before the Tribunal that it had no jurisdiction to adjudicate upon the issues. The tribunal did not give effect to this contention, with the result that an application was made to this Court for a writ of certiorari for bringing up the records of the proceedings before the tribunal to this Court and for quashing the same. I dismissed the application on the ground that it was premature. The Tribunal then decided the issues and on 20-5-1949, made an award in these words :

"Terms regarding the amount of dearness allowance and the payment of the same with retrospective effect

as per award dated 15-5-1948 shall cease to be in operation and the award is amended and modified accordingly."

This is the award which is sought to be set aside.

[9] On behalf of the respondent, it was contended that the award of 15.5.1948 had ceased to be effective after 25.5.1949 and, therefore, the modification of the award made by the award of 20.5.1949 could not affect the interest of the petitioner. Therefore, this Court should not make an order which is of no benefit to the petitioner. This contention, I do not think, is right. It overlooks the fact that though the award of 15-5-1948 had become ineffective by the passing of time, the rights flowing therefrom have not been wiped out. The award directed payment of certain dearness allowance which, if not paid, created a debt in favour of the workmen, and it was a binding debt. The award binds the parties in the same way, as if the terms were agreed between them. In my view, the payment of this debt can be enforced by a civil suit. It is a fallacy to say that the penalty clause in the Act bars such a suit. See *Couch* v. *Steel*, (1854) 3 El. & Bl. 402 : (23 L.J Q.B. 121), *Simmond's case*, (1921) 1 K.B. 616 : (90 L.J.K.B. 609) and *Standard Vacuum Oil Co.* v. *Avelino D'Souza*, 1946 Labour Gazette 331). The petitioners, therefore, are entitled to make the application.

[10] The next question is whether the tribunal in making the award of 20.5.1949 has acted in excess of its jurisdiction. The tribunal has only a limited jurisdiction under S. 19 (3) proviso, viz., to decide whether there has been a material change in the circumstances, in which the award in the said paragraph referred to was made, and to decide whether or not the award should by reason of such change cease to be in operation before the expiry of the period so fixed and to determine the period of operation of the award. That is the only thing the Tribunal can do and nothing else. An award can be modified only under S. 15. Sub-section (4) of that section says :

"Save as provided in the proviso to sub s. (3) of S. 19 an award declared to be binding under that section shall not be called in question in any manner."

The award in the proviso referred to is the entire award as the presence of the word "the" indicates, the award which was declared to be binding on the parties.

[11] Referring to the definition of the award, it was suggested on behalf of the respondent that the award means any part of the award. That submission is wrong, as is clear from the word 'the' before 'award' in the proviso.

[12] In this case the tribunal proposed not only to modify a part of the award but to give it a retrospective nullification, which, I think, is beyond the jurisdiction of the tribunal.

[13] I, therefore, set aside the award and direct defendant 2 to pay the cost of this application. The rule is made absolute to that extent.

D.R.R. *Rule made absolute.*

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BANERJEE J.

In the goods of Gagan Chandra Das — Applicant.

O. O. C. J. Appln. D/- 12-1-1949.

(a) **Interpretation of Statutes — Consolidating Act.**

Where a consolidating Act does not profess to amend or alter the provisions of the Acts consolidated, *prima facie*, the same effect ought to be given to its provisions as was given to those of the Acts for which it is substituted. [Para 10]

Anno. C. P. C. Preamble N. 2, Pts. 2 and 3.

(b) **Succession Act (1925), S. 383 (d) — Partial revocation — Death of one of grantees of Succession Certificate — Survivors if can give proper discharge.**

Section 383 does not make any provision for partial revocation of a succession certificate but provides for revocation of the certificate in its entirety.

Where a succession certificate is granted to several persons jointly and one of the grantees dies, the survivors cannot give proper discharge. The grantees of a certificate of succession have no estate in them. They are authorised only to collect the debt and to do nothing more. There cannot be any question of survivorship as in the case of executors or administrators. There must necessarily have to be a fresh certificate to empower the survivors to collect the debt and give the discharge. [Paras 16, 23 and 25]

Anno. Succession Act, S. 383, N. 1.

(c) **Succession Act (1925), Ss. 372, 373—Application for certificate — Corrections of defects in.**

Where an application is substantially defective, no certificate can be issued by allowing amendment of the application. But where the defect is a minor one, for example, in the name of the person whose estate is in question, and the petitioner takes up the correct position by putting in another petition, an order may be made. [Para 31]

Anno. Succession Act, S. 372, N. 1.

T. K. Ghose — for Applicant; K. P. Khaitan as amicus curiæ.

Order.— I regret I cannot accede to the prayer of the petitioner. I know what the refusal means. The applicant will have to make an application for a fresh certificate of succession. Even though it is to collect the debt for which a certificate had already been taken and the duty paid, the duty prescribed by the Court-fees Act must be again paid: *In re, Saroje Bahini*, 20 C. W. N. 1125 at p. 1128 : (A. I. R. (4) 1917 Cal. 380). This means further depletion of a loan fund. The debt for which the certificate was taken is a small one.

[2] I wish I could grant the prayer. If the point involved were a technical one, I would have ignored it, and granted the prayer.

[3] But, in my view, the point is not a technical one at all. It is one of substance. It touches the jurisdiction of the Court.

[4] The fact may be said in two or three sentences. The certificate was granted to several persons jointly. One of them has died. The survivors ask that the name of the deceased be deleted in the certificate, so that they may act on it. Counsel calls it a 'partial revocation' of the certificate.

[4a] Has the Court jurisdiction to do what is asked for ? In order to do that, the Court must amend the order on which the certificate was issued. The order has been drawn up and completed. Can the Court amend the order now ? Section 152, Civil P. C., gives power to Court to amend judgment, decrees or orders only in specific cases. If the decree or order sought to be amended does not come within S. 152, the Court can correct the errors only under the review section; or under the inherent power of the Court to amend or vary its own decree or order so as to carry out its own meaning. But the amendment asked for is not within the rules mentioned above. It follows therefore that I cannot amend the order. How can I then amend the certificate ?

[5] I felt great doubt in the matter when the application was first moved. I asked counsel under what section he was making the application and whether he had any authority for it. Counsel on that day asked for time to consider the matter. I gave him time. Next day he referred me to a judgment reported in *Sharif-un-nisa* v. *Masoom Ali*, 42 ALL. 347 : (A.I.R. (7) 1920 ALL. 139); counsel relies on a passage at p. 352. The passage is:

"We are of opinion that if a . . . certificate has once been granted in respect of the entire debt, and it becomes apparent to the Court that circumstances have subsequently changed so as to bring into operation cl. (d) or (e), or both, of S. 18 of Act VII [7] of 1889, it is open to the Court to pass orders having the effect of a partial revocation of the succession certificate once granted, or to modify the terms of that grant in such manner as the interest of justice may seem to require."

[6] Section 18 of Act VII [7] of 1889 has been replaced by S. 383 of the Act of 1925. There is no difference in the wording of the two sections. On the authority of that case, it was contended on behalf of the applicant that S. 383 (d) authorised the Court to grant the prayer. I was not satisfied. So, I requested the learned standing counsel to appear as *amicus curiæ* and argue the case. He was good enough to do so. He placed the opposite view in an argument brief and lucid. I am grateful for the assistance.

[7] The Standing Counsel referred me to a passage in Tristraw and Coot's Probate Practice, Edn. 19, p. 327. The passage is this:

"Alteration in a grant has been allowed where the error was in the surname, christian name, address, status, date of death or place of death of the deceased."

That passage indicates what errors the Court can amend in a succession certificate. I do not suggest that the English practice must be followed in preference to our rule or practice (if any).

[8] First as to our rules. The relevant rule is R. 21 Chap. XXXV of the Original Side Rules. That rule provides for amendment of a certificate, so as to extend its effect throughout British India. That rule does not meet the point in hand.

[9] Turning to the sections of the Succession Act, the material sections are Ss. 370 to 390, Part 10 of the Act. These sections replace the Succession Certificate Act (Act VII [7] of 1889). There has been no material change in the phraseology of the sections, relating to the matter and consideration.

[10] The Act of 1925 is a consolidating Act. It does not profess to amend or alter the provisions of the Act consolidated. *Prima facie* therefore, the same effect ought to be given to its provisions as was given to those of the Act for which it was substituted *Mitchell* v. *Simpson*, (1890) 25 Q. B. D. 183: (59 L. J. Q. B. 355). I make this observation, as I shall refer to certain decisions on the Act of 1889.

[11] I now proceed to examine the relevant sections. Section 370 places restriction on grant of certificates. Section 371 defines which Court has jurisdiction to grant certificates. Section 372 prescribes what particulars are to be given in the application for a certificate. Section 373 lays down the procedure on the application. Section 374 provides for the content of a certificate. It reads:

"Where the District Judge grants a certificate, he shall therein specify the debt and securities set forth in the application for the certificate, and may thereby empower the *person, to whom* the certificate is granted,"

to do the things specified in that section. Section 376 makes provision for extension of a certificate to any debt or security, not originally specified therein. Section 377 speaks of forms of the certificate and the extended certificate. The forms are rather important. I take a specimen form. It is addressed to the *person to whom* the certificate is granted.

"To A. B.

Whereas . . . . . this certificate is accordingly granted to *you* and . . . empowers *you* to collect those debts . . . . (debts specified in the application)."

[12] I have underlined (here italicised) the word 'you' to emphasise that the grant is made to named person or persons and he is or they are the only person or persons who is or are empowered by the Court to collect the debt, etc.

[13] Section 378 empowers the Court to amend a certificate. That section is:

"Where a District Judge has not conferred on the holder of a certificate any power with respect to a security specified in the certificate, or has only empowered him to receive interest or dividends on, or to negotiate or transfer, the security, the Judge may, on application made by petition and on cause shown to his satisfaction amend the certificate by conferring any of the powers mentioned in S. 374 or by substituting any one for any other of those powers."

[14] The most important section for our purpose is S. 383. That section deals with revocation of certificate. That section is:

"A certificate granted under this part may be revoked for any of the following causes, namely:

(a) that the proceedings to obtain the certificate were defective in substance ;

(b) that the certificate was obtained fraudulently by the making of a false suggestion, or by the concealment from the Court of something material to the case;

(c) that the certificate was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant thereof, though such allegation was made in ignorance or inadvertently,

(d) that the certificate has become useless and inoperative through circumstances;

(e) that a decree or order made by a competent Court in a suit or other proceeding with respect to effects comprising debt or securities specified in the certificate renders it proper that the certificate should be revoked."

[15] I have said in an earlier part of the judgment that counsel relies on sub-s. (d). Section 383 provides for revocation of a certificate. It does not make any provision for what counsel calls a partial revocation. It is clear that sub-ss. (a), (b), (c) and (e) provide for revocation of the certificate in its entirety, e. g., if a certificate is obtained by fraud or misrepresentation, etc. These sub-clauses strike at the root. Having regard to its setting, I do not think sub-s. (d) permits revocation of a different nature.

[16] It will be observed that S. 383 authorises revocation of "a certificate granted . . . . . (d) that *the* certificate becomes useless and inoperative through circumstances." I have underlined (here italicised) the words 'a' and 'the'. The revocation is to be of the certificate which was granted. It is not a partial revocation. The whole certificate may be revoked if at all but not partially. Section 383 does not permit 'partial revocation'.

[17] The words of sub-s. (d) have been judicially interpreted. I shall consider only three important decisions. They are decisions on the old Act, but the Act of 1925 being a consolidating Act, as I have said before, these decisions are applicable to the 1925 Act.

[18] Construing the words "becomes useless and inoperative," it was held that the words imply the discovery of something which, if known at the date of the grant, would have been a good ground of refusing it. *Bal Gangadhar Tilak* v. *Sakwarbai*, 26 Bom. 792 : (4 Bom. L. R. 637), *Gour Chandra* v. *Sarat Sundari*, 40 Cal. 50 : (15 I. C. 44). This Calcutta case follows the Bombay case, a judgment of Sir Lawrence Jenkins, C. J. These decisions say that the discovery must be of something which existed at the time of the grant but was not known then; e. g. the discovery of a later will or codicil; or discovery that the will was forged, or that the alleged testator is still living.

[19] *Gour Chandra* v. *Sarat Sundari*, 40 Cal. 50 : (15 I. C. 44) is a decision on Expln. (4) to S. 50, Probate and Administration Act (Act V [5] of 1881), which is reproduced in S. 263 (d), Succession Act, 1925. Clauses (a), (b), (c) and (d) of Ss. 263 and 383 respectively are identical. Therefore, *Gour Chandra* v. *Sarat Sundari*, 40 Cal. 50 : (15 I. C. 44) is an authority for the construction of S. 383 (d) of the Act of 1925.

[20] These decisions, however, have not been followed in *Surendra* v. *Amrita*, 47 Cal. 115 : (A. I. R. (7) 1920 Cal. 584). That is a judgment of a Bench presided over by Sir Ashutosh Mukherjee and Walmsley JJ. After a review of a large number of cases including the Bombay, the Calcutta and the Allahabad cases, I have cited above, their Lordships observed at p. 123 :

"We must consequently take it as settled law that the circumstances which make the grant useless and inoperetive and thus 'justify revocation may have come into existence after the original grant was made."

According to *Surendra* v. *Amrita*, 47 Cal. 115 : (A.I.R. (7) 1920 Cal. 584) an event which happens subsequent to the grant may affect the original grant itself.

[21] That then being the principle, the question is whether the death of one of the donees is an event which comes within sub-s. (d) of S. 383.

[22] In cases of probate or letters of administration, there are specific sections making provision for the death of one of the granters where the grant is made to several persons jointly. But, there is no such provision in the sections relating to the grant of a succession certificate. There being no express provision, can such a provision be implied ?

[23] The donees of a certificate of succession have no estate in them. They are authorised only to collect the debt and to do nothing more. There cannot be any question of survivorship, as in the case of executors or administrators, (see Ss. 311 and 312, Succession Act).

[24] Take an illustration : if A, B, C, are collectively given the power to collect a debt and give discharge, it is only reasonable to think that no two of them, or no one of them can give the proper discharge. That is common sense. The reason of the thing is this : that the

Court has not given to the two or to the one, the power.

[25] It follows, therefore, that on the death of one of the grantees of a succession certificates the other two cannot give proper discharge. There must necessarily have to be a fresh certificate to empower the survivors to collect the debts and give the discharge.

[26] I may refer to an observation in the case of *Sukumar* v. *Parbati*, I. L. R. (1941) 2 Cal. 311 : (A. I. R. 1941 Cal. 663):

"Where a certificate granted to two or more persons has become inoperative on account of the death of one of the grantees the existing certificate should be revoked before any fresh certificate is granted."

The point under consideration did not specifically arise in that case, but the observation I have quoted above is of B. K. Mukherji J. which is entitled to great respect. I respectfully agree with it. That is the law.

[27] The only thing that now remains for me is to consider the Allahabad judgment on which counsel for the applicant's so much relied. If the facts are analysed, it will be seen that the judgment does not support counsel's contention. The facts of the case are these : A Muhammadan lady died leaving as her heirs her husband (H), a daughter (D) and a brother (B). The shares inherited by them were, respectively, one-fourth, one-half, and one-fourth. A sum of Rs. 25,000 was alleged to have been due to the lady on account of her dower. After her death, B applied for a succession certificate in respect of the dower. D was a minor, and was made a party to the proceedings for the certificate and the notice issued to her was accepted by H, her father. No objection was raised on the score of H's interest in the matter being adverse to that of D. A certificate was granted to B for the entire amount. On the strength of that certificate B brought a suit against H for the recovery of his own share only of the dower debt, and got a decree accordingly. D then applied for either the revocation of the certificate which was granted to B and the granting of a certificate to D for her share of the debt, or, in the alternative, for the addition of her name to that of B in the certificate which had been granted to B. The trial Court was of opinion that there was no ground on which the certificate granted to B could be revoked and that the said certificate being extant, no further certificate could be granted. It was also of opinion that there was no provision of law by which the name of D could be inserted in the original certificate. It, therefore, dismissed the application of D.

[28] From this order there was an appeal to the High Court. The larned Judges remarked at p. 381:

"We think that the Court below could have *revoked the certificate* granted to Hussain Ali, or at least have revoked the same in part, on more than one ground. In the first place the proceedings which took place when Hussain Ali obtained his certificate were seriously defective in substance within the meaning of cl. (a) of S. 18 of Act VII [7] of 1889. Mt. Sherif-un Nissa was at the time a minor, and her father, whose interest in this matter was obviously opposed to hers, he being the debtor whose liability it was sought to enforce by means of the application, was allowed to accept service of notice on her behalf."

It will be observed that the original proceeding was defective in substance because there was no proper notice to a person who was vitally interested in the grant.

[29] The last portion of that judgment is instructive:

"We revoke the certificate granted in favour of Hussain Ali to the extent of half of the sum specified in the said certificate, namely, to the extent of Rs. 12,500 and we direct that a certificate for the realisation of this amount, as a debt alleged to be due from Hussain Ali to Mt. Keifayat Fatima, be granted in favour of the appellant Mt. Sharif-un-Nissa. (D)."

What happened in that case is this : B had already obtained his decree for his share of the debt. Further certificate to him or to anybody else on his behalf was unnecessary. The debtor (the husband of the lady who died) was a creditor to the extent of a fourth share. Therefore, there was merger of the two interests. The only outstanding debt was the debt for Rs. 12,500 to D. What did the learned Judges do? They granted a new certificate to D to enable her to realise her Rs. 12,500. It was really a new grant and I consider on the fact of the case that the old grant was revoked. But if this case means that under the Succession Act there can be a partial revocation by the death of one of the donees, I respectfully differ the judgment.

[30] As I said, the debt is a small one. If the particulars of S. 372 were in the petition, I would have on this application ordered a new certificate to issue in favour of the applicant. But the particulars are not there.

[31] I cannot allow an amendment of the petition. There is no doubt that, where the defect is a minor one, for example, in the name of the person whose estate is in question, and the petitioner takes up the correct position by putting in another petition, an order may be made—small error like this may be corrected—*Sukumar Deb* v. *Parbati Bala*, I. L. R. (1941) 2 Cal. 311: (A. I. R. (28) 1941 Cal. 663).

[32] In this case, the defect is not of that nature. I do not think, I can allow amendment of the petition.

[33] I must, therefore, dismiss the application.

G.M.J. *Application dismissed.*

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SEN J.

Ram Kalpa Kundu — Decree-holder—Appellant v. *Kasi Nath Dutta and others—Respondents.*

A. F. A. O. No. 94 of 1948, D/- 17-11-1949.

(a) Civil P. C. (1908), Ss. 47, 104 and O. 21, R. 92—Compromise of proceedings under O. 21, R. 90—Subsequent application by decree-holder purchaser to confirm sale in terms of compromise —Order on, if open to second appeal.

Where a proceeding for setting aside a sale is compromised and subsequently the decree-holder purchaser applies under S. 47 for declaration that the sale stands good in terms of the *solenama* which the judgment-debtor has failed to carry out, the order refusing to confirm the sale passed on such application will not come within the purview of O. 21, R. 92 inasmuch as it cannot be said that the judgment-debtor's application under O. 21, R. 90 has either been allowed or disallowed. The order would fall under S. 47 and is unaffected by the provisions of S. 104 and therefore, would be open to second appeal. [Para 5]

Anno. Civil P. C. S. 47, N. 28, 84.; S. 104, N. 21; O. 21, R. 92, N. 2.

(b) Contract Act (1872), S. 55 — Time when essence of contract—Intention.

The mere insertion of a term in a contract that a certain act shall be done whithin a particular period would not necessarily indicate that time was of the essence of the contract. The intention to make time an essence of the contract must be expressed in unmistakable language.

This intention must be deduced from the words of the contract, from the surrounding circumstances at the time that the contract was entered into and from the subject-matter of the contract: [Para 7]

Held on construction of *solenama* that time was of essence of contract to pay *sanja* paddy and rent within stipulated time. [Para 8]

Anno: Cont. Act S. 55, N. 2.

Ram Krishna Pal — for Appellant; Panchanan Pal—for Respondents.

Judgment.—This is a second appeal by one of the decree-holders and it arises in the following circumstances. The appellant obtained a decree and in execution of it put certain property to sale. The sale was held on 31-10-1938. In the year 1945 the judgment-debtors made an application under O. 21, R. 90, Civil P. C. for setting aside the sale on the usual grounds. That application was disposed of upon compromise on 15-12-1945. By the terms of the compromise the judgment-debtors were to deposit either in Court or amicably with the knowledge of the Court the sum of Rs. 260 within the month of February 1946, the sum of Rs. 245 within the month of February 1947 and the sum of Rs. 245 within the month of February 1948 and also to deposit the *sanja* paddy and cash rent for the years 1353 and 1354 B. S. within the month of Chaitra of those years respectively. Upon this being done the sale would be set aside. The judgment-debtors were (to be ?) put in possession of the auction sold property as licensees until the *solenama* was carried out. There was a further clause that if the judgment-debtors failed to pay any of the kist money or failed to pay the *sanja* paddy and cash rent in terms of the provisions of the *solenama*, then the sale would stand good. There was a footnote to the *solenama* to this effect, namely, that if any money in respect of the three first mentioned kists which were payable under the *solenama* were paid and if the sale were not set aside the decree-holders would be entitled to withdraw the same and would not be liable to refund the money which would be forfeited. There is another provision in the footnote which need not be set out as it is not relevant for the purpose of this appeal. The judgment debtors paid the first of the two kists within time but failed to pay the *sanja* paddy and cash rent in time. Thereupon the decree-holers made an application purporting to be one under S. 47, Civil P. C., claiming that as the terms of the solenama had not been fulfilled there should be a declaration that the sale stands good. The judgment-debtors opposed this application and the only ground taken by them which is pressed before this Court is that time was not of the essence of the contract so far as the payment of the *sanja* paddy and cash rent is concerned and therefore the failure of the judgment-debtors to pay the *sanja* paddy and cash rent within time did not entitle the decree-holders to the relief prayed for.

[2] Both the Courts below have held in favour of the judgment-debtors and have refused to grant the prayer of the decree-holders. Against this decision the present appeal has been filed by one of the decree-holders.

[3] A preliminary objection is taken on behalf of the respondents that no second appeal lies. The argument was this : The application of the decree holders was virtually an application for confirming the sale made in accordance with the provisions of O. 21, R. 92, Civil P. C. The Court has refused to confirm the sale. Against such an order of refusal an appeal lies in accordance with the provisions of O. 43 R. 1 (j) of the Code. Section 104, Civil P. C., prohibits a second appeal from such an appellate order. It was argued that although the application was instituted as one being under S. 47 of the Code, it was really an application made under O. 21, R. 92.

[4] On behalf of the appellant it was contended that this was not an application which fell within the purview of O. 21, R. 92 of the Code but it was an application for a declaration by the executing Court that in accordance with the terms of the *solenama* the sale stood good. Such

an application was not contemplated by O. 21, R. 92. It related to a matter of execution and was between the parties to the suit. It therefore fell within the purview of S. 47, Civil P. C. and a second appeal would therefore lie.

[5] There can be no question that the application relates to questions arising between the parties to the suit in which the decree was passed. There can also be no question that the application relates to the execution of that decree. It thus comes within the purview of S. 47, sub-s. (1). A second appeal would therefore lie from the decision in a proceeding upon the application unless there is some prohibition in the Code which would bar a second appeal. Now, an application by a judgment-debtor against a decree-holder for setting aside a sale in execution would come undoubtedly under the provisions of S. 47 of the Code and if there were no other provisions, a decision upon such an application by which the sale was either set aside or confirmed would be subject to two appeals, but S. 104, Civil P. C., in my opinion, would make a decision on such application subject to one appeal only. I refer to S. 104, sub-s. (1) (i) and sub-s. (2). If those sub-sections are read, it will be seen that they provide that an appeal shall lie from an order made under the rules from which an appeal is expressly allowed by rules and that no second appeal shall lie from an appellate order passed in an appeal under S. 104. Now, if an application under O. 21, R. 90 is allowed, then the Court in accordance with the provisions of O. 21, R. 92 shall set aside the sale. If it is disallowed, it shall make the sale absolute. An order passed under O. 21, R. 92 is appealable as an order by virtue of O. 43, R. 1 (j). It is thus an order which is described in S. 104 (1) (i) namely, an order made under rules from which an appeal is expressly allowed by rules. That being so, by virtue of sub-s. (2) of S. 104 of the Code no second appeal lies against an order on appeal. It does not matter how the application is instituted. What must be ascertained is the substance of the application. The question which therefore arises in this preliminary objection is whether the order passed in favour of the decree-holders is an order under O. 21, R. 92. If it does not come within that rule, then the preliminary objection must fail because it would then be an order under S. 47 which has the force of a decree and which is not governed by the provisions of S. 104 which deals with appeals from orders made under the rules of the Code. It is contended that the order comes within either sub-r. (1) or sub-r. (2) of O. 21, R. 92. The sub-rules are as follows :

"(1) Where no application is made under R. 89, R. 90 or R. 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application under R. 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale : Provided that no order shall be made unless notice of the application has been given to all persons affected thereby."

If sub-r. (1) is to apply, there must be a disallowance of the application under O. 21, R. 90. In the present case the application under O. 21, R. 90 was not disallowed. The case, therefore, does not fall within the ambit of sub-r. (1). Under sub-r. (2) the application under O. 21, R. 90 must have been allowed. In the present case that application was not allowed. Sub-rule (2) therefore will not apply. What happened in the present case has not been contemplated by O. 21, R. 92. In the present case the order was passed not according to the provisions of O. 21, R. 92 but in terms of a *solenama* and the decree-holders have applied not to enforce any rights which they alleged that they have acquired under the provisions of O. 21, R. 92 but they have applied under S. 47 for relief on the ground that the terms of the *solenama* have not been carried out by the judgment-debtors. The order therefore in my opinion is one under S. 47 of the Code which is unaffected by the provisions of S. 104. That being so I hold that a second appeal does lie and disallow the preliminary objection.

[6] The next point for consideration is whether the Courts below were right in refusing to grant the relief prayed for by the decree-holders.

[7] Learned advocate on behalf of the respondents argued that the terms of the *solenama* clearly showed that so far as the payment of the *sanja* paddy and cash rent was concerned time was not of the essence of the contract and therefore the relief prayed for by the decree-holders should not be granted. He referred me to the well-known decision of the Judicial Committee in the case of *Jamshed Khodaram* v. *Burjorji Dhunjibhai*, 43 I. A. 26 : (A. I. R. (2) 1915 P. C. 83) where the provisions of S. 55, Contract Act, were interpreted. He also referred me to a decision of this Court in the case of *Mahadeo Prosad* v. *Narain Chandra*, 24 C. W. N. 330 : (A. I. R. (7) 1920 Cal 651) where the decision of the Judicial Committee was noticed. The rights of the parties to the *solenama* must be decided in accordance with the provisions of S. 55, Contract Act, and that section says that if a party to a contract promises to do a certain thing at or before the specified time and fails to do such thing, the contract becomes voidable at the option of the promisee if the intention of the parties was that

time should be of the essence of the contract. It further says that if it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time but the promisee would be entitled to compensation from the promisor for any loss occasioned to him by such failure. It is clear from this section, apart from any case law, that the intention of the parties is what matters. This intention must be deduced from the words of the contract, from the surrounding circumstances at the time that the contract was entered into and from the subject-matter of the contract. The Judicial Committee says nothing more than this. What the Judicial Committee says is that the mere insertion of a term in a contract that a certain act shall be done within a particular period would not necessarily indicate that time was of the essence of the contract. The intention to make time an essence of the contract must be expressed in unmistakable language. The question is whether in this case such an intention is expressed in unmistakable language.

[8] I find that the learned lower appellate Court has come to its conclusion upon an entirely erroneous interpretation of the terms of the contract. It has stated the terms of the contract incorrectly and thereafter it has come to the conclusion that the payment of the *sanja* paddy and cash rent within time was not an essential term of the contract. I have set out at the inception of the judgment what the terms of the *solenama* are. The learned Judge says this :

"On going through the terms of the *solenama*, I find that the *solenama* would be liable to be rescinded only if the judgment-debtors failed to pay the three kist moneys within the time appointed. But no such condition was attached to the payment of the *sanja* paddy and cash rent. * * * I am satisfied that the *solenama* does not provide that the non-payment of the *sanja* paddy and cash rent by the dates fixed would carry with it the consequences of rescission of the *solenama*, as it does in the case of the three kist moneys."

In my opinion this is an entirely erroneous construction of the *solenama*. The provisions in the contract regarding the payment of the three sums of Rs. 260, Rs. 245 and Rs. 245 which are termed the 'kist money' and the payment of *sanja* paddy and cash rent for the years 1353 and 1354 B.S. are in the same terms. There is no difference made in the *solenama* as to the consequences which would follow from the non-payment of these two respective amounts within time. The *solenama* clearly says in the last portion of the second paragraph that if the judgment-debtors failed to pay the kist money or the *sanja* paddy and cash rent in accordance with the terms of the *solenama*, then the sale would stand good. There is no differentiation made between the kist money and the *sanja* paddy and cash rent. The terms of the *solenama* have been entirely misconstrued. Had the terms been correctly stated and had the learned Judge after a correct statement of the terms drawn his conclusion regarding the intention that would have been a different matter. But here I find that the learned Judge has misstated the terms of the *solenama*. His conclusions therefore are not based upon the terms of the *solenama* as they are, but upon the terms which are incorrectly stated. Be that as it may, what I have to decide is whether the *solenama* evidences an intention in express terms that time shall be of the essence of the contract. I am unable to see how such an intention could be more expressly stated. The sale was held many years before the *solenama* was entered into and it is obvious that the decree-holders were insisting upon something being done promptly. From the surrounding circumstances as also from the terms of the contract I am of opinion that the intention of the parties was to make time the essence of the contract not only with respect to the payment of the kists but also with respect to the payment of the *sanja* paddy and cash rent.

[9] In these circumstances I set aside the order passed by the learned District Judge and grant the application of the decree-holders with costs throughout.

K.S. *Appeal allowed.*

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END

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1950

[Vol. 37]

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DACCA HIGH COURT

1950.

CHIEF JUSTICE :

The Hon'ble Mr. Muhammad Shahabuddin.

PUISNE JUDGES :

The Hon'ble Mr. Eric Charles Ormond, Barrister-at-law.
" " Thomas Hobart Ellis, M.A.
" " Amir-ud-Din Ahmad, M.A., B.L.
" " Amin Ahmed, M.A., LL.B. (Cantab), Barrister-at-law.
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" " Muhammad Ibrahim.
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" " Faiyyaz Ali, M.A., B.L. (Acting).
" Shri Radhika Ranjan Guha, M.Sc., B.L. (Additional).
" Mr. Syed Afzal, (Additional).
" " Imam Hossain Chowdhury. (Additional).

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" Salahuddin Ahmed. (Acting).

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THE
ALL INDIA REPORTER
1950

Dacca High Court

A. I. R. (37) 1950 Dacca 1 *[C. N. 1.]*

AKRAM C. J.

Gagan Chandra Nama Sarkar—Plaintiff — Appellant v. *Sm. Goljan Bibi and others — Defendants — Respondents.*

Second Appeal No. 1706 of 1943, Decided on 5th July 1949, against decree of Dist. Judge, Noakhali, D/- 15th May 1943.

Tenancy Laws—Bengal Tenancy Act (VIII [8] of 1885), Sch. 3, Art. 3 —Limitation under, applies to mortgagee from tenant also—Suit for possession by mortgagee auction-purchaser after 2 years of his ouster by landlord is barred—Plea of limitation is mixed question of fact and law — No prejudice is caused to plaintiff when facts are admitted — Civil P. C. (1908), Ss. 100 and 101—Limitation Act (1908), Art. 144.

A, who was an occupancy raiyat under landlord *B* mortgaged his holding to *C*, who instituted a suit on his mortgage in 1931, got a decree and in its execution purchased the land on 24th November 1934. Possession was delivered symbolically to *C* on 12th July 1935. In the meanwhile *B* got a rent decree against *A* in 1930 and in execution thereof *B* purchased the land at auction on 22nd November 1931, taking possession of it in June 1932. *D* got a lease of the same land from *B* on 14th December 1935 and was in possession since that date. In 1942 *C* brought a suit for possession of the land as mortgagee auction-purchaser basing his cause of action on the fact that when he wanted to take actual possession he was foiled by *A* and *D*. The trial Court decreed the suit but the first appellate Court held it to be barred by limitation under Art. 3 of Sch. 3, Ben. Ten. Act. *C* appealed :

Held that the plea of limitation was a mixed question of fact and law and plaintiff *C* could not be held to have been prejudiced by the permission to raise it for the first time in appeal as on his own case, *C* was never in possession and *D* was in possession from 14th December 1935, the date of the kabuliyat to *D* by landlord *B* which had amounted to an ouster of *C* by landlord *B*: A. I. R. (23) 1936 Cal. 299 and A. I. R. (29) 1942 Cal. 611, *Ref.* [Para 8]

Held further that the principle that the dispossession of the mortgagee having commenced after the date of the mortgage time should not run against him is a correct principle where the Limitation Act has to be applied but Art. 3 being a special provision of limitation enacted for the benefit of the landlord the general principle stated above cannot be held to be applicable in a case like this : A. I. R. (17) 1930 Cal. 311, *Rel. on.* [Para 9]

Jitendra Kumar Sen Gupta for Bhobotosh Chakravorty — for Appellant.

Prafulla Kumar Roy for Rabiranjan Das Gupta — for Respondents.

Judgment. — This appeal by the plaintiff arises out of a suit for the recovery of khas possession of the plaint lands on declaration of plaintiff's title thereto as decree-holder auction-purchaser in mortgage execution case No. 194 of 1934.

[2] Briefly stated the plaintiff's case was that defendant 1, who was an occupancy raiyat under the Maharaja of Tippera, mortgaged his holding to the plaintiff; that as the mortgage dues were not paid, the plaintiff instituted mortgage Suit No. 280 of 1931, got a decree and in execution thereof purchased the suit land on 24th November 1934; that he then took delivery of symbolical possession through the Court on 12th July 1935, but in the meanwhile defendant 1 in collusion with the officers of the landlord suffered a rent decree to be passed against himself in a rent suit in 1930 and in execution of that decree got the properties in suit sold at auction on 22nd November 1931; that the landlord purchased the said properties and took possession thereof sometime in June 1932; that defendant 1 obtained a benami settlement of the said land from the landlord in the name of defendant 3 on 14th December 1935 and again had the same sold in the benami of his wife, defendant 2, and after that created a mortgage in favour of defendants 4 and 5; that all the transactions from the settlement taken by defendant 3 to the mortgage in favour of defendants 4 and 5 were all manipulated by defendant 1 and were fraudulent and collusive transactions; that in fact possession of the land in dispute had remained

with defendant 3 throughout inspite of the sale under the rent decree aforesaid; that no notice for annulment of the mortgage incumbrance under S. 167, Ben. Ten. Act was served upon the plaintiff and, consequently, his right to the suit land purchased at the auction sale on 24th November 1934 had remained intact and he was entitled to khas possession of the same, that when he wanted to take actual possession on 31st July 1936 he was foiled by the defendants.

[3] Defendants 2 and 3 alone contested the suit. They denied all the material allegations of the plaintiff and averred that the plaintiff's interest in the suit land ceased to exist after the rent sale on 22nd November 1931 long before the mortgage sale on 24th November 1934; that the settlement of the suit land by the landlord with defendant 3 was a *bona fide* settlement and was not benami for defendant 1; that the subsequent transactions thereafter were also valid and *bona fide*.

[4] The real question seems to me to be whether the plaintiff's claim to the suit land by right of auction purchase in the mortgage sale should prevail over the defendant's settlement obtained from the landlord, who had purchased the said land at a prior rent sale.

[5] The trial Court decreed the suit, taking the view that the mortgagee auction-purchaser was entitled to have possession of the properties in the absence of any annulment of the mortgagee's interest by notice under S. 167, Ben. Ten. Act: *Bidhuranjan Sarkar* v. *Soleman Pramanik*, 45 C W. N. 883 : (A. I. R. (28) 1941 Cal. 613). and that the rent sale was subject to the mortgage sale in view of S. 52, T P. Act.

[6] Defendants 2 and 3 thereupon appealed and the lower appellate Court reversed the decision of the trial Court and dismissed the suit, holding *inter alia* that this case was governed by the special law of limitation i. e., Art 3, Sch. 3, Ben. Ten. Act and as more than two years had elapsed between the date of possession by the landlord (June 1932) or at any rate by defendant 3 (14th December 1935) and the date of suit by the plaintiff (24th January 1942), plaintiff's claim was barred by limitation.

[7] Against that decision, the plaintiff has preferred the present appeal. It has been urged before me by the learned advocate for the appellant that the landlord purchaser, at a rent sale, is bound to follow the provisions of S. 167, Ben. Ten. Act, if he is desirous of annulling the incumbrances; that in case he fails to do so, the holding purchased by him remains subject to the mortgage and *Sital Chandra* v. *Parbati Charan*, 35 C. L. J. 1 : (A. I. R. (9) 1922 Cal. 32), is relied upon in support, it is further urged that the plaintiff mortgagee auction purchaser was entitled to claim recovery of possession from the defendants as the purchase by the landlord had taken place during the pendency of the mortgage execution case and was thus affected by the doctrine of *lis pendens*. However, whatever that may be, it seems to me that on the plaintiff's own case and the findings arrived at by the Court of appeal below the plaintiff cannot succeed, as the suit was instituted in 1942 and the plaintiff's case was that he had never been in possession, and that defendant 3 or defendant 1 was in possession of the land since 14th December 1935. Regarding this aspect of the case in the course of his judgment the learned Judge in the Court below has observed as follows :

"That possession must have ousted the plaintiff. It is idle for the plaintiff to say that he chose to allow his tenancy to remain fallow, and that therefore he was not in possession. His cause of action did not arise in July 1936 when he went to take possession; it arose on the date of the lease to defendant 3. He was then put out of possession in consequence of the act of the landlord and of the new tenant, defendant 3, inducted upon the land."

[8] It is, however, argued that no point of special limitation was taken before the Court of appeal below; that no issue was framed upon it and no evidence was adduced in respect of it; that it was a mixed question of fact and law and should not have been allowed to be raised for the first time before the lower appellate Court. But it has been pointed out by the learned Judge in the Court below that the plaintiff is not in the least prejudiced on that account, the plaintiff's case being that he had never been in possession and that defendant 3 was in possession from the date of the kabuliyat namely 14th December 1935. The only question, therefore, that can arise on the above admitted facts would be whether in the above circumstances the possession by defendant 3 amounted to dispossession by the landlord. On the facts and circumstances of this case, I do not think that the learned Judge in the Court of appeal below fell into any error in inferring ouster by the landlord on the basis of his settlement with defendant 3 aforesaid. Reference here may be made to the decisions in the cases of *Sheikh Alam* v. *Atul Chandra*, 40 C. W. N. 173 : (A.I.R. (23) 1936 Cal. 299) and *Shashi Kanta* v. *Nayjan Bewa*, 46 C.W.N. 938 : (A I.R. (29) 1942 Cal. 611).

[9] I am not impressed with the argument that although the case of defendant 1, mortgagor may be governed by Art. 3, Sch. 3, Ben. Ten. Act, the case of his mortgagee the plaintiff falls under the general law of limitation under Art. 144, Limitation Act. Reference in this connection may be made to the decision in the case of *Mohim Chandra* v. *Kamai Lal*,

33 C. W. N. 1085 : (A.I.R. (17) 1930 Cal. 311), where in a similar circumstance it was observed

"that the principle that the dispossession of the mortgagee having commenced after the date of the mortgage time should not run against him is a correct principle where the Limitation Act has to be applied but Art. 3 is a special provision of limitation enacted for the benefit of the landlord and the general principle stated above cannot be held to be applicable in a case like this. If it is allowed to prevail, the result will be that a tenant out of possession is unable to recover possession of a holding from the landlord after the lapse of two years; but his mortgagee is entitled to do so within 12 years of dispossession."

[10] In my opinion the contentions put forward by the learned Advocate for the appellant fail and I, accordingly, dismiss this appeal; but I make no order as to costs.

[11] The cross-objection is not pressed by the learned advocate for the respondents and is also dismissed without costs.

D.R.R. *Appeal dismissed.*

A. I. R. (37) 1950 Dacca 3 *[C. N. 2.]*

SHAHABUDDIN AND AMIN AHMED JJ.

The Crown v. *Jatindra Mohan Roy* — *Opposite Party.*

Criminal Ref. Nos. 1 and 2 of 1947, Decided on 8th July 1949.

(a) Legal Practitioners Act (1879), Ss. 13, 14 — Legal practitioner charged with criminal offence — Reference before launching prosecution and obtaining conviction is not incompetent.

Where a legal practitioner is charged with a criminal offence, a reference under the Act is not incompetent because there has been no previous criminal trial and conviction in respect of the charges formulated in that reference: *Case law referred.* [Para 9]

Annotation: ('46-Man.) Legal Practitioners Act, S 14 N 1.

(b) Legal Practitioners Act (1879), Ss. 13 (f) and 14 — "Any other reasonable cause" in S. 13 (f) — Meaning — Words are not confined to misconduct in professional capacity — Muktear held guilty of misconduct.

The words "any other reasonable cause" in S. 13, cl. (f) are not confined to misconduct of which a practitioner is guilty in his professional capacity but embrace all causes which may afford reasonable grounds for his suspension or dismissal. Section 13 (f), therefore, will cover the case of a Muktear charged with a criminal offence, though the offence complained of was not committed in his professional capacity: 29 Cal. 890 (F.B.) and A.I R. (4) 1917 Cal. 428, *Rel. on.* [Para 10]

J, a senior Muktear, stood surety in an abduction case for the abducted woman, a Hindu widow, and took her in his custody. She was removed from place to place until she came to live with *M*, a Muslim clerk of *J's* son and there sold her property for a nominal price. The sale proceeds were withdrawn from the bank within a few months after they were deposited. *J* gave no explanation as to how she came to live with *M* and as to his position in the sale transaction:

Held that apart from being a surety, when the widow escaped from his control, as a respectable member of the Bar, *J* should not have remained met over all that happened at *M's* house and the was nothing to show that he took any steps to trace her out or tha he made any complaint against anybody in respect of her. So, on the facts and circumstances of the case, the conduct of *J* was not what was expected of a member of the profession to which he belonged. So, he was guilty of misconduct and was liable for action under S. 14. [Para 17]

Annotation: ('46-Man.) Legal Practitioners Act, S 13 N 7b.

Advocate-General — for the Crown.

Priyanath Bhattacherjee — for Opposite Party.

Amin Ahmed J.—This is a reference under S. 14 (b), Legal Practitioners Act by the Sub-divisional Magistrate of Gaibandha through the District Magistrate and the Sessions Judge of Rangpur against one Babu Jatindra Mohan Ray, a Muktear practising in the Criminal Courts of Gaibandha Sub-Division in the District of Rangpur. The Sub-divisional Magistrate of Gaibandha has recommended disciplinary action against him and the District Magistrate and the Sessions Judge have endorsed his views. The material facts as stated in the report are as follows:

[2] In Baisak 1353, Jashoda Dashya filed a complaint under Ss. 147, 343 and 366, Penal Code, against one Ghataram Das and others being Case No 410 of 1946 alleging, *inter alia*, that Kanakprova who was the widow of her late brother, was abducted by the accused. A search warrant was issued, Kanakprova was recovered by her cousin one Bolai with the assistance of the Home Guards and was produced before the Court on 3rd July 1946, when the opposite party Jatindra Mohan Ray (and hereafter we shall call him only "Jatin Babu") stood surety for her and it was arranged, lest she was abducted again if she were taken to her relation's house, that she would stay in Jatin Babu's house and her relations would bear all her expenses. On 1st August 1946 when Ghatram, the principal accused of this case, surrendered in Court, Babu Sailendra Mohan Ray, son of Jatin Babu stood surety for him and had him released on bail. After one month Kanakprova was removed to the house of one Bejoy Govind Nag and after her stay there for a few days, she was removed to the house of one Miajan Sarkar, who was then the registered clerk of Jatin Babu's son, Sailendra Mohan Ray. As the relations of Kanakprova could not interview her there the villagers suspected foul play, held a *salis* over the matter and reported it to the President of the Hindu Mahasabha. When the latter enquired of Kanakprova and her whereabouts from Jatin Babu, he denied that Kanakprova was staying in the house of Miajan and said that she was living in a Brahmin family at Ballanjhar. Further, under instructions of Jatin Babu, Miajan negotiated the sale of her movable and immovable properties, her corrugated iron sheet hut was sold while she was staying at Jatin

Babu's house, the receipt of which was written by Miajan on the dictation of Jatin Babu and Sailendra Mohan Ray was an attesting witness to the document thereof; rents were realised on her account, remissions were granted over receipts written by Miajan and while she was in the custody of Jatin Babu she was made to sell property worth about Rs. 10,000 for Rs. 4000 out of which only Rs. 3000 was deposited in the bank in the name of a minor son of Miajan and that also were all withdrawn from the bank within a few months after they were deposited and this transaction was hastened as the final report of the Case No. 410 of 1946 filed by the police was accepted on 8th October 1946 and the accused were all discharged on that date. Lest Kanakprova's relations knew the result of the case the sale of this immovable property for Rs. 4000 was effected on 12th October 1946, i. e., on the reopening date of the criminal Courts and it was on the representation of Jatin Babu to Guna Mohan Das that Kanakprova wanted to sell her property in order to get some cash money and that Jatin Babu would see that Kanakprova was married well, that the vendee Guna Babu was satisfied about the *bona fides* of the transaction and actually bought the property as he did.

[3] On 17th October 1946, Balai Chandra Sarkar a maternal cousin of Kanakprova, filed a complaint before the Sub-divisional Magistrate, Gaibandha, alleging that she was insane and that her uncle-in-law one Kali Charan Das was after her properties and had her abducted. On this, although an abduction case being case No. 916 of 1946 was started, ultimately the Police submitted a final report to the effect that no case had been made out against the accused.

[4] On 8th January 1947, on behalf of the Hindu Public of Gaibandha the present petition was filed against Jatin Babu, Sailendra Mohan and Miajan alleging, among other things, that both Jatin Babu and Sailen Babu

"had ruined this Hindu widow by allowing her to be kept under the custody of the said Miajan Sarkar knowing fully well what sort of man Miajan Sarkar is."

On this petition, on 14th February 1947, the present proceedings were drawn up by the Sub-divisional Magistrate of Gaibandha against Jatin Babu the opposite party in this case and he framed the following charges against him and called upon him to answer them :

"Whereas it has been brought to my notice by some members of the public that Babu Jatindra Mohan Ray, a Muktear, ordinarily practising at Gaibandha in the criminal Courts stood surety for the abducted woman Kanak Prova Dasya, a Hindu widow for Rs. 200 on 3rd July 1946 in connection with G. R. Case No. 410 of 1946, *Emperor* v. *Ghata Ram Das and others*, under Ss. 366/342, Penal Code, and took her to his house where Kanak Prova used to bring necessary food stuff and money from her house for her maintenance; Kanakprova Dasya allowed to stay in the house of Babu Jatindra Mohan Roy Muktear for about a month and thereafter she was shifted to a house near the Gaibandha Thana where she had been for only about a fortnight, when Babu Jatindra Mohan Roy Muktear, allowed Miajan Sarkar—clerk of his son Babu Sailendra Mohan Roy Muktear—to remove the said Kanakprova to the house of Miajan Sarkar. The Vice President of the Local Hindu Mahasabha Babu Nishi Kanta Sarkar, B. L., the relations of Kanak Prova and her people inspite of their repeated requests could not know the whereabouts of Kanak Prova either from Jatin Babu, his son Sailen Babu or the clerk Miajan Sarkar and Babu Jatindra Mohan Roy Muktear began to negotiate with some persons to sell all the properties of Kanak Prova worth about Rs. 10,000 giving out that the sale proceeds would be deposited in a bank and Kanak Prova would be settled in the town of Gaibandha and she would be given in marriage with any Hindu bridegroom. Holding out such hopes and keeping Kanak Prova concealed in the house of Miajan Sarkar beyond the reach of her relatives and any legal advice, she was sent with Miajan Sarkar to Rangpur on 12th October 1946 and she was induced to sell all her properties at a nominal price of Rs. 4000. Thereafter the money and Kanak Prova could not be traced. But a petition having been filed by Balai Sarkar—a cousin of Kanak Prova—it was given out that Kanak Prova embraced Islam and Nikamarried Miajan Sarkar; it is reported that at the time of giving shelter to Kanak Prova, Jatin Babu assured her to look upon her as his daughter and to create confidence in her, Miajan Sarkar called her mother but after the above incident Babu Jatindra Mohan Roy Muktear did not take any action against Miajan Sarkar, moreover he has still been retained as a registered clerk under Jatin Babu's son Sailen Babu who live in the same house and in same mess, by concealing his antecedents."

[5] On 4th March 1947 pending the enquiry, with the sanction of the District Magistrate Jatin Babu was suspended by the Sub-divisional Magistrate from practising but on 24th March 1947, after hearing the arguments of the lawyer for Jatin Babu this order was vacated. After making the enquiry, at the time of submitting the proceedings to this Court, the Sub-divisional Magistrate, on 16th July 1947, with the sanction of the District Magistrate suspended Jatin Babu again from practice pending enquiry by this Court.

[6] The learned Advocate-General appears in support of this reference and Mr. Bhattacherjee appears for Jatin Babu against this reference.

[7] The learned Advocate Mr. Bhattacherjee for the opposite party has taken a preliminary objection that his reference is incompetent as the offences complained of are criminal offences and so, his client should not be tried summarily under the Legal Practitioners Act but he should be tried by a criminal Court and, if found guilty, then and then only proceedings under the Legal Practitioners Act may be taken against his client. In support of his argument, he has relied on the following cases: *In re Mukhtear of Bargarah* reported in A.I.R. (30) 1943 Pat. 52: (44 Cr. L. J. 323 S. B.). This is a decision of a Special Bench

of the Patna High Court. In this case Harries C. J. said :"

"When the charge brought against a legal practitioner amounts to an allegation of the commission of a serious crime, the proper procedure to follow is to launch a prosecution for that crime and, if a conviction is obtained, to institute proceedings under the Legal Practitioners Act."

Mr. Bhattacherjee has also cited the decisions of the Calcutta High Court: the case of *Chandi Charan*, reported in 24 C. W. N. 755 : (A. I. R. (7) 1920 Cal 565: 21 Cr. L. J. 691), case of *In the matter of Rajendra Kumar Dutt*, reported in 30 C. W. N. 186 : (A. I. R. (13) 1926 Cal. 502 : 27 Cr. L. J. 701) and the case of *In the matter of Satish Chandra*, reported in 31 C. W. N. 554 : A. I. R. (14) 1927 Cal. 536 : 29 Cr. L. J. 665). It is contended that in all these cases, it has been held that the correct procedure in those cases where a practitioner is charged with criminal offences is to institute criminal prosecution first. We may mention that even in the above case of *Rajendra Kumar Dutta*, (30 C. W. N. 186 : A. I. R. (13) 1926 Cal. 502 : 27 Cr. L. J. 701) and *Satish Chandra Singha*, (31 C. W. N. 554 : A. I. R. (14) 1927 Cal. 536: 29 Cr. L. J. 665), the case of *In the matter Chandi Charan*, reported in 24 C. W. N. 755 : (A. I. R. (7) 1920 Cal. 565 : 21 Cr. L. J. 691) was referred to with approval. In the latter case at p. 762, Mukherjee J., observed:

"It is not necessary to lay down an inflexible rule that there must in every case be a trial and conviction for criminal misconduct before disbarment will be ordered. That should be the ordinary rule when the misconduct alleged has no direct connection with the conduct of the pleader in his practical and immediate relation to the Court. On the other hand, when the misconduct attributed indicates unfitness to discharge professional duties, a criminal conviction may not always be a prerequisite to the adoption of disciplinary measures; and indeed, notwithstanding acquittal on the criminal charges, disciplinary measures may be successfully taken as in the case of *In the matter of the Second Grade Pleaders*, reported in 34 Mad. 29: (6 I. C 313). The test to be applied in each case is, whether the person concerned will be prejudiced by the adoption of summary procedure for the investigation of what is in reality a grave criminal charge."

[8] It will thus appear even from the decision of the Calcutta High Court that there is no such hard and fast rule that proceedings under the Legal Practitioners Act must follow only a conviction in criminal Court. Besides, as urged by the learned Advocate General far from there being any such invariable rule, it will appear from the wording of S. 14, Legal Practitioners Act itself, that S. 14 gives the High Court very wide discretion in regard to the exercise of disciplinary authority. In support of this, the learned Advocate General has cited the case of *In re S. B. Sarbadhicary*, reported in 34 I. A. 41 : (5 Cr. L. J. 57 P. C.), where their Lordships of the Judicial Committee held that in a case of libel and contempt of the High Court Judges, the High Court had "reasonable cause", in suspending the practitioner.

[9] The learned Advocate General has also cited a series of cases where proceedings taken under the Legal Practitioners Act before conviction not only in ordinary cases of charges of criminal offences but also in cases of charges of grave criminal offences were approved by Courts. The cases are: *In the matter of a Pleader*, reported in 20 C. W. N. 1069: (A. I. R. (4) 1917 Cal. 609 : 18 Cr. L. J. 42), *In the matter of Rasik Lall*, 20 C. W. N. 1284: (A. I. R. (4) 1917 Cal 478: 18 Cr. L. J. 420), *District Judge, Kistna* v. *Hanumanulu*, 39 Mad. 1045 : (A. I. R. (3) 1916 Mad. 1144: 17 Cr. L. J. 38 F. B.), *P, a first grade Pleader, Markapur*, A. I. R. (29) 1942 Mad. 630: (44 Cr. L. J. 17 S. B.), *In the matter of R. S. Pleader*, A. I. R. (22) 1935 Pat. 249: (36 Cr. L. J. 1023 S. B.), *K., a Muktear of Aurangabad*, A. I. R. (23) 1936 Pat. 337: (38 Cr. L. J. 916 S.B.), *In the matter of U, an Advocate*, A. I. R. (26) 1939 Rang. 142 : (1939 Rang. L. R. 213 S. B.); *In re Hari Prosunno*, reported in 21 C. W. N. 516 : (A. I. R. (5) 1918 Cal. 196 : 18 Cr. L. J. 465) and *Re Second Grade Pleader*, reported in 51 Mad. 798 : (A. I. R. (15) 1928 Mad. 918 : 29 Cr. L. J. 783 F. B.). In the above case of *a Pleader* reported in 20 C. W. N. 1069 : (A. I. R. (4) 1917 Cal. 609: 18 Cr. L. J. 42), their Lordships Teunon and Chaudhuri JJ. held that tampering with Court's records was a serious matter and suspended the pleader for 3 months. In the above case of *Hari Prosunno*, reported in 21 C. W. N. 516 : (A. I. R. (5) 1918 Cal. 196 : 18 Cr. L. J. 465), his Lordship Woodroffe J. held that when a Muktear was found to have received a sum of money from a person against whom some police case was pending for the purpose of bribing the police and acted as a go between, his action furnished reasonable cause for punishment under S. 13, cl. (f), Legal Practitioners Act. In the above case of a *second grade Pleader*, reported in 51 Mad. 798 : (A. I. R. (15) 1928 Mad. 918 : 29 Cr. L. J. 783 F. B.), in support of an application for a transfer of a criminal case pending before a Magistrate, the pleader in question swore to an affidavit that he witnessed the Magistrate receiving a bribe from the accused. In this Full Bench case in which the sanad of the pleader was withheld for certain period Sir Murray Coutts Trotter, C. J. observed as follows:

"We wish to make it clear to the profession, if it does not already realise it, that it is a misconduct for a professional man not only to make charges which he knows to be false but charges which he must know he has no reasonable prospect of substantiating."

So, we are unable to uphold the preliminary objection of Mr. Bhattacherjee that this reference is in competent inasmuch as there has been no

previous criminal trial and conviction in respect of the charges formulated in this reference.

[10] The next point urged by Mr. Bhattacherjee is that this case does not come under cl (f) of S. 13, Legal Practitioners Act, i. e., it is not covered by the words therein, viz. "for any other reasonable cause." It is too late in the day to argue this and if any authority need be cited we may refer to the case of *Le Mesurier* v. *Wajid Hossain*, reported in 29 Cal 890, Full Bench decision in which Hill J. as early as 1902 dealt with this point at length and referred to a large number of English and Indian cases. It was held in that case that the words "any other reasonable cause" in S. 13, cl. (f), Legal Practitioners Act, are not confined to misconduct of which a practitioner is guilty in his professional capacity but embrace all causes which may afford reasonable grounds for his suspension or dismissal. In this case Hill J. also observed :

"The moral defect is the same whether there has or has not been a conviction, the difference lying only in the machinery employed in establishing it. In England, I may observe in the case of an attorney, the fact that an indictment might be but has not been preferred, is no reason for the Court to stay its hand, if the fact of misconduct is brought before it? *W. H. B* reported in (1882) 50 L. J. 165) and see *In re Hill*, reported in (1868) 3 Q B 543 And in this country, if the law be as I conceive it to be. I think the same view would be taken. See the case of *In the matter of Gholab Khan*, reported in 7 Beng L. R. 179 : (16 W. R. Cr. 15) .... It appears to me also a strong authority for saying that the Court will act on proof of facts from which a moral defect of character may be implied, although they amount to a criminal offence for which the offender has not been convicted and have no connection with his professional avocations."

The case of *Rasik Loll Nag*, reported in 20 C.W.N. 1284 : (A I.R. (4) 1917 Cal. 428 : 18 Cr L J. 420), may also be referred to in this connection. So, in our opinion, there is no doubt that s.13 (f) covers the present case and there is no substance in Mr. Bhattacherjee's argument that as the offences complained of were not committed by his client in his professional capacity, he is not hit by S. 13 (f), Legal Practitioners Act.

[11] The learned Advocate General argues that from the facts and circumstances of the case it is established that the conduct of Jatin Babu is not that of a honourable member of the Legal Profession to which he belongs. He suggests that Jatin Babu took Kanakprova under his care on 3rd July 1946 and had her removed first to the house of Nag and thence to the house of Miajan and his motive in doing so must be to share the sale proceeds of the property of Kanakprova with Miajan and this is apparent from the fact that he was screening Miajan although he knew where Kanakprova was living at different times and he misled people as to her whereabouts and discouraged interviews with her. For this he relies on the evidence of P. W. 1 Balai, P. W. 3 Maniruddin Sarkar, P. W. 4 Jaki Mamud Sarkar, P. W. 8 Shamshuddin Sarkar and P. W. 11 Nishi Kanta Sarkar, P. W. 19 Ramani Mohan Sarkar. Balai is the cousin of Kanakprova. We cannot rely very much on Balai's evidence as it was Balai who made a complaint before the present Magistrate and his complaint was not only dismissed but he was asked to show cause why he should not pay compensation for filing a false and frivolous complaint. P. W. 3, Maniruddin, Ex-Tahsildar of Kanakprova, says :

"On another occasion I was not allowed to see her by Miajan. On hearing this I went to Jatin Babu and stated what Miajan had done Jatin Babu told me that Kanakprova did not like to see any of us."

P W. 4 another Tahsildar of Kanakprova says "I enquired of Jatin Babu who said that Kanakprova would not see us any more." P. W. 8 states that when he went with Bolai to enquire of Jatin Babu as to the whereabouts of Kanakprova, he was told by him that she was kept in the house of a Brahmin where there were other widows and she was happy there and eventually even Bolai was not allowed to interview Kanakprova. The evidence of P. W. 11, President of Hindu Mahasabha, who is a B. L. pleader practising in Munsiff's Court seems to be most damaging. He says :

"Towards the end of Sraban, Jatin Babu told me that he was feeling it inconvenient to keep Kanakprova in his house as he has young sons and the woman was good looking ..... I got a report from Sukhan Banarjee, Secretary of the Organisation that Rishi Mohan Dey was willing to accommodate her. After 3 or 4 days Jatin Babu informed that he had made arrangement to keep the woman in the house of one of his relations, Bejoy Govinda Nag and the organisation need not think over it. By the middle of Bhadra Mobarak Sarkar, a pleader's clerk and Sukhan Babu informed me that the woman was living in the house of Miajan Sarkar. On the morning following I met Jatin Babu in his house and told him what I had heard but he stated that it could not be ..... He further stated that Miajan was like his own son. I met Jatin Babu in Court who told me that what I had heard was not true. Mobarak made a false statement and that the woman was kept in a Brahmin family at Ballnighar (in the house of Sarkar Chakravaorty). I believed Jatin Babu and did not make any further enquiry about it"

But P. W. 18, Govind Kumar Roy, a teacher of H. E. School states that there is no Brahmin family at Ballnighar except their family. If the evidence of these witnesses is accepted and there is no reason why their evidence should not be accepted and why they should all tell a lie, there is no doubt that whatever the motive may be it was at the instance or with the connivance of Jatin Babu that Kanak Prova was removed from place to place and that ultimately she came to live with Miajan.

[12] Now, as to the disposal of her properties both movable and immovable. It is the evi-

dence of P. W. 1, Balai and P. W. 3, Maniruddin that for her maintenance the corrugated iron sheet hut was sold at Rs. 210 while she was living at Jatin Babu s house and, in our opinion, Jatin Babu cannot be blamed for it in any way.

[13] But as to the sale of her immovable property, it is argued that, although Kanakprova was not in need of any money at the time, on account of the influence of Jatin Babu Kanakprova was made to sell her property worth ten or twelve thousand rupees for Rs. 4000, and not only it was sold at less than its proper price but it was sold in hot haste as soon as the final report was submitted by the Police. According to the evidence of P. W. 17, Babu Hira Lal Chatterjee, Court A. S. I., the final report of the case in question was submitted by the police on 25th September 1946 and it was accepted and the accused were discharged on 8th October 1946. Except the evidence of P. W. 1, Balai and P. W. 3 Maniruddin that the property in question may be worth 10 or 12 thousand, there is no other evidence as to the real and exact value of the property. It is proved that the said property was purchased by P. W. 9, Guna Mohan Das, the then President of Hindu Mahasabha for Rs. 4000 and the document thereof was registered on 12th October 1946, i. e., on the re-opening date of criminal Courts after the puja vacation, not at Gaibandha but at Rangpur registration office. The most important witness of this transaction is P. W. 9, the vendee of the property, Guno Mohan Das who is an M.A.B.L. pleader practising at Gaibandha. He says:

"About 15 or 20 days before the execution of the Kabala I had discussion about the purchase with Jatin Babu. Jatin Babu stated the reason for sale to be that Kanakprova would not be able to reside any more in her own place and that she would be given in marriage at Gaibandha. Many people will be agreeable to marry her if she had any money. Jatin Babu stated that money would be kept in a bank. I withdrew the consideration money from my deposits in Hazordi Bank. At the time of the withdrawal, I told Atul Babu, the Manager of the Bank that if he would approach Jatin Babu he might get the money again in deposit . . . . I had previous talk with Jatin Babu who stated that he looked upon Miajan as his own son and that he trusted him . . . . She was selling the property as she was put to various trouble on account of the property . . . . "Sampatti amar kal haia-e, shei janya biori karitechhi."

Again in re-examination, he says: "My bona fides regarding the execution of the Kabala arose from my discussion with Jatin Babu." From the evidence of this witness, it appears as if both Jatin Babu and he were doing things out of the best of intention. Jatin Babu gave out that he wanted to get Kanakprova married with the cash money after the sale of her property and Guno Mohan Babu helped her to sell her property.

[14] But the evidence of other witnesses as to what happened afterwards does not support this view for P. W 10 Babu Atul Chandra Roy, local agent of Hazordi Bank corroborates P. W. 9 Guno Mohan Babu when he states that Guno Mohan withdrew Rs. 3900 by an overdraft and advised him to approach Jatin Babu so that he might get the money deposited by Jatin Babu after the sale and he actually approached Jatin Babu and the latter assured him with the deposit. But instead of depositing any money in the said Bank as promised the evidence of P. W. 5 an employee of local Das Bank is that on 15th October 1946 Miajan Sarkar opened an account in the Das Bank Ex. 2 in the name of his minor son Aminul Haque. According to this account only Rs. 3000 was deposited and by 30th January 1947, the entire amount except a balance of Rs 10-15 6 was withdrawn. So, it is suggested that but for the instigation or connivance of Jatin Babu all this could not happen. Points are also made of the facts that to start with in the very abduction case in which Jatin Babu filed the complaint and stood for surety for Kanakprova his son Sailendra stood surety for the principal accused 1 Ghatu Sarkar that his son Sailendra's clerk Miajan was also working for Jatin Babu and most of the exhibits viz. Ex. 6 bail bond of Kanakprova dated 3rd July 1946, Ex. 3 receipt of Rs. 96 dated 14th August 1946 given by Kanakprova to her tenant, Ex. 1 a receipt of Rs. 210 dated 19th July 1946 given by Kanakprova to the vendee of the hut were all written by Miajan Sarkar and that even her younger brother who was staying with her was sent away as it appears from the evidence of her tenant Ruhini Kanta who says :

"Miajan came to the station with Anath, the minor brother of Kanakprova and asked me to take him to Naldanga to his sister's house . . . . I took the boy to Naldanga."

Some witnesses have said that they heard that Kanakprova became a Muslim and Miajan has married her but hearsay evidence is no evidence and the learned Adovcate General has frankly conceded that there is nothing to prove that she has become a Muslim or that she is married to Miajan but he urges that on the above evidence and circumstances taken as a whole one cannot but say that Jatin Babu's conduct is not that of an honourable member of the profession and it calls for disciplinary action on our part.

[15] Jatin Babu cannot escape from the fact that from the date, i. e., 3rd July 1946 he stood surety for Kanakprova till 10th October 1946 when the final report was accepted and accused were discharged. Jatin Babu was the surety and according to his undertaking he was bound to produce her before Court whenever he was called upon to do so, and so, he cannot be heard to say that he did not know the whereabouts of Kanakprova or he did not know how and when

she went to the house of Miajan Sarkar. It is too much to say that all that P. W. 9 Guno Mohan Babu and P. W. 11 Nishi Kanta Sarkar who are respectable and leading pleaders of Gaibandha said are untrue. It is also curious that Jatin Babu has not only kept himself out of the witness-box but even in his written statement he has chosen not to give any explanation as to how Kanakprova who admittedly was staying with him to start with and for whom he stood surety escaped from his house and managed to land herself in the house of Miajan Sarkar and there sell her property. In this enquiry, we are somewhat handicapped as neither the prosecution nor the defence has examined Kanakprova or Miajan. Evidence of P. W. 15 and Ex. 5, deposition of Miajan Sarkar in the case filed against Mubarak Sarkar and others sought to be relied upon by the prosecution are not, in our opinion, admissible in evidence. It seems to us that both the prosecution and the opposite party fought shy of examining Kanakprova and Miajan. At least to clarify matters further the Court should have examined them as court witnesses. The learned Advocate-General contends that the prosecution did not examine them as they were under the influence of Jatin Babu and to give the lie direct to the prosecution case, the defence could have called either or both of them in order to demolish the prosecution case. In any case, in our opinion, in the interest of justice, the Court should have examined Kanakprova.

[16] Mr. Bhattacherjee has argued that as soon as the Hindu community of Gaibandha came to hear of the disposal of property by Kanakprova and her living in the house of Miajan, there was a great sensation in the town as a result of which the present petition under the Legal Practitioners Act was filed and his client was made a scape-goat on mere suspicion. In this connection he relied on the case of *Anandalwan* v. *Judges of High Court of Judicature, Madras*, reported in 34 C. W. N. 534 : (A. I. R. (17) 1930 P. C. 144 : 31 Cr. L. J. 489). In this case their Lordships of the Privy Council observed that charges of professional misconduct must be clearly proved and should not be inferred from mere ground of suspicion, however reasonable, or what may be mere error of judgment or indiscretion. The enquiry in a serious case of professional misconduct should proceed on formulated charges and the evidence should be carefully taken and judged according to the ordinary standard of proof. This case only says that the enquiry should be according to charges and the evidence should be taken and assessed according to ordinary standard of proof. But, in the present case evidence has been led in support of the charges and certain facts and circumstances have been proved according to ordinary standard of proof and so, the above case of *Anandalwan*, (34 C. W. N. 534 : A. I. R. (17) 1930 P. C. 144 : 31 Cr. L. J. 489) has no application to the present case.

[17] It is true that P. W. 11 Nishi Kanta Sarkar, the President of Hindu Mahasabha, says that one of the reasons for the proceedings in question is the sensation in the town caused by the fact that Kanakprova sold her property. P. W. 14 who filed the petition before the S. D. O. against Jatin Babu also says :

"I cannot name particularly who gave me the date of the disposal of the property. That was a talk everywhere in the town. Because the woman was converted to Islam led us to file the petition before S. D. O. . . . . another factor was that all her properties were robbed."

It seems to us that undoubtedly there was a sensation as soon as the public started talking that a Hindu widow had not only become a Muslim but also married a Muslim and was also deprived of all her property. So, it is all the more difficult to understand this complacency of Jatin Babu who stood surety for Kanakprova. Although on the date the sale took place, he was no longer the surety according to P. W. 9, negotiation took place 15 or 20 days before that and but for the representation of Jatin Babu he would not have been induced to buy the property as he did. It is curious that inspite of such representation Jatin Babu failed to take charge of at least of the sale proceeds. It may well be that the money was deposited in the bank or spent according to the wishes of Kanakprova but it was for Jatin Babu to explain his position in the transaction. But he has not done this. Jatin Babu is a very senior Mukhtear. Apart from being a surety, when Kanakprova escaped from his control, as a respectable member of the Bar, he should not have remained quiet over all that happened at Miajan's house and there is nothing to show that he took any steps to trace her out or that he made any complaint against anybody in respect of her. So, on the facts and circumstances of the case, it appears to us that the conduct of Jatin Babu was not what is expected of a member of the profession to which he belongs. So, we find that he is guilty of misconduct and is liable for action under S. 14, Legal Practitioners Act. But, as he has been under suspension for nearly 2 years by now and he is nearly 69 years old, we consider that he has been sufficiently punished.

[18] So, we accept this reference but in view of the above circumstances, we only confirm the period of suspension already undergone by him and take no other disciplinary action against him.

Shahabuddin J. — I agree.

V.B.B. *Reference accepted.*

A. I. R. (37) 1950 Dacca 9 *[C. N. 3.]*

AKRAM C. J. AND AMIN AHMED J.

Sm. Joshoda Sundari Debi—Defendant—Appellant v. *Sumanta Chandra Kangsha Banikya and others — Plaintiffs — Respondents.*

A. F. A. D. No. 1729 of 1943, Decided on 22nd June 1949, against decree of Sub-Judge, Noakhali, D/- 8th May 1943.

(a) Transfer of Property Act (1882), S. 82 — Right of contribution—Right not available against mortgagee or auction-purchaser.

Section 82 applies to mortgagors *inter se* and gives one mortgagor a right to have the other's property contribute to the discharge of the mortgage debt. This right cannot be availed of against the mortgagee or the auction-purchaser : A. I. R. (18) 1931 Cal. 251 (FB), *Rel. on.*

Properties *X* and *Y* were mortgaged to *A* and then property *Y* was mortgaged to *B*. *B* sued on his mortgage and purchased property *Y* in execution of his decree. In the meanwhile *A* brought a suit on his mortgage impleading *B* and obtained a decree for sale. Property *X* was sold in execution of that decree and was purchased by *B* whose actual possession was resisted by *C* who claimed to have purchased *X* in execution of his money decree while *A*'s mortgage suit was pending. *C* claimed right of contribution under S. 82, T. P. Act against *B*. It was held that there could be no claim for contribution against *B* who was an auction-purchaser. [Para 4]

Annotation : ('45-Com) T. P. Act, S. 82, N. 3.

(b) Transfer of Property Act (1882), S. 81 — Marshalling—Properties *X* and *Y* mortgaged to *A* — *Y* mortgaged to *B*—*B* purchasing *Y* in execution of his decree—Suit by *A* impleading *B*—Decree for sale — *B* applying for sale of property *X* only under S. 81—Held there was no right of marshalling.

Properties *X* and *Y* were mortgaged to *A* and then property *Y* was mortgaged to *B*. *B* obtained a decree for sale on his mortgage and purchased property *Y* in execution. *A* then sued on his mortgage impleading *B* and obtained a decree for sale. In execution of that decree *B* applied, ostensibly under S. 81, T. P. Act, that property *X* should be sold first;

Held, that no question of marshalling arose in these circumstances of the case as *A* was entitled to execute his decree against any of the properties *X* and *Y* and there was no other mortgage in existence. [Para 3]

Annotation : ('45-Com) T. P. Act, S. 81, N. 7, 8.

Hemendra Kumar Das and Tapendra Kumar Pal for Chandra Sekhar Bhowmick — for Appellant.

Prafulla Chandra Nag and Jitendra Kumar Sen Gupta—for Respondents.

Akram C. J.—This appeal by defendants 1 and 5 arises out of a suit for declaration of the plaintiff's title to the suit lands and for khas possession of the same.

[2] The plaintiff's case was that one Madhab Chandra Nath borrowed Rs. 600 from a person called Dina Bandhu Nath on 1st January 1930, by executing a mortgage bond in his favour, which comprised two plots of lands the homestead Plot No. 1 and the nal lands Plot No. 2 of the mortgage bond. Later on the said Madhab Chandra Nath again borrowed another sum of Rs. 300 by mortgaging only Plot No. 1 (namely, the homestead) of the previous bond to the plaintiff sometime in September 1930. Dina Bandhu Nath then brought mortgage Suit No. 351 of 1936 impleading the plaintiff also in the suit and on obtaining a mortgage decree applied for the execution of the same, in execution Case No. 107 of 1937. In the meanwhile, however, the plaintiff obtained a mortgage decree upon his own mortgage bond of September 1930 and in execution thereof purchased the homestead (i.e. the aforesaid Plot No. 1) on 22nd September 1937. Having done so, he applied ostensibly under S. 81, T. P. Act, and secured an order for the sale of the nal land only (i.e., Plot No. 2 aforesaid) in the first instance in execution Case No. 107 of 1937. The nal land only (i.e., Plot No. 2) was thereupon brought to sale in the execution case aforesaid, and the same was purchased by the plaintiff on 18th September 1939 for Rs. 1162 odd, and delivery of possession was taken by the plaintiff on 10th March 1940, but when the plaintiff went to take actual poesession he was resisted by defendants 1 and 5 on the ground that on 23rd March 1937 defendant 1 had purchased the nal land i.e., Plot No. 2 for a sum of Rs. 40 in execution of a money decree in Small Cause Court Suit No. 310 of 1936 and obtained possession of the same and that defendant 5 had subsequently purchased the said plot from defendant 1.

[3] The main defence was : (1) the order of marshalling under S. 81, T. P. Act, was without jurisdiction and consequently the plaintiff acquired no title by his auction-purchase in execution case No. 107 of 1937; (2) that in any event the plaintiff could not recover possession of the suit lands without payment to the defendants a sum of Rs. 934 under S. 82, T. P. Act, by way of contribution. Both the Courts below decreed the plaintiff's suit. The defendants thereupon preferred the present appeal.

[4] Once again the defendants appellants have urged before us the same contentions mentioned above. It seems to me however that the appellants in this case have entirely misunderstood the situation and misconceived their position. No doubt it is true that S 81, T. P. Act, has no application to the facts of this case; but neither has S. 82. In my opinion no question either of marshalling or of contribution arises. Dina Bandhu Nath was clearly entitled to execute his decree against any of the mortgaged properties he liked, there was but one single mortgage in existence at the time, and the equity of redemption, we may take it, was in defendant 1 who had made his purchase under the money decree while the mortgage suit was pending; there was no other mortgage which existed

for the application of S. 81 or S. 82, T. P. Act. I cannot see how there could be any marshalling or any claim for contribution as against the auction-purchaser of execution Case No. 107 of 1937, in those circumstances. Section 82, T. P. Act

"applies to mortgagors inter se and gives one mortgagor a right to have the other's property contribute to the discharge of the mortgage debt",

as was observed in the case of *Umar Ali* v. *Asmat Ali* reported in 58 Cal. 1167 at p. 1177 : (A. I. R. (18) 1931 Cal. 251 F.B.). This right in my opinion cannot be availed of against the mortgagee or the auction-purchaser. I, accordingly, agree with the conclusion arrived at by the Court of appeal below, although I am unable to agree with it in the reasonings given in support of its conclusions.

[5] The appeal is, therefore, dismissed but without costs. The cross-objection by the plaintiff is also dismissed but without costs.

Amin Ahmed J.—I agree.

D.R.R. *Appeal dismissed.*

A. I. R. (37) 1950 Dacca 10 *[C. N. 4.]*

AKRAM C. J. AND AMIN AHMED J.

Abdul Sobhan Bhuya and another— Defendants — Appellants v. *Wasin Bhuyia and others—Respondents.*

A. F. A. D. No. 174 of 1943, D/ 9-11-1949, against decree of A. D. J., Dacca, D/-23-7-1942.

Muhammadan law—Wakf — Wakif making provision for appointment of mutwalli — Successor of wakif cannot alter number and personnel of mutwallis in violation of original wakf-nama.

Even a wakif, after he has created a wakf and made provision for the appointment of mutwalli has no power to alter the arrangement and remove the mutwalli appointed by him, unless he reserves such powers at the time he creates the wakf; much less can a successor of the wakif do the same. The Muhammadan law does not allow alteration of the number and personnel of mutwallis in violation of the original wakfnamas: A. I. R. (32) 1945 Cal. 418 and 37 Cal. 263, *Rel. on.* [Para 3]

Birendra Kumar De for Hemendra Ch. Sen— for Appellants.

Jitendra Nath Guha for S. P. Ghosh— for Respondents.

Bhupendra Nath Roy Choudhury — for Dy. Registrar.

Amin Ahmed J. — This appeal on behalf of defendants 1 and 4 arises out of a suit for partition of certain ejmali wakf properties. The facts may be briefly stated as follows: One Fazil Bhuia who was the owner of the properties in suit, by two wakfnamas dated 26th Sravan 1321 B. S., corresponding to 11th August 1914, and 2nd Sravan 1326 B. S., corresponding to 18th July 1919, respectively, made wakf of his 2/3rd interest in certain properties covered by a tenure called mirash Dengari Kaibarta. According to these two deeds Fazil Bhuia made himself mutwalli during his life time, and after his death the plaintiff was to be mutwalli of the wakf properties. The deeds also empowered the plaintiff to nominate his successor and also indicated the class of persons from whom the plaintiff was to nominate his successor. Fazil Bhuia died in 1327 B. S. corresponding to 1920, leaving three sons, namely, one Wasil Bhuia, the plaintiff (mutwalli) who is also defendant 2 (in personal capacity), one Abdus Sobhan Bhuia, defendant 1 appellant, and one Ishaque Bhuia defendant 3 and also one Abdul Ali Bhuia, his grand son by pre-deceased son, who is defendant 4. After the death of Fazil Bhuia, all the four defendants and also the plaintiff executed a wakfnama dated 20th Kartick 1328 B. S. corresponding to 16th November 1921 which is Ex. A, by means of which they amicably disposed of the remaining 1/3rd share of the properties of late Fazil Bhuia left over after the wakfnamas of Fazil Bhuia, according to which all the four defendants were to be joint mutwallis in respect of all the properties of Fazil Bhuia, and if one of these 4 joint mutwallis died his survivors or his survivor would be the mutwalli.

[2] The plaintiff's case is that the executants of the deed of 1328 B. S. had never intended to dedicate these properties to God; that they all along treated their shares as their personal property that under the wakfnamas of the plaintiff's father the plaintiff had no power to make defendants 1, 3 and 4 his co-mutwallis and, therefore, the wakfnama of 1328 B. S. was void; further that because the joint possession of all the properties in suit is inconvenient and is a source of trouble among the relations, the plaintiff demanded the partition of the 2/3rd share of the ejmali property of late Fazil Bhuia as made wakf of by the late wakif, Fazil Bhuia by the two wakfnamas dated 1321 B. S. and 1326 B. S. but as the defendants did not agree to such a partition the present suit has been filed. Defendant 3 did not contest the suit. Defendants 1 and 4 contested the plaintiff's claim for partition and at the trial various issues were raised, one of them being, whether the present suit was maintainable by the plaintiff as sole mutwalli. Both the Courts below have held that the wakfnama of 1328 B. S. was not a valid and operative document and that the plaintiff was entitled to institute the present suit as the sole mutwalli of the wakf properties. Hence the present second appeal.

[3] Mr. Birendra Kumar De, the learned advocate for the defendants-appellants has argued before us that the Courts below ought to have held that inasmuch as the other defendants are the three co-mutwallis of the plaintiff according to the wakfnama of 1328 B. S., the plaintiff alone was not competent to file the present suit

for partition. It is true that the plaintiff himself along with the other defendants is a party to the wakfnama of 1328 B. S. by means of which the number of mutwallis was amicably increased to four and the parties acted on this wakfnama for a number of years; but the question is whether the Mahomedan law allows such alteration of the number and personnel of mutwallis in violation of the original wakfnamas of 1321 B. S. and 1326 B. S. made by the wakif, Fazil Bhuia. It may be that according to Fazil Bhiua's wakfnamas plaintiff was empowered to nominate his successor; but he was not empowered to appoint co-mutwallis. The nomination of his successor is quite different from appointing co-mutwallis. According to the wakif the plaintiff was the sole mutwalli and he did not empower the plaintiff to add to the number of mutwallis; nor did he anywhere in his wakfnama stated that after his death the plaintiff could appoint three persons as co-mutwallis. So this deed of wakf of 1328 B. S. is clearly contrary to the intention of the wakif. Apart from this, it is now a settled law that even a wakif, after he has created a wakf and made provision for the appointment of mutwalli has no power to alter the arrangement and remove the mutwalli appointed by him, unless he reserves such powers at the time he creates the wakf; vide the case of *Siddiq Ahmed* v. *Sayed Ahmed*, 49 C. W. N. 311 : (A. I. R. (32) 1945 Cal. 418). So much less can a successor of the wakif, in this case, the plaintiff mutwalli and his heirs, do the same.

[4] It has also been held that a mutwalli has no power to transfer his office to another person, unless such power is expressly conferred upon him by the wakif but he may appoint a deputy to assist him in the management of the wakf property; vide the case of *Salimullah* v. *Abdul Khair*, 37 Cal. 263 : (3 I. C. 419). In the present case the persons appointed by the wakfnama of 1328 B. S. are not appointed as deputies to assist the plaintiff mutwalli, but are admittedly appointed co-mutwallis which the plaintiff mutwalli had no right to do according to the wakfnamas of his father. The result, therefore, is that this appeal is dismissed with costs.

[5] The question of the substitution of the eldest son of late Wasin Bhuia alone instead of all his heirs need not be gone into in this appeal. We therefore, pass no order on the application in this connection.

Akram C. J.—I agree.

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Dacca 11 *[C. N. 5.]*

AKRAM C. J. AND AMIN AHMED J.

Mt. Mahe Badan Banu Choudhurani and another —*Appellants* v. *Abdul Aziz Khan and others* — *Respondents.*

A. F. A. D. No. 1487 of 1944, D/-17-11-1949, against decree of D. J., Sylhet, D/- 28-3-1944.

(a) Assam Land and Revenue Regulation (I [1] of 1886), S. 65 — Notice under — Objection cannot be raised to opening of separate account by persons in possession but not recorded proprietors — They can however file suit under Limitation Act (1908), Art. 14.

Even though persons in possession, who were not recorded proprietors cannot raise an objection at the time of notice under S. 65 in respect of the opening of a separate account, it is open to them to file a suit under Art. 14, Limitation Act against the order of the Deputy Commissioner opening a separate account within one year of the said order. [Para 5]

Annotation : ('42-Com.) Limitation Act, Art. 14, N. 2.

(b) Assam Land and Revenue Regulation (I [1] of 1886), Ss. 63, 67, 70 and 71 — Defendants in possession but not recorded proprietors—They are bound to pay Government revenue—Non-payment will make them defaulters — Defendants claiming by adverse possession—This also constitutes them joint proprietors of taluk, with corresponding liability to pay Government revenue—On non-payment, they become defaulters and on revenue sale the purchaser gets rights, title and interest of defaulting defendants free from all encumbrances: A. I. R. (4) 1917 Cal. 213, A. I. R. (4) 1917 Cal. 326 and A. I. R. (4) 1917 Cal. 199, *Rel. on.* [Para 5]

Jitendra Kumar Sen Gupta and Sabita Ranjan Pal —for Appellants.

Hemendra Kumar Das and Narapada Kumar Pal — for Respondents.

Amin Ahmed J. — This appeal by defendants 29 and 30 arises out of a suit for recovery of possession on declaration of the plaintiff's title thereto. The suit relates to 5 plots of lands but the plaintiff claims only plots No. 1, 3, 4 and 5 and not plot No. 2.

[2] The plaintiff's case *inter alia* is that the suit lands appertain to taluk No. 25059/334. In 1924 a separate account No. 9 was opened by one Abdullah and others. On 24th September 1929, on account of non-payment of arrears of revenue, under the Assam Land and Revenue Regulation 1886, the separate account was sold and it was purchased by defendant 28. The sale was confirmed on 3rd December 1929 and, on 28th August 1931, he was given possession through Court. On 22nd October 1938, the plaintiff purchased the said separate account from defendant 28 with arrears of mesne profits. As the defendants have kept the plaintiff and his vendors out of possession, the present suit has been instituted.

[3] The suit is mainly contested by defendants 29 and 30. Their case *inter alia* is that the suit lands appertain to taluk No. 25060/335. One Najiba Banu was originally the owner and

was in possession of the disputed plots NOS. 1, 3, 4 and 5 as appertaining to taluk NO. 25060/335. In the year 1838 the suit lands were taken settlement of from Najiba Banu by one Bhikai *alias* Mahammad Safi, the maternal grand-father of Abdullah who is said to have opened the separate account NO. 9. In the year 1866, the interest of Najiba devolved one Sultan Khan and in the year 1890 Sultan Khan opened a separate account NO. 1 in respect of the disputed land as appertaining to taluk NO. 25060/335, so according to these defendants in all the transactions the suit lands have been treated as appertaining to taluk NO. 25060/335 and in separate account NO. 1 when it came to be opened; that if the thak papers show that the lands appertain to taluk NO. 25059/334 they must be incorrect and that separate account NO. 9 was fraudulently and collusively opened.

[4] Both the Courts below held that the suit lands appertained to taluk NO. 25059/334 separate account NO. 9 standing in the name of Abdullah and others, that the separate account NO. 9 was not fraudulently and collusively opened, that Abdullah or his predecessors were not in possession of plots 1, 3, 4 and 5 and that plot NO. 2 was in possession of Abdullah and others who opened the separate account NO. 9.

[5] Mr. Sen Gupta appearing for the appellants has argued that in as much as the plots NOS. 1, 3, 4 and 5 were in adverse possession of the defendants-appellants' predecessors since 1838, in 1924 when separate account was opened by Abdullah and others the latter had no proprietary interest or title, so, under S. 65 of the Assam Land and Revenue Regulation, 1826 Abdullah and others should not have been allowed by the Deputy Commissioner to open a separate account and, therefore, opening a separate account at the instance of a person without title followed by a revenue sale of such separate account cannot affect the interest of the defendants-appellants who acquired good and valid title on account of adverse possession for more than 12 years. Mr. Sen Gupta's answer as to not raising any objection at the time the notice under S. 65 in respect of the opening of a separate account was served is that as his clients were not recorded proprietors, they did not raise any objection as the objection could not be heard or gone into by the Deputy Commissioner under S. 65. This may be so. But it was open to his clients to file a suit under Art. 14, Limitation Act against the order of the Deputy Commissioner opening a separate account within one year of the said order and that was not done. But Mr. Sen Gupta points out that as Abdullah and others who opened the separate account NO. 9 had no title the purchaser of the separate account at the revenue sale has no title either. This argument is not tenable for more than one reason. Although the defendant-appellants were not recorded proprietors, on their own showing they were in possession of the plots in question. So, according to S. 63 of the Assam Land and Revenue Regulation they were bound to pay the Government revenue. Section 63 of the said Regulation runs:

"Land revenue payable in respect of any estate shall be due jointly and severally from all persons who have been in possession of the estate or any part of it during any portion of the agricultural year in respect of which the revenue is payable."

Section 67 of the said Regulation runs:

'Land revenue not paid on the date when it falls due shall be deemed to be an arrear and every person liable for it shall be deemed to be a defaulter."

According to this section the defendants being in possession were defaulters. Further, Mr. Sen Gupta claims for his clients more than possession that is title by adverse possession long before the date of the revenue sale. The effect of this adverse possession of the defendant-appellants was to constitute them joint proprietors of the taluk in question; with the acquisition of that right they also incurred the corresponding liability, namely, to pay Government revenue. They were, therefore, in the position of defaulting proprietors whose interest was wiped out by the revenue sale. So by their default to pay the arrears of revenue, at the revenue sale, the purchaser got the right, title and interest of the defaulting defendant-appellants free from all encumbrances. *Vide* the case of *Mohim Chandra* v. *Pyari Lal*, 44 Cal. 412 : (A. I. R. (4) 1917 Cal. 213) Section 70 of the Assam Land and Revenue Regulation runs:

"When an arrear has accrued in respect of a permanently settled estate or of an estate in which the settlement-holder has a permanent, heriditable and transferable right of use and occupancy, the Deputy Commissioner may sell the estate by auction; provided that . . . . . (2) if the arrear has accrued on a separate account opened under S. 65, only the shares or lands comprised in that account shall in the first place be put up to sale; and if the highest bid does not cover the arrear the Deputy Commissioner shall stop the sale and direct that the entire estate shall be put up for sale at a future date, to be specified by him; and the entire estate shall be put up accordingly and sold. . . . ."

Section 71 of the said Regulation runs thus:

"Property sold under S. 70 shall be sold free of all incumbrances previously created thereon by any other person than the purchaser, ..."

Vide the case of *Aftar Ali* v. *Brojendra Kishore*, 24 C. L. J. 60 : (A. I. R. (4) 1917 Cal. 326), and also the case of *Jitendra Kumar* v. *Mohendra Chandra*, 24 C.L.J. 62 : (A.I.R. (4) 1917 Cal. 199).

[6] In the result this appeal is dismissed with costs.

Akram C. J.—I agree.

R.G.D. *Appeal dismissed.*

A. I. R. (37) 1950 Dacca 13 (1) *[C. N. 6.]*

AKRAM C. J.

Abdul Gani — Petitioner v. *Khestra Mohan Roy and others—Opposite Party.*

Civil Revn. No. 215 of 1947, D/- 9-8-1949, against order of Munsiff 2nd Court, Comilla, D/- 1-5-1947.

Civil P. C. (1908), O. 47, R. 1—Application under S. 174 (3), Bengal Tenancy Act (VIII [8] of 1885) to set aside sale—Application allowed on condition of petitioner's depositing certain dues by certain date or upon failure, sale to stand confirmed — Petitioner not having knowledge of order — Relief against forfeiture — Court can grant relief upon merits by extending time.

An application under S. 174 (3), Bengal Tenancy Act, for setting aside sale, was allowed upon condition that the petitioner should deposit costs and other dues by certain date, upon failure of which the sale was to stand confirmed. The order was passed in the chamber without the knowledge of the petitioner and without reference to his lawyer. The petitioner was a poor cultivator and lived nearly 35 miles away from the town wherein the Court was situated and the petitioner had no intimation from the pleader of the order passed by the Court : [Para 2]

***Held* that the Court had power to grant relief against forfeiture, upon a proper application being made to it. The right of forfeiture in such cases was not beyond the scope of the application of the principle of equitable relief, and an application under O. 47, R. 1, Civil P. C., was not, therefore, incompetent and the Court ought to consider upon such application whether on the merits the application should be allowed and the petitioner given a reasonable time within which to make the payment : A. I. R. (26) 1939 Cal. 309 and A. I. R. (26) 1939 Cal. 581, *Ref.* [Para 3]**

Anno. Civil P. C., O. 47, R. 1, N. 16 and 16 (a).

Ashrafuddin Chaudhury—for Petitioner.
Bhagirath Chandra Das—for Opposite Party.

Order.—On an application under S. 174, cl. (3), Bengal Tenancy Act, by the judgment-debtor Misc. Case No. 155 of 1946 came to be started. This was disposed of on 22nd April 1947 when the following order was passed :

"Miscellaneous Case be allowed on contest with cost and pleader's fee at Rs. 4 on the condition of petitioner's depositing decretal dues with cost of execution by 30th April 1947. On the petitioner's making the deposit the sale will be set aside. If the petitioner fails to make the deposit within the time allowed Misc. Case shall stand dismissed and the sale will remain confirmed."

On the said date, however, namely 30th April 1947 an application was filed by the petitioner for extension of time. This application, was rejected on 1st May 1947 on the ground that the Court had no jurisdiction to extend the time fixed for payment by its order dated 22nd April 1947. Another application for review under O. 47, R. 1, Civil P. C., was thereupon made on 10th May 1947. This application also was rejected on 27th September 1947 on the ground that the application under S. 174 (3) had been finally disposed of already and the application under O. 47, Civil P. C., was, therefore, incompetent. In that view of the matter the other points in respect of the said application and the merits thereof were not gone into. It is against this order that the judgment-debtor, the applicant for review obtained the present rule.

[2] In the petition here, upon which the rule was issued, it has been stated that the order dated 22nd April 1947 was passed in the Chamber without the knowledge of the petitioner and without reference to his lawyer; that the petitioner was a poor cultivator and lived nearly 35 miles away from the town of Comilla, wherein the Court was situated, that the petitioner had no intimation by the pleader of the order passed by the Court; that the petitioner had deposited the amount in the treasury on 12th May 1947 where the said amount was still lying. It is now urged by the learned Advocate for the petitioner that the view taken by the Court below that the application for review of the order dated 22nd April 1947 was incompetent and could not be entertained cannot be supported, and the decisions in the cases of *Mahammad Asrafali* v. *Nabijan Bibi*, 43 C. W. N. 417 : (A. I. R. (26) 1939 Cal. 531) and *Girish Chandra Das* v. *Annadamani Dasi*, 43 C. W. N. 553 : (A. I. R. (26) 1939 Cal. 309) are relied upon in support.

[3] It seems to me that the contention put forward by the learned advocate for the petitioner is well founded and that the Court in a case of this nature has authority to grant relief against forfeiture upon a proper application being made to it. The right of forfeiture in such cases is in my opinion, not beyond the scope of the application of the principle of equitable relief. In my view, the application under O. 47, R. 1, Civil P. C., is not, therefore, incompetent and the Court ought to have considered whether on the merits the application should have been allowed and the petitioner given a reasonable time within which to make the payment. I accordingly set aside the decision of the learned Munsif and send back the case to be disposed of on the merits in accordance with law.

[4] The Rule is made absolute with costs. Hearing fee one gold mohur.

R.G.D. *Rule made absolute.*

A. I. R. (37) 1950 Dacca 13 (2) *[C. N. 7.]*

GUHA J.

Ashutosh Roy and others — Appellants v. *Arun Sankar Das Gupta and others — Respondents.*

Second Appeal No. 844 of 1944, D/- 7-8-1950, against decree of Sub-Judge, Jessore, D/- 24-12-1948.

(a) Contract Act (1872), S. 213—Legal representatives of agent — Liability to render account — Limitation Act (1908), Art. 89.

The liability of an agent to account is personal and the deceased agent's legal representatives cannot be required to render accounts in the same sense in which the agent himself might have been called upon to do. [Para 7]

Anno. Contract Act, S. 213, N. 2 ; Limitation Act, Art. 89, N. 5 and 10.

(b) Accounts—Suit for — When lies enumerated —Limitation Act (1908), Art. 89.

A suit for account will lie if the defendant is under an obligation to account and an obligation to account arises only (i) if the person upon whom the obligation is sought to be imposed must have received some kind of property not belonging to himself, (ii) that the person seeking to impose the liability must be the owner or must have some title to that property as would enable him to recover it, (iii) that the defendant must have received the property in his possession and control ; and (iv) there must be fiduciary relationship between the plaintiff and the defendant. [Para 7]

Anno. Limitation Act, Art. 89, N. 5.

(c) Limitation Act (1908), Art. 89 — Agent dying without rendering accounts — Remedy of principal against his legal representative — Contract Act (1872), S. 213.

The estate of the agent, who has expired without rendering accounts to his principal, does not escape all liability in the hands of his representatives. The remedy of principal in such a case is to sue the representatives of the agent for any losses he may have suffered by reason of the negligence, misconduct, misfeasance or malfeasance of his agent; such a suit is not one for accounts strictly so-called but a suit for money payable by the representatives of the agent out of his assets in their hands. [Para 8]

Anno. Limitation Act, Art. 89, N. 10; Contract Act, S. 213, N. 2.

(d) Limitation Act (1908), Arts. 62 and 89 — Suit for recovery of specified sum of money—Nature of.

A suit for recovery of a specified sum of money does not assume the character of a suit for accounts merely because in the determination of the question in contraversy accounts may have to be examined. The sole foundation for a suit for account is the obligation to account and where that does not exist, the suit for money cannot be regarded as a suit for accounts. [Para 8]

Anno. Limitation Act, Art. 62, N. 4 ; Art. 89, N. 5.

(e) Limitation Act (1908), Art. 89 — Accounts demanded and refused—Suit brought more than three years after.

Where a cause of action accrues and limitation once commences to flow it will not cease to flow. Hence if there was demand and refusal during the life-time of the agent, who subsequently dies, then a suit brought against his legal representative more than three years after such demand is barred by limitation. [Para 12]

Anno. Limitation Act, Art. 89, N. 13.

(f) Limitation Act (1908), Arts. 89 and 120 — Accounts demanded — Death of agent — Suit against his legal representatives—Article which applies.

Where there is a demand and refusal to render account by the agent a suit brought against his legal representative after his demise is a suit governed by Art. 89 and not by Art. 120 : 25 All. 55 and 31 All. 429, *Dissent.* [Para 12]

Anno. Limitation Act, Art. 89, N. 10 ; Art. 120, N. 19.

(g) Limitation Act (1908), Art. 89 — Suit for accounts against legal representative of agent, if lies.

The Limitation Act classifies suits according to their "description." Therefore, a suit of the description referred to in Art. 89 may be brought against the legal representative of the agent as well as against the agent himself : 25 All. 55 and 16 I. C. 742 (Cal.), *Dissent.* [Para 13]

Anno. Limitation Act, Art. 89, N. 10.

(h) Limitation Act (1908), Arts. 62 and 89 — Recovery of money—Suit against legal representative of agent—Applicability of article.

A suit brought against the legal representative of an agent for recovery of a definite sum only is governed by Art. 62 and not by Art. 89. [Para 14]

Anno. Limitation Act, Art. 62, N. 11 ; Art. 89, N. 10.

Birendra Kumar De — for Appellants.
Tapendra Kumar Pal — for Respondent 1.

Judgment.—This appeal by the plaintiffs is against the decision of the Subordinate Judge of Jessore dated 24th December 1943 in a suit for recovery of a sum of Rs. 2225-15-9 from the defendants and in the heading of the plaint it has been stated to be Account Suit No. 16 of 1942 but from the prayer in the plaint it is clear that it is a simple suit for recovery of the sum mentioned above.

[2] The plaintiffs' case is a simple one. According to them, late Babu Jnanada Sankar Das Gupta, predecessor of the defendants, was appointed as law agent of the plaintiffs at Gopalganj in the district of Faridpur on 2nd January 1926. Jnanada Babu was also the pleader for the plaintiffs' estate at Gopalganj. Jnanada Babu acted as law agent till his death on 12th Magh 1345 B. S., corresponding to 26th January 1939. The duties of Jnanada Babu included the looking after all litigations on behalf of the plaintiffs' estate, sending the money realised to Sadar at Hatbaria, despatching a copy of the *Rokor* every month and submitting accounts from time to time. Jnanada Babu rendered accounts partially for the year 1339 B. S., but did not render any accounts from the year 1340 B. S. After his death, the plaintiffs could not get all the papers, but from the papers received by them, they laid the claim in the present suit at Rs. 2225-15-9 after deducting the amount that was due to Jnanada Babu, on account of his bills. The plaintiffs allege that Jnanada Babu by his neglect of duty, mal-feasance and non-feasance, has caused loss to the plaintiffs' estate and the defendants, who are his heirs, are bound to compensate for the loss to the extent of the assets left by Jnanada Babu in their hands. This suit has been instituted on 26th January 1942 as 25th January 1942 was a Sunday.

[3] Defendant 2 filed a written-statement in the suit but did not appear at the trial. The other defendants 1 and 3 to 7 contested the suit by filing a written statement. The defendants contend that the suit is not maintainable as it is virtually a suit for accounts and that it is barred by limitation. The defendants further

contend that the plaintiffs have withheld necessary papers and so the suit was not maintainable. The defendants denied that Jnanada Babu was guilty of neglect of duty, misappropriation, etc., and contended that if all the papers were produced, it would be found that the plaintiff's estate was indebted to Jnanada Babu.

[4] The learned Munsif, Sadar Jessore, held that it was not an account suit at all but a suit for recovery of a specified sum of money and so the suit was maintainable and that the suit was brought within 3 years of the death of Jnanada Babu, so was within time and Art. 115, Limitation Act applied to the case; and that the plaintiffs would be entitled to recover a sum of Rs. 1069-8-5 and corresponding costs from out of the assets of Jnanada Sankar Das Gupta in the hands of the defendants and the plaintiffs' suit was decreed in part. There was an appeal by the defendants and cross-objection by the plaintiffs in the Court of the District Judge of Jessore and the Learned Subordinate Judge of Jessore, who has heard the same, in a judgment which is remarkable for its lucidity, had held that the plaintiffs will be entitled to a decree for Rs. 752-4-5 only, but the learned Subordinate Judge has held that Art. 62, Limitation Act, applies to the case and as regards the claim under "*Muktear Sherista*" it is governed by that article and is barred because it is the common ground of both parties that all those moneys were received prior to 7th Aswin 1345 B. S. corresponding to 24th September 1938, which was clearly beyond 3 years of the institution of the suit. The learned Subordinate Judge has further held that as regards the claim of the plaintiff under "*account Sherista*" that is also barred by limitation on the facts because the date of demand for account and refusal is beyond three years of the suit and is, therefore, barred by limitation, either under Art. 62 or 89, Limitation Act and Art. 115, Limitation Act is not at all applicable. The learned Subordinate Judge has found also that there is no substance in the cross objection of the plaintiffs because in his view it is also barred by limitation under Art. 62, Limitation Act, and in the result he has dismissed the plaintiffs' suit in entirety.

[5] The plaintiffs are the appellants here and their learned advocate Mr. B. K. De made it quite clear at the opening that his clients would be satisfied with a decree for Rs. 752-4-5 only as found by the learned Subordinate Judge and he contended that the learned Subordinate Judge was wrong in his decision on the question of limitation and according to Mr. De the article applicable to the case was either Art. 115 or Art. 120, Limitation Act. Mr. De in support of his argument referred to the case of *Kumeda Charan Bala* v. *Ashutosh Chattopadhya*, 17 C. W. N. 5 : (16 I.C. 742) and incidentally to the case of *Bindraban Behari* v. *Jamuna Kunwar*, 25 ALL. 55 : (1902 A. W. N. 191). Mr. Tapendra Kumar Pal for defendants-respondents raised two contentions in supporting the decree of the learned Subordinate Judge, firstly, that the present suit was not maintainable and secondly, that the suit was barred by limitation either under Art. 62 or 89, Limitation Act, and he cited before me the cases of *Ramhari Kapali* v. *Rohini Kanta*, 35 C. L. J. 330 : (A.I.R. (9) 1922 Cal. 499) and *Rameswar Singh* v. *Narendranath Das*, A.I.R. (10) 1923 Pat. 259 : 71 I. C. 916.

[6] Let me first consider the second contention of the learned advocate for the respondent as to the maintainability of the suit. The learned advocate says that the suit has been described in the cause title as an account suit and is in essence a suit for accounts against the legal representatives of a deceased agent, hence it is not maintainable.

[7] It is not disputed that Jnanada was an agent and he was liable for accounts. Section 213, Contract Act, provides that an agent is bound to render account to his principal on demand and this duty will be enforced by following in the hands of the agent the properties representing the money for which he ought to have accounted, and the liability to account is irrespective of any express contract to that effect. It is well settled on principle that the liability of an agent is personal and the deceased agent's legal representatives cannot be required to render accounts in the same sense in which the agent himself might have been called upon to do. The reason seems to me that the legal representatives of the deceased cannot be required to discharge the duty to explain matters of which they have no personal knowledge and they cannot assist the principal in the investigation of the management of his estate of which they are wholly ignorant and they cannot be asked to do that which does not lie within their power and they should not be required to do something which is impossible. The rights and remedies of the principal against the agent and on the death of the agent against his representatives are not identical and this is supported by the view taken by Wilson J. in *Lawless* v. *Calcutta L. & S. Co.*, 7 Cal. 627. A suit for account will lie if the defendant is under an obligation to account and an obligation to account arises only (i) if the person upon whom the obligation is sought to be imposed must have received some kind of property not belonging to himself, (ii) that the person seeking to impose the liability must be the owner or must have some title to that pro-

perty as would enable him to recover it, (iii) that the defendant must have received the property in his possession and control and (iv) there must be fiduciary relationship between the plaintiff and the defendant. Now the legal representative of an agent does not stand in a fiduciary relationship. So a suit for account is not maintainable. *Monmothanath Bose* v. *Basanta Kumar Bose Mullick*, 22 ALL. 332 : (1900 A. W. N. 98) is a case by a ward for accounts against his guardian during his guardianship. *Kumeda Charan Bala* v. *Ashutosh Chattopadhya*, 17 C. W. N. 5 : 16 C. L. J. 282 : (16 I. C. 742), is a suit by principal against legal representatives of an agent, *Nobin Chandra* v. *Chandra Madhab*, 44 Cal. 1 : (A. I. R. (3) 1916 P. C. 148) and *Bir Bikram Kishore* v. *Jadab Chandra*, 40. C. W. N. 245 : (A. I. R. (22) 1935 Cal. 817), are suits by principal's legal representative against the agent. and *Srish Chandra* v. *Supprovat Chandra*, 44 C. W. N. 304 : (A. I. R. (27) 1940 Cal. 337), and *Amiya Krishna* v. *Debendra Lal*, 46 C. W. N. 865, the former is a suit against a trustee and the latter by a co-trustee against legal representative of his co-trustee.

[8] Then the question arises what is the remedy of the principal against the representatives of the agent. It is not at all tenable that the estate of the agent, who has not tendered accounts to his principal, escapes all liability in the hands of his representatives. It is equally well-settled that the remedy of principal in a case of this description is to sue the representatives of the agent for any losses he may have suffered by reason of the negligence, misconduct, misfeasance or mal-feasance of his agent; in other words, the suit is not one for accounts strictly so-called but a suit for money payable by the representatives of the agent out of his assets in their hands. The contention that the liability is personal and has expired, on the death of the agent is not well founded. A suit for recovery of the money misappropriated by a trustee or agent will lie against the legal representatives of the agent and in such a suit the decree will be against the assets of the deceased agent or trustee. A suit for recovery of a specified sum of money, however, does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. The sole foundation for a suit for account is the obligation to account and where that does not exist, the suit for money cannot be regarded as a suit for accounts. *Kshetranath Banerjee* v. *Kalidasi Dasi*, 27 C. L. J. 96 : (A. I. R. (5) 1918 Cal. 1037). The law is well settled now that a case of this description is maintainable by the principal against the agent's legal representatives. *Bindraban Bahari* v. *Jamuna Kumar*, 25 ALL. 55 : (1902 A. W. N. 191); *Kumeda Charan Bala* v. *Ashutosh Chattopadhya*, 17 C. W. N. 5 : 16 C. L. J. 282, *Sashi Sekhareswar Roy* v. *Hajirannessa Bibi*, 28 C. L. J. 492 : (A. I. R. (5) 1918 Cal. 276); *Bameswar Singh Bahadur* v. *Narendra Nath Das*, A. I. R. (10) 1923 Pat. 259 : 71 I. C. 916 and *Sree Amiya Krishna* v. *Debendra Lal*, 46 C. W. N. 865.

[9] In the light of these principles the plaint in this case has to be examined. I may say at the outset that both the Courts below have come to the right conclusion that the present suit is not a suit for accounts but one for recovery of money against the legal representatives of the agent Jnanada Babu. The plaint consists of 10 paras and the first prayer is for a decree for a sum of Rs. 2225-15-9 only with costs and the second prayer is for general or other relief. The plaint states how the sum claimed in the suit has been arrived at. So on a reading of the plaint one comes to the only conclusion that it is a suit for recovery of money and not for accounts. It is true that the suit has been described at the heading as an account suit and this appears to me, as has been pointed out by the trial Court, that it is a mistake which has been committed by the office of that Court. In construing the plaint, I must look to the substance and not to the form. I hold that this is not an account suit at all but a suit for recovery of money. So the first branch of argument of Mr. Pal on his second contention fails. As regards the second branch of the argument of Mr. Pal on his second contention, I have already pointed out the law on the subject and the principle governing a case like the present one instituted by the principal against the legal representatives of his agent and I hold that this suit for recovery of a specified sum of money against the representatives of the deceased agent and for a decree to recover the said sum from out of the assets of the agent Jnanada Babu in the hands of the defendants is maintainable. So the second branch of the second contention of Mr. Pal is not well-founded and is without any substance.

[10] The main question, which has been seriously argued by the learned advocates of both parties, is the question of limitation. In the facts of this case and in view of the findings, I am clearly of opinion, that the learned Subordinate Judge has arrived at a right conclusion, and I am unable to give effect to the contention of Mr. B. K. De for appellants and I hold that Mr. Tapendra Kumar Pal, advocate for the respondent, is right in his contention that the suit is governed by Art. 62, Limitation Act. I

may point out at the beginning that there has been divergence of judicial opinion in different and same High Courts on the point whether in a case like the present, Art. 62 or 89 will apply or as contended by Mr. De Art. 115 or 120, Limitation Act will apply. In determining this question of limitation, one will have to keep in view the definition of "defendant" in the Limitation Act which is in S. 2 (4) and it is in the following terms :—" 'Defendant' includes any person from or through whom a defendant derives his liability to be sued." I shall have to keep in view also the language in Arts. 62, 89, 115 and 120, Limitation Act, which are as follows :

Article 62 :

For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years.	When the money is received.

Article 89 :

By a principal against his agent for moveable property received by the latter and not accounted for.	Three years.	When the account is during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.

Article 115 :

For compensation for the breach of any contract, express or implied, not in writing registered and herein specially provided for.	Three years.	When the contract is broken, or where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.

Article 120 :

Suit for which no period of limitation is provided elsewhere in this schedule.	Six years.	When the right to sue accrues.

[11] To decide the point of limitation, I shall have to recapitulate certain facts. Jnanada Babu, predecessor of the defendants, was the law agent of the plaintiffs from 2nd January 1926 till his death on 12th Magh 1345 B. S. corresponding to 26th January 1939. It is also an admitted fact that Jnanada Babu rendered accounts to the plaintiff partially for the year 1339 B. S., and the present suit was for recovery of a sum of Rs. 2,225-15-9 from the defendants, the heirs and legal representatives of Jnanada Babu. The present suit has been filed on 26th January 1942 as 25th January 1942 was a Sunday. It is common ground between the parties and also found by the learned Subordinate Judge that all the money that is claimed by the plaintiffs under the *Muktear Sherista* was received by Jnanada Babu prior to 7th Aswin 1345 B. S. corresponding to 24th September 1938. The learned Subordinate Judge says as follows :

"It is in evidence in this case that demands were made from Jnanada Babu during his life-time for a sum of Rs. 2,226 entered in the rokar Ex. 2Z (17). There can, therefore, be no doubt that the cause of action arose with effect from the date of this demand, which was made prior to the death of Jnanada Babu. Even if it was made one day before the death of Jnanada Babu, the suit would be barred. I found that the disregard made by Jnanada Babu of the demand amounted to his refusal. I find therefore, that the plaintiffs' claim under the account Sherista is also barred by limitation. In this case the breach occurred at the time when the demand was made and the demand was not satisfied."

[12] The contention of Mr. De for the appellant is that Art. 115 applies as held in the case of *Kumeda Charan* v. *Ashutosh Chattopadhya*, 17 C. W. N. 5 : 16 Cr. L. J. 282 or Art. 120 applies as held in *Brindraban Behari* v. *Jamuna Kunwar*, 25 ALL. 55 : (1902 A. W. N. 191). The reason of Mr. De is that the cause of action arose on the death of Jnanada Babu on 26th January 1939 and this is a suit within 3 years from that date, so Art. 115 applies and the plaintiffs' claim is not barred by limitation. In that respect Mr. De is in a serious difficulty because it has been found by the Court of fact that there was demand and refusal during the lifetime of Jnanada Babu and so plaintiffs' suit is barred by limitation. It is correct on principle as has been pointed out by their Lordships of the Judicial Committee in *Harinath Chatterjee* v. *Mothoor Mohun*, 20 I. A. 183 : (21 Cal. 8 P. C.) and *Khunilal* v. *Gobind Krishna*, 38 I. A. 87 : (33 ALL. 356 P. C.) that the intention of the law of limitation is not to give a right where there is not one, but to interpose a bar, after a certain period, to a suit to enforce an existing right. It is equally settled that when a cause of action accrues and limitation once commences to flow it will not cease to flow. Here, in the present case, the finding is that there has been a demand on 24th September 1938 and there was refusal during the lifetime of Jnanada Babu and if that refusal was even one day before his death the suit would be barred even under Art. 115, Limitation Act. The only other argument of Mr. De is that Art. 120, Limitation Act, applies. But I do not find any reason how this article is applicable when there are other articles governing a case like this. Mr. De's other branch of argument is that Art. 89 does not apply as the suit is not against the agent but against his representatives. But I cannot uphold this contention. The cause of action here began not on the death of the agent on 26th January 1939 but on 24th September 1938 when there was demand and refusal, as found by the lower appellate Court and that

finding is binding on me in second appeal, hence in any view the suit is beyond three years. The case of *Bindraban Behari* v. *Jamuna Kunwar*, 25 ALL. 55 : (1902 A. W. N. 191), is cited. That was a suit by the plaintiff against the sons of a pleader, who collected plaintiff's money. There it was argued that Art. 62 or Art. 89 applied but that contention of the plaintiff was overruled on the ground that the suit was not against the pleader but as against the pleader's representative, and the right to sue did not accrue when the money was received by the pleader but when it was received by the son and on the death of the pleader, and as the suit was within six years of the receipt of money by the father it was in time. This case in my opinion has not been correctly decided and in no way can Art. 120 be applicable as there are other articles in the Act, applicable to that class of cases. In that case the definition of 'defendant' in S. 2 (4), Limitation Act, has been overlooked. According to the definition the defendant includes any person from or through whom a defendant derives his liability to be sued. To the similar effect is also the decision of *Rao Girraj Singh* v. *Rani Raghubir Kunwar*, 31 ALL. 429 : (2 I. C. 118), and that was a suit against the sons and grandsons of the agent and it was held that Art. 120 applied. There also the definition of defendant in S. 2 (4), Limitation Act, was overlooked. The case of *Bindraban Behari* v. *Jamuna Kunwar*, 25 ALL. 55 : (1902 A. W. N. 191), has been dissented from in *Parthasarthi Appa Rao* v. *Subba Rao*, 50 Mad. 249 : (A. I. R. (14) 1927 Mad. 157) and in *Ramhari Kapali* v. *Rohini Kanta*, 35 C. L. J. 330:(A.I.R. (9) 1922 Cal. 499) and the case of *Rao Girraj Singh* v. *Rani Raghubir Kunwar*, 31 ALL. 429 : (2 I. C. 118), has been dissented from in the case of *Deorao Zolba* v. *Laxmansingh*, I. L. R. (1943) Nag. 470 : (A. I. R. (30) 1943 Nag. 227) and I respectfully agree with the aforesaid decisions of the Calcutta, Madras and Nagpur High Courts. The decision of the Calcutta, Madras and Nagpur High Courts seems to be in accordance with well-established principles.

[13] Now if the principal sues his agent during latters' life-time after the termination of the agency, or when the accounts are demanded and refused and the defendant agent dies during the pendency of that litigation, then the suit could be continued against the legal representatives. The next position is where the agent dies after the termination of the agency or where there is a demand and refusal in the agent's life-time. In that event the cause of action will accrue during agent's life-time and limitation once having commenced to run will not cease to run by reason of the death of the agent. In that event, the agent's representatives can be sued after his death because the cause of action cannot alter by reason of the agent having died. The third position is where the agency terminates on the death of the agent. I find no reason why the rule should be different in this case. Again when the case is looked at the other way round, there is no doubt as to what the law is because as has been pointed out by their Lordships of the Privy Council in the case of *Nobin Chandra* v. *Chandra Madhab*, 44 Cal. 1 : (A. I. R. (3) 1916 P. C. 148) and *Bir Bikram Kishore* v. *Jadab Chandra*, 40 C. W. N. 245 : (A. I. R. (22) 1935 Cal. 817), where it has been held that the suit by the principal's legal representatives is governed by Art. 89, Limitation Act. Though it is a converse case, to the present one, the principle appears to me to apply. The cases where Art. 89 has been applied as against the legal representatives of the agent are numerous and I may mention *Parthasarathi Appa Rao* v. *Subba Rao*, 50 Mad. 249 : (A. I R. (14) 1927 Mad. 157), where reasons given in the case of *Kumeda Charan* v. *Ashutosh Chattopadhya*, 17 C. W. N. 5:16 C. L. J. 282, have been considered and have not been followed. The decision in the case of *Parthasarathi Appa Rao* v. *Subba Rao*, 50 Mad. 249 : (A. I. R. (14) 1927 Mad. 157), has been followed in the case of *Bir Bikram Kishore* v. *Jadav Chandra*, 40 C. W. N. 245 : (A. I. R. (22) 1935 Cal. 817), where it has been held that Art. 89, Limitation Act, applies to a suit for accounts brought by the principal against his agent as also to a suit brought by the legal representative of the principal against his agent. That Art. 89 applies to suit by a principal against the legal representatives of the agent has also been held in the case of *Deorao Zolba* v. *Laxmansingh Bania*, I. L. R. (1943) Nag. 470 : (A. I. R. (30) 1943 Nag. 227), *Mt. Piari* v. *Kashi Prasad*, 23 Luck. 65 : (A. I. R. (36) 1949 Oudh 51) and *Rameswar Singh* v. *Narendranath Das*, A. I. R. (10) 1923 Pat. 259 : 71 I. C. 916. I respectfully agree with the aforesaid decision and do not agree with the decision in *Kumeda Chandra Bala* v. *Ashutosh Chattopadhya*, 17 C. W N. 5 : 16 C. L. J. 282 for the reason that case overlooks the definition of 'defendant' in S. 2 (4), Limitation Act. Moreover, as I have said that in the present suit the cause of action arose before the death of Jnanada Babu and so the present suit filed on 26th January 1942 is clearly barred by three years rule of limitation in Art. 89, Limitation Act. In this connection I may refer to a passage in *Brindaban Behari* v. *Jamuna Kunwar*. 25 ALL. 55 at p. 56 : (1902 A. W. N. 191), where it has been held that a fresh cause of action arose

upon the death of the father, that the suit against the sons would not fall under Art. 89, Limitation Act, because the suit was not against the agent but against his legal representative. In all respect, I must dissent from the view that it can be pointed out that the Limitation Act classifies suits according to their 'description' and that a suit of the description referred to in Art. 89 may be brought against the legal representative of the agent as well as against the agent himself. The case of *Kumeda Charan Bala* v. *Ashutosh*, 17 C. W. N. 5 : (16 I. C. 742), is based on the case reported in *Bindraban* v. *Jamuna Kunwar*, 25 ALL. 55 : (1902 A. W. N. 191), and as I dissent from that decision, I respectfully also disagree with the decision in *Kumeda Charan Bala* v. *Ashutosh*, 17 C. W. N. 5 : (16 I. C. 742), cited above.

[14] Then only one other question remains, namely, whether Art. 89 applies to this case or Art. 62 applies. My answer is that Art. 62 applies because the suit here is one for recovery of money only from the legal representatives and in this view I am supported by the decision of *Ramhari Kapali* v. *Rohini Kanta*, 35 C. L. J. 3[illegible] : (A. I. R. (9) 1922 Cal. 499) and the case of *Rameswar Singh* v. *Narendra Nath Das*, A. I. R. (10) 1923 Pat. 259 :71 I. C. 916 and respectfully following the said decisions I hold that the present suit is governed by Art. 62, Limitation Act, and in that view I find that the present suit of the plaintiffs is clearly barred by limitation.

[15] As the only contention of Mr. De for the appellants fails, the result is that this appeal is dismissed. In the circumstances of this case I direct that the parties will bear their own costs upto this Court. Leave asked for and is refused.

V.S.B. *Appeal dismissed.*

A. I. R. (37) 1950 Dacca 19 *[C. N. 8.]*

ELLIS AND ISPAHANI JJ.

Sashi Bhusan Das — Petitioner v. *The Crown.*

Cri. Misc. Case No. 47 of 1949, D/- 2-12-1949.

Criminal P. C. (1898), S. 498 — Sessions Judge directing that accused was to remain on bail as before — Magistrate avoiding or circumventing order — Contempt — Contempt of Courts Act (1926), S. 1.

Where a Sessions Judge directs that the accused was to remain on bail as before, the Magistrate is not justified in enhancing the bail or in demanding a fresh bail bond, to do so is to avoid or circumvent the order of the superior Court which amounts to a contempt of Court. [Paras 2, 5 and 7]

Anno. Cr. P. C., S. 498, N. 8a ; Contempt of Courts Act, S. 1, N. 3.

R. C. Talukar — for Petitioner ; S. Afsal, Deputy Legal Remembrancer — for the Crown.

Ellis J. — In this matter the Court was moved by Babu Sashi Bhusan Das, a pleader, ordinarily practising in Gaibandha in the district of Rangpur, who appeared in person. He filed a petition which, stripped of all its offensive irrelevancies, charged 2 Magistrates of Gaibandha —Mr. M. A. Muttalib, Sub-divisional Magistrate, and Mr. R. A. Khan a Lawyer Magistrate of Gaibandha, with contempt of the Sessions Court at Rangpur. On his petition a Rule was issued on each of the Magistrates to show cause why proceedings should not be taken against them for contempt of Court. The relevant records were called for.

[2] We propose to deal first of all with the case of the Sub-divisional Magistrate, Mr. M. A. Muttalib, and the relevant record in his case is Cri. Case No. 1089 of 1948 which was instituted on a complaint filed on 18-10-1948. The complainant was one Surendra Nath Chakrabarty, and on his complaint and after his examination on solemn affirmation Mr. M. A. Muttalib issued warrants of arrest under S. 406, Penal Code, against 3 persons, Jagabandhu Saha, Jagat Behari Saha and Nikunja Behari Saha. On 20 10-1948, Jagabandhu Saha and Nikunja Behari Saha both appeared in the Court of the District Magistrate and, in the absence on tour of the District Magistrate, Mr. F. Azim acting on his behalf directed that they were to appear before the S. D. O., Gaibandha on 16-11-1948 furnishing bail of Rs. 300 each. On 25-10-1948, Jagat Hari appeared before the District Magistrate and the order in his case was :

"Let him appear before S. D. O., Gaibandha on 16-11-1948. He may give bail of Rs. 300. Send papers to the S. D. O."

On 26-10-1948, Jagat Behari appeared before Mr Muttalib who recorded the following order :

"Seen the order of the learned D. M. Accused Jagat Behari may appear on 16-11-1948 on a bail of Rs. 300."

As is not unusual in cases under S. 406, Penal Code, the petitioners moved the Sessions Judge to have the proceedings against them quashed. It appears that one of them, Jagat Behari was acting on behalf of the others. The learned Sessions Judge on 11-12-1948 passed an order declining to make a reference to this Court and directing that the petitioner was to remain on bail as before as granted by the D. M. In spite of this order, on 15-1-1949 when the accused again appeared before Mr. Muttalib, the Sub-divisional Magistrate, he stepped up the bail from Rs. 300 to Rs. 5000, and called upon the accused to find bail to that amount.

[3] At first the learned Magistrate showed cause in a written petition in which he argued with sophistic equivocation, unworthy of one in his position, that the words "on bail as before"

did not mean "on the same amount of bail as before" and so he was justified in enhancing the bail from Rs. 300 to Rs. 5000. Subsequently, better thoughts prevailed and the learned Magistrate admitted his error and tendered an unconditional apology.

[4] The next case is the case of Mr. R. A. Khan, Lawyer Magistrate of Gaibandha. The case in which he is concerned is G. R. Case No. 827 of 1948 pending in this Court. The accused in that case one Khichiruddin was before the S. D. O. Mr. Muttalib in custody on 12-12-1948. A bail petition was moved and the learned Sub-divisional Magistrate directed that pending a further report from the investigating officer the accused could be released on bail of Rs. 100. On the next date, 15-12-1948 a charge-sheet was received against Khichiruddin under S. 379, Penal Code, and Mr. Muttalib transferred the case to Mr. R. A. Khan, Lawyer Magistrate for disposal. When the case went before this Magistrate, he was obviously firmly of opinion that the accused should not be allowed bail, rejected a petition asking for him to be enlarged on bail and sent him to *hajat*. The Magistrate was clearly annoyed when the accused went to the Sessions Judge and obtained from the Sessions Judge an order releasing him on bail on certain conditions. The Magistrate's irritation is to be seen in his order of 6-6-1949, in which he comments on the fact that accused was a pickpocket having a previous conviction, and that though his Court did not grant bail to the accused, the learned Sessions Judge had granted bail. The learned Magistrate would do well in his orders to avoid any criticism, either express or implied, of his superior Court.

[5] This, however, is not the worst. The accused once more moved the learned Sessions Judge and obtained from the Sessions Judge on 2-7-1949 an order upsetting the order of the Magistrate cancelling bail. The order of the learned Sessions Judge is in the following language:

"I do not consider in the circumstances stated that the bail should be cancelled. The petitioner will continue on the same bail as before."

This order is dated 2-7-1949. Two days l[ater] when the case came up befor Mr. R. A. F[han] again, he recorded the following order:

"Seen the order of the learned Court of S[essions]. The accused will continue on the same bail as [before]. The accused, therefore, may find a fresh bail bon[d] the same amount and nature as before — in default t[o] *hajat* to the date fixed."

It only needs to be added that the fresh bail bond was at first rejected on the ground that the surety was unfit, and the Magistrate told the Court Sub-Inspector to take necessary steps to move the Sessions Judge to have the bail cancelled.

[6] Mr. R. A. Khan submitted an explanation of his conduct. After matching the petitioner in his offensive irrelevancies, the Magistrate argues on his own behalf that the words "in the same bail as before" do not mean "[on] the same bail bond as before," and, therefore he was entitled to demand, and if he thought fit to reject another bail-bond. We can only describe this argument as a piece of pettifogging chicanery unworthy of any Magistrate. Mr. Khan had subsequently second and better thoughts and submitted an unqualified apology.

[7] In these circumstances we accept the apologies and discharge the Rules with an expression of our grave disapproval of the conduct of the two Magistrates concerned. We trust that in future these Magistrates will loyally carry out the orders of their superior Court and not seek either to avoid or circumvent them.

[8] Let a copy of this judgment be sent to the Chief Secretary to the Government of East Bengal with the observation that in our opinion it is undesirable that the two Magistrates concerned shall remain in the same district as the Sessions Judge whose orders they have flouted.

[9] **Espahani J.**—I agree.

V.R.B. *Rules discharged.*

END

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